

FORMS MATTER: Informing consumers effectively



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1. Summary and policy recommendations

Consumer information and mandated transparency are important regulatory tools, and are pivotal in the strategy of empowering consumers. **Informing consumers, however, does not automatically lead to informed consumers.** While consumers may value and even demand the general availability of detailed consumer information, they also tend to either not read, not understand or not act upon that information. Over the past years behavioural research has done a great deal to further our understanding of why this is so. An important aspect is the way and form in which information is communicated to the consumer. This is an aspect that, so far, has been neglected in general consumer law and policy, both in Europe as well as at the national level. Until now, consumer law was traditionally more preoccupied with the content of mandatory disclosure requirements than with the form in which the information is communicated to consumers.

This study has argued that piling ever more information on the consumer without having measures and safeguards in place that guarantee that consumers are given the chance to engage meaningfully with that information is **ineffective** and creates a **false sense of security and trust**. It also creates the **illusion of ‘consumer empowerment’** in situations where too much or badly presented information rather does the opposite: it confuses and weakens the consumer’s position in the market. Consumer information may be a powerful tool, but only after substantial effort has been invested not only in making that information available, but also in communicating that information effectively. In this light it is problematic, if not **counterproductive** that the Consumer Rights Directive not only underestimated the aspects of form and effective communication, but also barred national legislators from imposing additional form requirements, and this at a time when the importance of form requirements is being more and more understood and research is being performed that could give valuable insights.

Investing in effective consumer information

Communicating consumer information effectively is a user-centric process, and a process that goes beyond mere compliance with most existing mandatory disclosure requirements.¹ Doing so **requires extensive research** into the actual behaviour, information needs and practices of consumers, a sound understanding of their behavioural biases and cognitive limitations, the investment of diverse skills and knowledge about the potential of language and of technology, and a comprehensive view on the broader transparency-enhancing structures consumers are situated in. The effective communication of consumer information **is neither cheap nor non-invasive**, and it requires substantial investments on the side of suppliers,² governments, consumer representatives, academics as well as consumers themselves. Put differently, while consumer information has been for a long time seen as a relatively cost-effective and easily implemented policy measure, in reality

¹ As the Better Regulation Council has observed, the present focus of the regulatory framework is on compliance. Instead, the Council suggested experimentation with more outcome-based approaches to information requirements, which are enforced on the basis of consumer understanding of messages rather than provision of information, Better Regulation Council, p. 12. In this sense also Loos, Helberger, Guibault, Mak et.al, 2011. Regarding compliance with existing information obligations, see U. Stenzel, M. G. S. Lima And J.J. Downes, Study on Digital Content Products in the EU, report prepared for the European Commission, http://ec.europa.eu/consumers/enforcement/sweep/digital_content/docs/dcs_complementary_study_en.pdf

² The Better Regulation Executive and the National Consumer Council estimated in 2007 that the recent administrative burdens in the UK for information requirements in the consumer policy area alone cost business more than 1.5 billion pounds per year.

there may be situations in which alternative measures, such as standardization, bans, defaults, mandatory quality and safety safeguards are probably more effective and less costly.

Not an act, but a (user-centric) process

A key to understanding the conditions for the effective communication of consumer information is to realize that consumer information is not a one-time act, it is a process. This process involves **different stages of processing** information: becoming aware of the information, collection and processing of consumer information, acting upon it and staying up to date. At each of these stages consumers can have different information needs, and may need information in different formats and functions. Eventually, the same items of information would need to be repeated for the different steps.³

Comparable, understandable and correct timing

At a minimum, consumer information should be communicated in comparable and ideally standardized and machine-readable format. It would need to be written from the perspective of consumers, and not lawyers, and offer explanations of the (legal) concepts used as well as real-life implications. The aspect of correct timing is as important as the general findability, accessibility and searchability of consumer information. More recently, a number of informative and useful guidelines and recommendations of how to inform consumers effectively have been published, and can provide valuable guidance.

Framing is crucial

One important insight from behavioural research is the importance of framing and presenting information in a way that corresponds to the personal information needs of consumers. Doing so can have positive effects on the attractiveness, usability and persuasiveness of information. The heterogeneity of consumers, however, can raise major practical and organizational difficulties as – ideally – different types of information would need to be framed differently for different consumers. Digital technologies can help to make more personalized, targeted forms of informing consumers more feasible, and it can hence be expected that **more personalized and ‘smarter’ ways of informing consumers** will play an important role in the future.

Future consumer information is smart

“Smart transparency” can be coupled to open data or big data in order to optimize choices and also better predict user preferences and information needs. Having said that, these personalized and smarter ways of informing consumers come with their own set of concerns and public policy challenges, including concerns about user privacy and fair processing of personal data, and more generally aspects of fairness and non-discrimination, data security, accuracy and quality as well as the preservation of trust, autonomous choices and functioning competition. Accordingly, it is important to understand the desirability, benefits and challenges of smart transparency, and to draw the necessary political and regulatory conclusions.

³ To give an example: when informing consumers about the exclusion of liability, this would be ideally done in a way to first create awareness for the reading of what that particular supplier says on the topic, to then point consumers to the exact place where the respective information is presented in a language and frame that is easily understood also by laymen, and that also explains the practical consequences, as well as actively informing the user whenever that particular part of the terms of use has been changed.

Diversifying the transparency chain

The information process also involves a **multitude of actors**, all with their own distinct preferences, skills, incentives, etc.: suppliers, governments, regulatory authorities, the media, friends, family & social networks, and consumers themselves. The resulting matrix of information flows is vast, complex and dynamic. By contrast, mandated disclosure provisions typically address only snapshots of this information matrix (e.g. by obliging the supplier to provide the consumer with specified information before the contract is being concluded). A better informed approach to consumer information acknowledges that there are **many more potential sources of information**, beyond the circle of the 'usual suspects' (suppliers and consumers), including governments, regulatory authorities, but also third party experts and choice intermediaries, consumer representatives, academics, icons or the (old and new) media.

Consumers are real, not ideal

If there is a core message from the insights of behavioural research then it is that consumers do not live up to idealized, standardized notions, and that there is a variety of very human reasons why they are neither well informed nor circumspect. Consumers are real, not ideal. It is time that consumer law and policy takes these insights into account and ceases to ignore the fact that real flesh-and-blood consumers may **differ quite strongly from the ideal of the circumspect and reasonably well-informed consumer** that is still at the basis of existing mandatory disclosure requirements. Real-life consumers are only seldom disciplined and patient enough to read terms of use, and even if they do so, there are many, including cognitive, reasons why they will not understand the information, may not find it useful, or will be unable to translate it into sensible commercial decisions.

This is not to say that consumer information is not an important tool, or that important information about products, services and terms and conditions should not be made publicly and prominently available. This is to say, however, that consumer information has to overcome a variety of obstacles to be effective, and that under certain circumstances consumers are **not even the only and most optimal addressees of consumer information**. Some items of information might be better and more usefully shared (first) with experts, such as consumer organizations, comparison sites, academics, but also the media, rather than (exclusively) with consumers. Also here, form matters, and information needs to be provided in a format that makes it easily and publicly accessible, comparable and computable. In addition, an important task and challenge for future consumer policy is to find ways of promoting the proliferation of **trustable third party expert services** that inform consumers about their rights, terms and conditions and other items of consumer information, and to create the necessary legal safeguards of reliability, trust and fair competition.

Information reduction is inevitable

Less can be more. A constantly growing body of (mandated) consumer information is vying for the limited attention and capacity of human brains. It is important to acknowledge that there is a certain point at which consumers are simply **no longer able to process information**, even if they are willing to and the information is well presented. Consumer information is a potentially powerful medicine for many problems that ail consumer markets, but it is also a potion that needs to be administered with care and in small amounts. Like with potions it is not only the amount but also the combination with other "medicines", namely obligations to inform consumers, that is decisive for the success or failure of the cure. If consumer information is supposed to be a useful tool also in the future, it is high time to acknowledge the importance of **information discipline and smart information**

reduction as principles to guide not only suppliers and third parties that inform consumers but also governments and policy makers. At the level of **individual disclosure requirements**, smart reduction of consumer information, be it in the form of information prioritization, correct timing, standardization, but also by making information searchable and comparable, can be an important means to make consumer information more valuable, practically useful and even attractive to consumers. With respect to the **policy level** and existing information obligations, it is necessary to review, and where possible, consolidate the existing transparency obligations. So far, there has been **too little coordination** between the different (general and sector specific) laws and initiatives that mandate the publication of consumer information. Finally, before imposing new information obligations, it is necessary to develop a **more coherent and coordinated approach to informing consumers**. Therefore, mandated information disclosure initiatives need to be guided by a **consistent and coherent information theory** – a theory that is only about to be developed.

Towards a new understanding of consumer information and transparency

Based on what has been said earlier about the need to rethink consumer information as a regulatory tool in the light of the diversification of the transparency chain and more realistic notions of “the consumer”, a more complex understanding of consumer transparency as a regulatory objective is required. In particular, a distinction should be made between

- **Public transparency**, which refers to the overall public availability of critical information. This information must not necessarily be (only) intended for consumers, but also should be available to regulatory authorities, competitors, consumer organizations, the media, academics and whoever else feels competent and responsible to review such information and detect possible problems
- **Personal transparency**, in the sense of the – limited– set of information that individual consumers need and use when making transactional decisions.

In the case of public transparency, aspects such as continuity, objectivity, comprehensiveness and standardization are potential key values. Regarding personal transparency, a more dynamic understanding is needed, acknowledging that personal information needs may change per transaction, and depending on the personal situation and actual needs of the individual consumer. Here, aspects such as relevancy, timeliness, and quality of presentation come to the fore, but also aspects such as confidentiality, integrity, trustworthiness and user-friendliness. Eventually, this could also mean that information is implemented into the design of products and services, in the sense of smart transparency. For the area of personal transparency this signals a shift, or a progressive development **from information as given to information as a process**.

2. Introduction

Consumer information is, and will continue to be, one of the most important and popular instruments in consumer protection and policy. ‘Important’ because consumer information has an important function in correcting information asymmetries, and in enabling consumers to make transactional decisions that respond to their individual preferences and requirements. ‘Popular’ because mandated consumer information is widely perceived as a comparatively less intrusive form of government interference, one that leaves the autonomy of market players in principle intact and refrains from imposing mandatory standards of consumer protection that either hinder market developments and innovation, are easily outdated by e.g. technological developments, fail to achieve the intended purposes, or are impossible to enforce. Particularly in the digital realm, informing the consumer is almost an automatic response to all questions that involve consumer protection, ranging from network neutrality, information and systems security, behavioural targeting, protection of personal data, to even more abstract policy objectives such as ensuring media diversity and democratic participation. Ironically, the popularity of consumer information as a form of regulation is also at the heart of the problem with consumer information obligations, and one important reason why consumer information, as a regulatory tool, threatens to lose much of its effectiveness: there is only so much information that consumers are able to take in, process and act upon. A growing body of research from the behavioural economics and psychological sciences provides evidence that the human brain is not a computer, but subject to cognitive limitations as well as quite human behavioural biases.

The insights from behavioural research have a number of important implications for consumer law and policy. One important conclusion is that informing consumers does not automatically result in informed consumers. Consumer information is a process, and to be actually useful for consumers, consumer information needs to pass a number of steps first. In the course of this process, it is not only the content of information that matters, but also, and importantly, the form in which it is presented and communicated to the consumer. Effective consumer information needs to be communicated in a form that is understandable for consumers, that can overcome behavioural biases, and that consumers can easily translate into action. This is not to say that the form should mislead consumers about the actual content, or that well-presented information may not be in conflict with consumers and contract law. The point that this study wishes to make is that too often the form aspect has been neglected. Effective communication of consumer information is key in an increasingly complicated and abundant ‘information economy’. It is also a question that general consumer law and policy has still largely neglected, but can no longer afford to do in the future.

The effective communication of consumer information is the focus of this research paper. By way of example, this study will concentrate in the first place on the communication of terms of use and contract terms, though many of the insights presented will also hold true for the presentation of consumer information in general. For this purpose, the study will first offer some **general observations about consumer information as a regulatory tool** (section 2). It will then briefly summarize the **main findings from behavioural research** into the behavioural restraints that effective communication of consumer information needs to overcome (section 3). Based on these insights, the study will **explore possibilities to inform consumers more effectively** (section 4). To this end, section 4 will evaluate the insights from behavioural research, the relevant academic

literature as well as, to the extent they exist, policy reports. The evaluation will use **best or worst practice examples** from the analysis of seven of the most popular digital services in Europe, and their terms of use.⁴ Before concluding in section 6, section 5 will analyze how the **European legislator** has dealt with form requirements for general consumer information so far (looking in particular at the Consumer Rights Directive, the E-Commerce Directive and the Services Directive), as well as the possible lessons to be learned from two other sectors where the effective form of consumer information has been debated for some time now: the area of financial information as well as consumer information about communications services.

3. Placing consumer information in perspective

Transparency and informed consumers are not so much a clearly discernible outcome of a regulatory mandate as rather the result of complex processes in which a variety of different actors and factors are potentially involved. Placing consumer information in its broader perspective is not only important for the decision whether, and if so, which information to make mandatory, but also: in which form.

3.1 Consumer information: serving multiple purposes

Transparency rules can serve a plethora of **different regulatory objectives** that are responses to different problems and regulatory goals themselves.⁵ The primary and most prominent task of consumer information is to inform consumers and to level information asymmetries, thereby improving the decision-making position of consumers vis-à-vis specialized sellers that understand potentially better the complexities and implications of the products they are selling.

Consumer information, however, can also have the objective to attune consumers to certain problems, create **awareness** or even **guide (steer)** their behaviour. Examples of such forms of ‘asymmetric paternalism’⁶ or ‘information with a mission’ are smart metering or fair trade labelling. Another important objective that can be pursued through consumer information is competition policy. By requiring energy providers or traders to publish certain information about the quality and conditions of their services and products, and by doing so in a way that **facilitates comparison**, regulatory agencies hope to engage consumers as a ‘third’ regulating force, pressing competition towards the products and services with the ‘best’ terms and conditions.⁷

The objective of consumer information also depends on the source of information as well as the reasons for and incentives behind informing consumers. In addition to compliance with legal requirements, businesses, for example, can have **strategic, business-related reasons** to inform consumers. One example is **expectation management**. The expectations that consumers have

⁴ Google, Apple, Facebook, Microsoft, Vimeo, ebay, Marktplaats (a Dutch variation on ebay). For the purpose of this research, we have strived, to the extent that it was available, to visit the UK site of each service examined (for language reasons as well as because the UK is a member of the European Union).

⁵ D. Heald, Varieties of Transparency, in: Proceedings of the British Academy, 2006-135, p. 25-43, p. 27.

⁶ C. Camerer, S. Issacharoff, G. Loewenstein, T. O’Donoghue and M. Rabin, Regulation for Conservatives: Behavioural Economics and the Case for “Asymmetric Paternalism”, University of Pennsylvania Law Review, 2003-151, p. 1211-1254.

⁷ See O. Ben-Shahar and C.E. Schneider, The Failure of Mandated Disclosure, John M. Olin Law/Economics Research Paper No. 516, March 2010, available online at: <http://www.law.uchicago.edu/files/file/516-obs-disclosure.pdf>

regarding products and services are shaped by the information that consumers receive. To that extent, expectation management is important as the 'reasonable expectations of consumers' are also an important benchmark for judges in the application of consumer and contract law, and when they determine the level of protection against unfair terms or non-conformity that consumers are entitled to expect. For example, if a CD is labelled with 'no copying possible' it is more difficult for consumers to argue that the failure to permit copying conflicts with their reasonable expectations of how to use CDs. Informing consumers about contract terms and conditions can be necessary to include these terms and conditions validly into the contract. Another important strategic objective of informing consumers is to **allocate rights and responsibilities** of the contracting party, but also risks.⁸ Informing consumers in the terms of use about their obligations, the suppliers' restricted liability, etc. can also be a means to indemnify suppliers from consumer claims should matters go wrong and consumers insist to complaint.⁹ And, finally, there can be instances in which businesses can have a **disincentive to inform consumers**, if this would harm the marketability and attractiveness of their products. In situations in which the law requires them to do so nevertheless, this can cause them to present information less prominently or in a less readable manner.¹⁰

On a more general note it is important to realize that **not all goals or objectives of consumer policy are equally well suited for forms of informational regulation**. For example, in economic analyses, information asymmetries are one of the most common grounds of market failure, causing consumers to make ill-informed choices that are not in their best interest. In such cases, transparency rules can in theory resolve market failure by equipping consumers with information and lowering their transaction costs.¹¹ However, if the reason for the market failure is, for example, monopolistic market power (i.e., the consumer has no choice), transparency obligations are in all likelihood inadequate.

3.2 The result of complex interactions

A fact that is often overlooked in the transparency debate is that consumer information is not the straightforward outcome of a legal obligation to inform. Informed consumers are the result of a complex interplay of internal and external factors, many of which have their origin in the dynamic relationship between markets, consumers, experts and governments. For example, the effectiveness of transparency obligations in influencing consumer behaviour can depend on a **dynamic chain of personal factors** (e.g., level of knowledge, technical sophistication but also incentive structure of the different players), **technical factors** (e.g., the form in which information is provided, such as machine-readable, comparable, in the form of icons, etc.), **institutional factors** (e.g., involvement of experts or intermediaries such as regulatory authorities, consumer associations, monitoring systems in place, etc.) as well as **contextual factors** (e.g., level of media attention for particular issues, media literacy initiatives, development of price or feature comparing platforms, expert communities, and information campaigns but also, for example, pending threats of regulation). Moreover, the effect

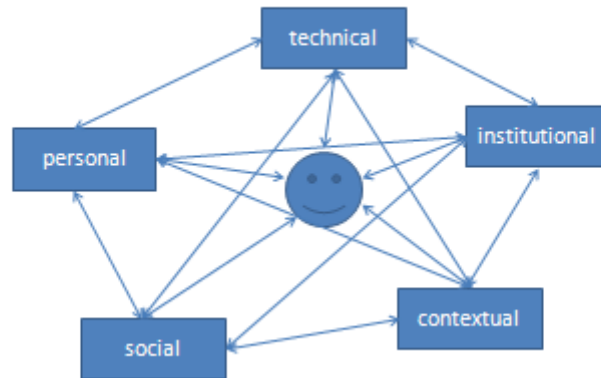
⁸ H. Beales, R. Craswell, and S.C. Salop, S. C., The efficient regulation of consumer information, *Journal of Law and Economics*, 1981- 24, p. 491-539, p. 511.

⁹ Another question is whether certain exclusions of liability will withstand the application of unfair terms regulation.

¹⁰ Ben-Shhar & Schneider, 2010, p. 33 subseq.

¹¹ M. Fritsch, T. Wein and H.J. Ewers, *Marktversagen und Wirtschaftspolitik*. 7th ed., Munich, 2007, p. 305; S. Grundmann, and W. Kerber, *Information Intermediaries and Party Autonomy. The Example of Security and Insurance Markets*, in: Grundmann/Kerber/Weatherill (eds.), *Party autonomy and the role of information in the internal market*, Berlin/New York 2001, p. 264-310, p. 269.

may not be achieved immediately or in isolation. Particularly in complex technical environments such as digital markets, **social** interaction with educators, experts, but also other consumers can be an important or even necessary prerequisite.



Picture 1: Informed consumers are the result of complex interactions of many different factors

3.3 Diversified transparency web

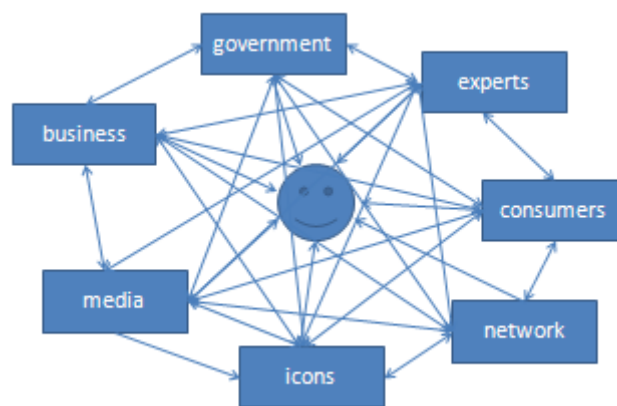
Finally, consumers derive their information not necessarily from one, but from multiple sources.¹² While consumer information that is provided by the suppliers of services to their (potential) customers is probably the most common form of (mandated) consumer information, it is important to realize that the spectrum of possibilities to inform consumers directly or indirectly is far larger, including for example:

- businesses inform governments or regulatory authorities (who then may or may not undertake actions)
- governments issue public information
- expert information, such as information issued by consumer representatives, national regulatory authorities, review and testing services or comparison sites
- consumers themselves
- the social network (friends, family, children, teachers, etc.)
- the media
- icons (such as popstars, popular writers, activists, social influencers).

¹² In this sense also Consumer Information Working Party, Transforming Consumer Information, October 2011, p. 11, available online at: <http://www.actuaries.org.uk/research-and-resources/documents/transforming-consumer-information>

Each source of information will not only communicate different items of consumer information, but also do so in a different form. Consumers will concentrate on different aspects of products and services and will use different language and means to communication do so than e.g. suppliers or a reviewer in a consumer-oriented publication.

The fact that consumer information can be derived from various sources, each with its own vested interests, skills and resources, is an important factor when designing consumer information obligations. It is not always the supplier of services who is in the best position to inform the consumer, or who has the incentives to do so in an effective and easily accessible way.¹³ Also, at present, law and policy making tends to concentrate on particular sources of information (businesses, regulatory authorities, governments) while not dealing with others.



Picture 2: Transparency web

4. Why we (do not) read consumer information the way we do

The popularity of consumer information as a regulatory tool has attracted a growing body of critical research that studies the effectiveness of consumer information as a tool and/or more generally strives to learn more about the ways in which consumers interact with, and benefit (or not) from consumer information. One key insight from this research is that when designing effective consumer information it is critical to take into account how consumers collect, process and act upon information. This section will give an overview of the most prominent cognitive failures and biases that also affect the form in which consumer information must be delivered in order to be communicated effectively.

For this purpose it is helpful to understand that informing consumers is not an act. It is a process. The way consumers collect and engage with information can be conceptualized as a behavioural information pathway that covers (at least) the following steps:

¹³ Beals, Craswell, Salop, 1981, p. 507.



Picture 3: Behavioural information pathway

The model describes the four steps in the **behavioural pathway** for reading, processing and acting upon consumer information: It is only after a consumer has become **aware** of the importance of consumer information for her situation, and which types of information she needs, that she will engage in the activity of **collecting and processing** (reading and understanding) that information, which then can influence her **actions**, i.e. the decision to act in a particular way. The staying **up to date & evaluation** phase concerns the phase after consumers have acted, and can include elements such as the (periodical) evaluation of one's choices but also the collection of information about changes in the terms and conditions of the service. The model presented here has been inspired by the model of Sandman and Weinstein.¹⁴

- Along that behavioural pathway, consumer information can encounter a number of obstacles:
- consumers are unaware of and/or do not read consumer information or contract terms;
- they do not understand or misinterpret what they have read;
- they fail to act as the regulator expected them to react; they fail to notice and consequently adapt their choices to newly received information.

4.1 Phase One (Awareness): Why consumers do not read terms of use



The most simple, and arguably also most optimistic reason for not reading consumer information is that **people cannot find it**. Optimistic because it implies that if people could find it they would read it. This is not always the case, or rather: hardly ever. Bakos, Marotta-Wurgler and Trossen found that “only one or two out of every thousand retail software shoppers chooses to access the license agreement, and those few that do spend too little time, on average, to have read more than a small portion of the license text.”¹⁵ Other studies are more optimistic, stating that between 11% and 28% of users said that they had not read the information provided to them.¹⁶ Maybe not entirely surprisingly, the proportion of users who did not read the information was the largest for consumers who accessed digital content products through mobile phones.¹⁷ These findings may be puzzling considering that in the same study consumers indicated the lack of information or the low quality of

¹⁴ N.D. Weinstein and P.M. Sandman, A Model of the Precaution Adoption Process: Evidence from Home Radon Testing, *Healthy Psychology*, 1992-11, p. 170-180, available online at: <http://www.psandman.com/articles/precautn.htm>

¹⁵ Y. Bakos, F. Marotta-Wurgler and D.R. Trossen, Does Anyone read the fine print? Testing a Law and Economics Approach to Standard Form Contracts, CELS 2009 4th Annual Conference on Empirical Legal Studies Paper, 6 October 2009, NYU Law and Economics Research Paper No. 09-40, available online at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1199&context=nyu_lewp, p. 36.

¹⁶ Europe Economics, Digital content services for consumers: assessment of problems experienced by consumers (Lot 1), Report 3 Assessment of consumers' experience and possible problems, Final Report, London, 2011, p. 45, available online at: http://ec.europa.eu/justice/consumer-marketing/files/empirical_report_final_-_2011-06-15.pdf

¹⁷ Europe Economics, 2011, p. 54.

information provided as the second most pressing consumer concern of digital consumers in Europe.¹⁸ And yet, consumers do not read consumer information/contract terms and conditions.

One important reason for not doing so is that they **underestimate the value of the information**, or their need for this information.¹⁹ To give an example one could think of the situation where a consumer is not aware of the fact that it is theoretically (and legally) possible that in order for her to sue the provider of a faulty app that caused her mobile phone to crash, the consumer would need to sue before the Californian State court – a bizarre situation as the costs of a flight to California would by far exceed the price of the app and the mobile phone together - he will not search in the terms of use for any information about this. Another important reason is that consumers **trust the supplier or website** to guard their interests and do nothing that might harm them.²⁰ Naïve? Maybe. But the fact that major companies advertise in terms of “we do not do evil” already indicates that there is a market for trust and that trust, from the perspective of consumers, is an all-in package, extending to standard terms and privacy policies and, more generally, compliance with the legal rules and obligations meant to protect their interests. Consumers *also trust the law*. The importance of a stable legal framework for consumer trust and confidence is being advertised prominently by law and policy makers, most recently in the context of the revised Consumer Rights Directive, as well as the Common Framework. These messages can be read by consumers as confirmation that they do not have to worry (and hence read the terms of use) because the (European) legislator is there to protect them.²¹

Already the fact that sites **do have privacy policies** has been interpreted by consumers as a signal that their privacy is safe with that supplier.²² Similarly, the fact that a service displays terms of use can be (mis)interpreted by consumers as a confirmation that the terms of use are part of a standard contract and as such subject to legal scrutiny (with the consequence that consumers might conclude that there is no need to read the terms).²³ In other words, part of the not-reading-problem is that people lack a *rudimentary understanding of how laws and contracts work* and, most importantly, what the law or regulatory authorities do not do (e.g. scrutinize terms and conditions on a regular basis). The lack of legal expertise or the inability to understand or fathom the legal implications is also a reason why people simply lack the incentive to invest effort in the reading of terms of use.²⁴

¹⁸ Europe Economics, 2011, p. 38-50; see also EEC-Net, The European Consumer Centers’ Network, The European Online Marketplace: Consumer Complaints 2008-2009, August, 2010, 24 ff.

¹⁹ Beales, Craswell, Salop, 1981, p. 506, Ben-Shahar & Schneider, 2010, p. 40 subsq.

²⁰ N.A.N.M. van Eijk, N. Helberger, L. Kool, A. van der Plas en B. van der Sloot, Online tracking: questioning the power of informed consent, info, 2012-5, p. 57-73; A.M. McDonald and T. Lowenthal, McDonald, Aleecia M. and Lowenthal, Tom, Nano-Notice: Privacy Disclosure at a Mobile Scale (September 09, 2012). 2012 TRPC. Available at SSRN: <http://ssrn.com/abstract=2031720> or <http://dx.doi.org/10.2139/ssrn.2031720>

²¹ Van Eijk, Helberger, Kool, Van der Plas & Sloot, 2012; J. Turow, J. King, C.J. Hoofnagle, A. Bleakley and M. Hennessy, Americans Reject Tailored Advertising and Three Activities that Enable It, September 29, 2009, Available at SSRN: <http://ssrn.com/abstract=1478214> or <http://dx.doi.org/10.2139/ssrn.1478214>

²² A. McDonald, 2012; N.A.N.M. van Eijk, N. Helberger, L. Kool, A. van der Plas en B. van der Sloot; Turow et al., 2009.

²³ Ofcom, A Review of Consumer Information Remedies, March 2013, p. 47, available online at: http://stakeholders.ofcom.org.uk/market-data-research/other/research-publications/consumer-information-remedies/?utm_source=update&utm_medium=email&utm_campaign=consumer-info-remedies

²⁴ Ofcom, 2013, p. 34.

And finally, too many terms and conditions vie for the attention of consumers, with the result that consumers have to make choices (**the overload problem**).²⁵ The amount of terms of use a single consumer is exposed to on a single day is simply overwhelming – and these are not only the terms of use for any new service that consumers encounter. At least in theory, consumers are urged to regularly revisit the terms of use of services they already utilize in the event that the service provider meanwhile decided to change these terms.

4.2 Phase Two (Collecting and Processing): Consumers do not understand or misinterpret information



Among the (few) consumers that do actually try to read the information provided to them by suppliers, between 16% and 44% (depending on the access channel, age, and level of education of digital consumers surveyed) indicated that they did not understand the information.²⁶ Interestingly, for positioning and navigation devices, e-learning, but also ringtones a higher proportion of users claimed that they had not understood the information provided as compared to users of other services.²⁷ The most frequently cited reasons for not understanding the information are the **complexity of the language**, the technicality of the language, the layout, the small font, as well as the length of the information provided.²⁸ In other words, one important reason why people, even if they try, fail to understand contract terms is that these are badly written: ancient grammar, an excess of legal terms, never-ending sentences – even judges and experienced lawyers have come to fear contract terms and terms of use, not to speak of the common consumer who has to tackle them s confronted with them in his spare time.

The task of writing readable terms of use is, admittedly, not an easy one. Obviously, the subject matter is not an easy one, to begin with. While certain general pieces of consumer information are still relatively easily communicated and understandable for consumers, such as the price, the main characteristics or the name of the trader, other pieces of information in consumer contracts are inherently abstract and very legal, such as the information about the right to withdrawal, legal guarantees, the conditions for terminating a contract, redress mechanisms, court settlement, etc.

What is often overlooked is that the **target group for terms** of use ranges from construction workers to language professors, youngsters to their grannies, multi-lingual people to immigrants. What is common to most of them is that they will lack the rudimentary knowledge to be able to understand and weigh in their decisions legal terms of use. What distinguishes all of them, apart from the heterogeneity of the audience, is that everyone has his or her own preferences when it comes to collecting and processing information, not least as the result of their different backgrounds, but also because of personal factors. While some consumers may indeed prefer the written word, others need oral, visual or numeric stimulants to be able to access, remember and process information.²⁹

²⁵ Better Regulation Executive and National Consumer Council, Warning, too much information, November 2007, available online at: <http://www.berr.gov.uk/files/file44588.pdf> ; S. Iyengar, M. Leeper, When Choice is demotivating: can one desire too much?, *Journal of Personality and Social Psychology*, 2000-79, p. 995-1006.

²⁶ Europe Economics, 2011, p. 45.

²⁷ Europe Economics, 2011, p. 45.

²⁸ Europe Economics, 2011, p. 48. See also Vanilla Research, Consumer Information and Regulation, report prepared for the Better Regulation Executive and the National Consumer Council (NCC), July 2007, available online at: <http://www.berr.gov.uk/files/file44592.pdf>

²⁹ Consumer information working party, 2011, p. 42

Probably one of the most important findings in recent behavioural transparency research is the **importance of framing**. To be able to make sense of information, this information must be framed in a way to correspond with our personal environment,³⁰ expertise,³¹ personal and professional background as well as our particular situation, needs and interests when purchasing that product. Framing also influences the way we judge e.g. risks or implications for our personal situation.³² The dilemma is clear: while terms of use are written for as large and general audiences as possible, in order to be able to make sense of that information, a certain level of personalization and customized framing is necessary.³³ Framing is also important because of certain behavioural biases, such as the tendency in people to prioritize the importance of attributes,³⁴ to memorize more easily positive above negative messages,³⁵ or to care more about losses than gains (regret & loss aversion).³⁶

Even if information is framed according to the actual and individual needs of the heterogeneous target group (another question is if this is possible and at which price, see below), a problem of a different kind are **cognitive limitations** that no one can escape. Already in the 1960s, Miller concluded in his famous article that the average person is able to receive, process, and remember about six or seven different pieces of information at a time (or what Miller calls a limited 'span of absolute judgment' and the 'span of immediate memory').³⁷ Since then a growing body of research has built up, demonstrating that simply piling ever more information on consumers will do nothing to further their interest, nor will it create incentives for traders to provide consumers with the best, safest, and most innovative and user-friendly products and services. On the contrary, too much information can actually confuse or distract consumers, as well as be costly and cause a competitive disadvantage for traders.³⁸ The implications for information policy are disconcerting: the more popular transparency solutions are as a regulatory tool, and the more well-advanced and 'transparent' consumer markets are, the greater is the chance that that information will be ineffective because each piece of (new) information will compete with other pieces of information for the consumer's attention.

Important reasons for not understanding consumer information are the complexity of the language, mismatch between information presentation, framing and target group, as well as very human cognitive limitations.

³⁰ Ben-Shahar & Schneider, 2010, p. 45 subsq.

³¹ Ben-Shahar & Schneider, 2010, p. 46

³² D. Kahneman and A. Tversky, Prospect Theory: An Analysis of Decision under Risk, *Econometrica*, 1979-47, pp. 263-291, available online at: http://www.princeton.edu/~kahneman/docs/Publications/prospect_theory.pdf

³³ OFT, Advertising of Prices (2010), December 2010, available online at: http://www.oft.gov.uk/shared_of/market-studies/AoP/OFT1291.pdf and OFT, The impact of price frames on consumer decision making, May 2010, available online at: <http://www.londecon.co.uk/publication/the-impact-of-price-frames-on-consumer-decision-making-2>); Kahneman & Tversky, 1979, *ibid*.

³⁴ Ofcom, 2013, p. 38

³⁵ Ben-Shahar & Schneider, 2010, p. 47

³⁶ Knowledge about human biases can be used to design more effective information strategies, along the lines what Larrick as described as "debiasing", P. Larrick, Debiasing, in: D. Koehler and N. Harvey (eds), *Blackwell Handbook of Judgement and Decision Making*, Blackwell Publishing, Malden: 2004, p. 316-337.

³⁷ G.A. Miller, The magical number seven, plus or minus two: some limits on our capacity for processing information, *Psychological Review* 1956-63, p. 81-97.

³⁸ OECD, Consumer Policy Toolkit, Paris, 2010, available online at: <http://www.oecd.org/sti/consumer/consumerpolicytoolkit.htm>.

4.3 Phase Three (Action): Consumers do not act as the legislator would expect them to



Finally, even in the (unlikely) event that consumers find and read the terms of use, consumers are subject to a number of failures and behavioural biases that cause them to deviate from the prototype of the rational consumer that is still the standard addressee of most existing consumer information obligations. In other words, consumers often do not act as could be expected from a rational and well-informed market participant.

One obvious reason why people fail to act upon the information they received is that it is **not the information that they were looking for** or they do not consider it helpful.³⁹ Informing consumers effectively requires research into the items of information that consumers seek, or exhibit a need of when taking a decision – research that is not always being performed. This is not to say that consumers' declared need for information should be the only guidance of which information to mandate. The provision of unasked-for consumer information also can have a certain educational effect, by drawing the attention towards items of information that consumers should also consider when taking a decision but are unlikely to seek out themselves (e.g. information about withdrawal periods or legal guarantees). Yet, in order to be able to inform the consumer effectively it is necessary to actually understand also the specific information needs of the consumer.

On a more basic level, people **fail to remember** much of what they have heard/read.⁴⁰ Very often, consumers are presented most of the information in one set of terms of use or contractual conditions, out of which some they will find directly relevant, others may become relevant later, while of many they will not grasp the immediate relevance to them at all. The consumers' ability to decide, even with perfect information, can be moreover inhibited by having simply **too much choice** (option swamp) – for example in the area of mobile phone contracts or energy tariffs.⁴¹

Sometimes, it may take more than just information to make people change their behaviour because of **cognitive biases**.⁴² Behavioural research observed, for example, a strong preference in people for maintaining the current state (inertia).⁴³ Simply informing people about their choices may not be enough to trigger them to act, which is why there is experimentation with alternative schemes, such as defaults or auto-enrollment strategies. Also, consumers seem to be particularly sensitive to framing, and different ways of framing information can result in different actions.⁴⁴

³⁹ See e.g. Mc Donald & Loewenthal, 2013; Nano-Notice: Privacy Disclosure at a Mobile Scale, p. 9, indicating that users are clearly more interested in some information than in other; Better Regulation Executive and National Consumer Council, p. 11 requiring governments to check if information is actually helpful.

⁴⁰ Ben-Shahar, 2010, p. 47.

⁴¹ Ofcom, 2013, p. 39, 46.

⁴² For a useful overview of some of the most influential cognitive biases that influence consumer behaviour, see D. Arcidiacono, Consumer rationality in a multidisciplinary perspective, *The Journal of Socio-Economics*, 2011(40), p. 516-522; and of course D. Koehler and N. Harvey (eds), *Blackwell Handbook of Judgement and Decision Making*, Blackwell Publishing, Malden.

⁴³ See e.g. R. Hartman, M. Doane, C. Woo, Consumer Rationality and the Status Quo, *The Quarterly Journal of Economics*, 1991(1), p. 141-162.

⁴⁴ D. Kahneman and A. Tversky, Choices, Values, and Frames, *American Psychologist* 1984, p. 341-350.

People are averse to losses,⁴⁵ and bad at anticipating the future (availability heuristics), or how they will behave in the future if their interests, needs and attitudes change.⁴⁶ The classical example is that people find it easy to decide to exercise more as of next year, but once 1st of January has arrived they find it difficult to set this plan into action. In this perspective, in addition to providing information about today, such information should, ideally, be framed in a way that explains the medium to long-term implications of consumers' options, or offers guidance in interpreting the available information in a dynamic personal setting.⁴⁷ Closely linked to the phenomenon of availability heuristics is a tendency in consumers to over-confidence.⁴⁸ People are also more averse to uncertain outcomes where probabilities are unknown or hard to understand,⁴⁹ which can be a reason why people find it difficult to concentrate on more abstract items of consumer information, e.g. the provisions on dispute settlement or the right of withdrawal. Again, to effectively communicate information in a way that is actually useful for consumers requires helping them to better understand the outcome and likelihood of risks – framing plays a critical role in that context.

Finally, consumers are **not necessarily rational**, neither in their decision making nor in the way they collect, process and act upon information. To that extent, the value of consumer information obligations must be viewed with a certain portion of healthy realism.

Even if consumers do find and read terms of use, transparency obligations might still fail their objective, because consumers find the information unhelpful, fail to remember it at the crucial moment, are influenced by cognitive biases or simply do not act rationally, even when well informed.

4.4 Phase Four (Staying up to date & Monitoring): Why consumer choices are sticky



The aforementioned behavioural biases towards maintaining the present state and avoiding unknown or abstract risks also explain why people fail to adapt their choice, even in the event that they are aware of and understand information that indicates a changed situation. Moreover, the aforementioned reasons for not reading consumer information are, quite naturally, even more pronounced for situations in which consumers are required to read the same or a similar piece of information repeatedly – ‘just in case’ something might have changed (another question is how realistic it is to assume that even if consumers were to read e.g. terms of use repeatedly they would be able to detect and to understand changes that might have occurred in the meantime).

⁴⁵ D. Kahnemann and A. Tversky, Loss aversion in riskless choice: a reference dependent model, Journal of Business 1986(59), p. 251-278.

⁴⁶ P. Schoemaker, Forecasting and Scenario Planning: the Challenges of Uncertainty, in: D. Koehler and N. Harvey (eds), Blackwell Handbook of Judgement and Decision Making, Blackwell Publishing, Malden: 2004, p. 274-297.

⁴⁷ Consumer Information Working Party, 2011 p. 21; S. Frederick, G. Loewenstein and T. O'Donoghue, Time Discounting and Time Preference: A Critical Review, Journal of Economic Literature, 2002-40, pp. 351-401.

⁴⁸ Verbraucherzentrale Bundesverband (Vzvb), Information gut, alles gut? Empfehlungen für wirksame Informationen, November 2011, available online (in German) at: http://www.vzvb.de/mediapics/verbraucherinformationen_wirksam_empfehlungen_vzvb.pdf

⁴⁹ Consumer Information Working Party, 2011, p. 21

5. Implications for the effective communication of consumer information

The previous section has sought to convey a better understanding of who the consumer – as information gatherer and processor – is, the factors that characterize some of her behaviour towards information, and the different sources of failure of consumer information as a regulatory tool. It is only recently that there have been attempts, particularly in the UK, but also in Germany and in the US, to translate behavioural insights into concrete recommendations for more effective consumer information. One example is a publication by the vzbv, the Federation of German Consumer Organizations, in which it develops criteria for ‘good’ information and guidelines for producers of consumer information.⁵⁰ Important elements in this guide are information accuracy, relevancy, accessibility, adequacy, attractiveness, transparency and user-orientation.⁵¹ The British Telecommunications Regulator OFCOM has identified a somewhat different set of criteria, focusing more on the process of information provision, rather than (only) the information itself: awareness, and the communication of consumer information must be accessible, trustworthy, accurate, comparable, clear, understandable and timely.⁵² Yet another example is the Better Information Handbook, another UK publication, that targets very concretely, comprehensively and at a practical level the provider of information. The handbook includes examples, links to external resources as well as a ‘project plan builder’ that should help to produce better information.⁵³ One common strand in these recommendations is that it is not enough to simply inform consumers (or oblige suppliers to provide consumers with certain information). **In order to be effective, consumer information must be framed and communicated in a form that is actually useful and effective for consumers.**

In order to be effective, consumer information must be framed and communicated in a form that is actually meaningful.

Based on the analysis in section 3, and the recommendations made in the aforementioned guidelines and elsewhere, this section will critically discuss a number of key suggestions on how to improve form and communication of consumer information. The principal point of departure is the conceptualization of consumer information as a process, rather than an act (section 3). The analysis will use for the purpose of illustration selected best or worst case examples from the way businesses communicate consumer information today.

5.1 The importance of creating awareness

The point was made in the previous section that being aware of the importance of reading terms of use is a first and necessary step towards reading them. As demonstrated earlier, many consumers do not even try to read the terms of use because they do not understand the importance of doing so – be it because they do not understand that they enter into legally binding obligations or because they exhibit trust in a website but also in the law to protect them. This is why it is important to not only issue consumer information (and oblige businesses to do so) but also to explain to consumers the

⁵⁰ Vzbv, 2011.

⁵¹ Ibid, p. 36-37.

⁵² Ofcom, 2013, p. 40.

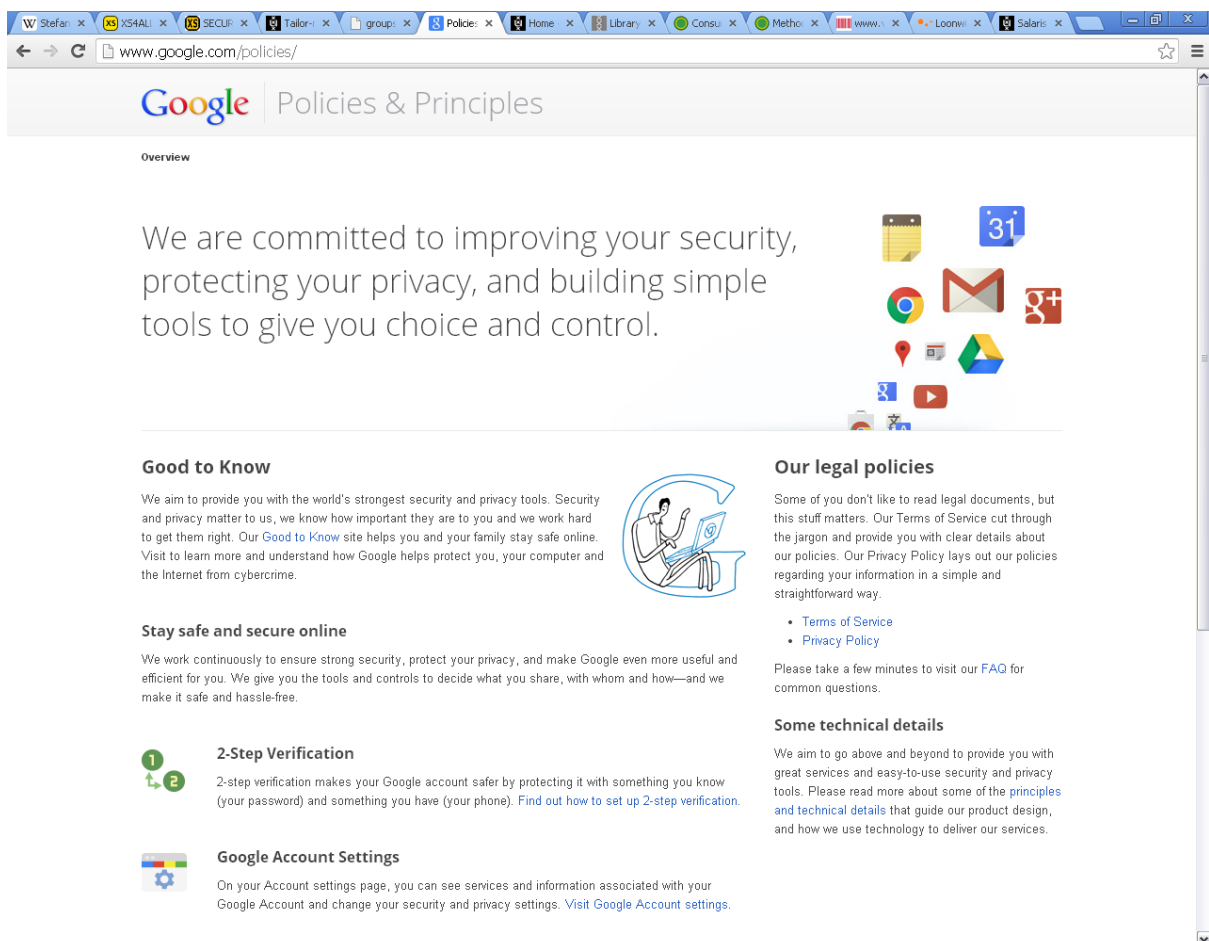
⁵³ Advice now, Better Information Handbook, available online at: <http://www.advicenow.org.uk/better-information>.

importance of reading this information and remove some of the inhibitions that prevent them from doing so.

Some websites seek to tackle that issue by explaining the relevancy of reading terms of use. One example is Google that informs users under the heading “Our legal policies” that: “Some of you don’t like to read legal documents, but this stuff matters. Our Terms of Service cut through the jargon and provide you with clear details about our policies. Our Privacy Policy lays out our policies regarding your information in a simple and straightforward way.

- [Terms of Service](#)
- [Privacy Policy](#)

Please take a few minutes to visit our [FAQ](#) for common questions.”



Screenshot Google Policies & Principles (1 July 2013)

By promising consumers that Google will cut through the legal jargon and provide clear details Google tries to take away one disincentive to engage with the terms, namely the legal, incomprehensible jargon, even if the rather traditional presentation of the legal policies might have a deterring effect on its own. When clicking through to its privacy policies, Google further explains that “We’ve tried to keep it as simple as possible, but if you’re not familiar with terms, such as cookies, IP addresses, pixel tags and browsers, then read about these key terms first. Your privacy

matters to Google, so whether you are new to Google or a long-time user, please do take the time to get to know our practices – and if you have any questions, contact us.” Next to the privacy policy, and prominently visible, is a link to a glossary.

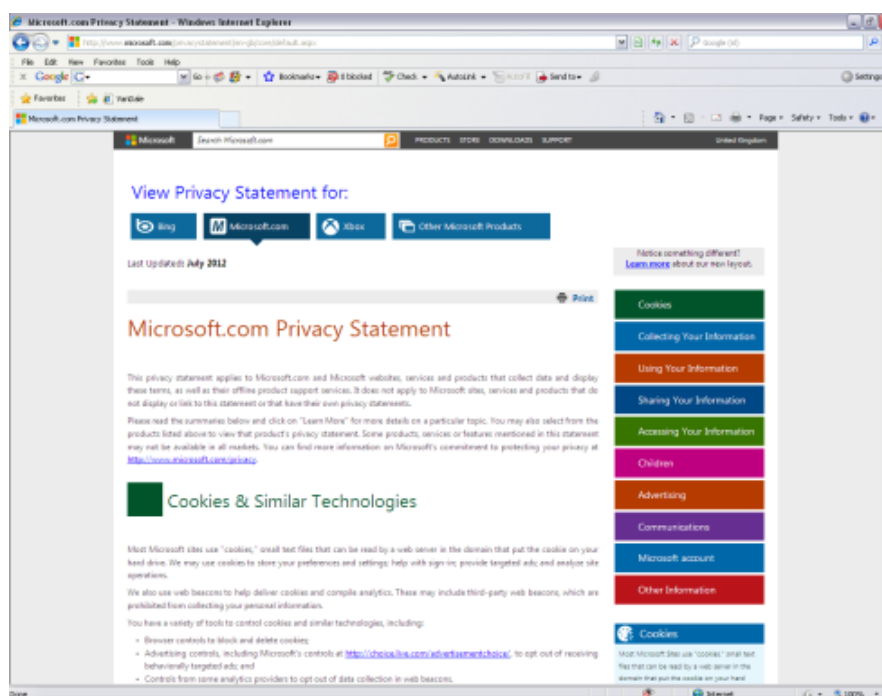
In a similar vein, though less linguistically appealing, is Vimeo’s explanation at the very beginning of its terms of use: “PLEASE READ THIS DOCUMENT CAREFULLY. Vimeo, LLC (“Vimeo,” “we,” or “us”) offers an online video sharing platform and community through its website located at Vimeo.com (the “Vimeo Site”) and related domains (including VimeoPRO.com), mobile applications, desktop applications, and PC television applications (collectively, the “Vimeo Service”). By registering as a member or by using the Vimeo Service in any way, you accept these Terms of Service (“Agreement”), which forms a binding agreement between you and Vimeo. If you do not wish to be bound by this Agreement, do not use the Vimeo Service.”

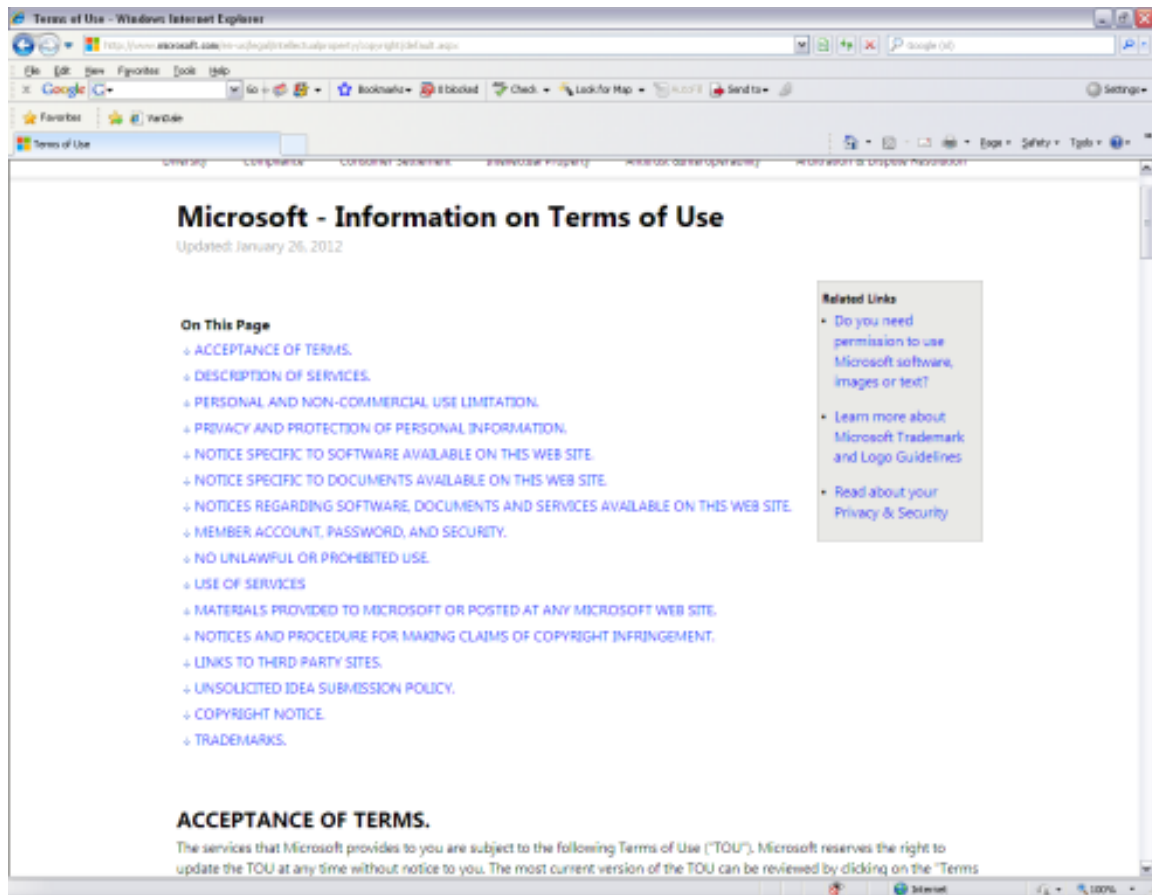
Vimeo’s explanation, though less entertaining to read, does actually explain to users why it is important to read the terms, namely because by accepting these terms a binding agreement will be formed:

“By registering as a member or by using the Vimeo Service in any way, you accept these Terms of Service (“Agreement”), which forms a binding agreement between you and Vimeo. If you do not wish to be bound by this Agreement, do not use the Vimeo Service”.

By contrast, Google avoids drawing consumers’ attention to that fact, and instead speaks only of giving “clear details about our policies.”

It is worth noting that at least a number of sites, such as Google, Microsoft and Facebook, have **invested considerable efforts in drawing the attention of consumers to their privacy policies, much less effort goes into the presentation of the terms of use** (see the example of Microsoft below).

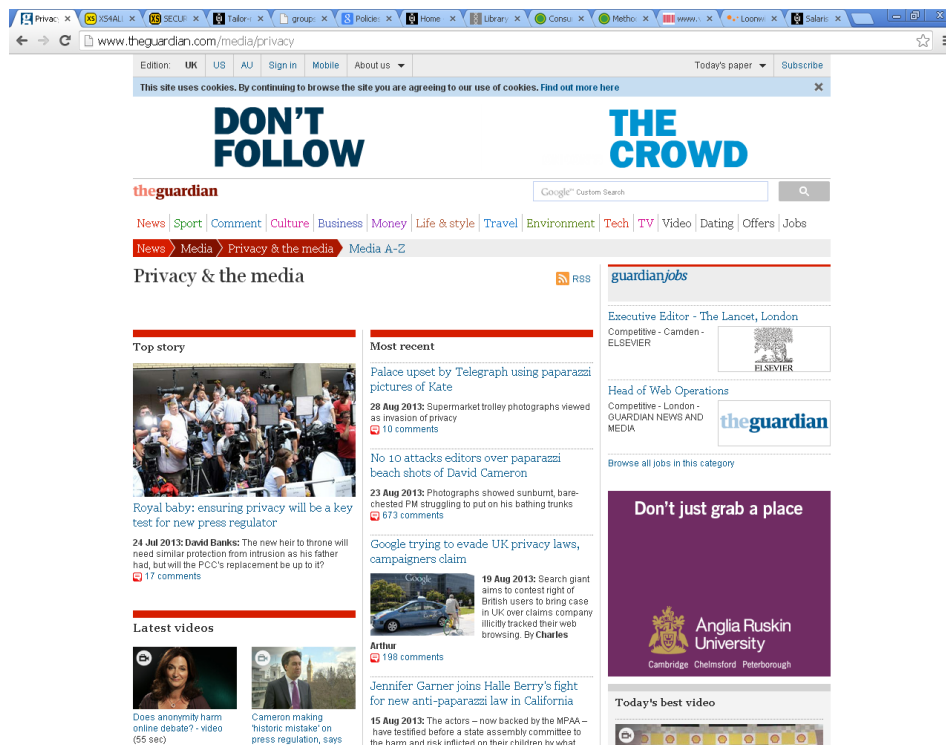




Screenshot Microsoft Privacy Statement/Terms of Use (1 July 2013)

Unlike the terms of use, which are provided in plain text, the privacy information in the example is a true multimedia show, vying for attention. Also, unlike for the terms of use, when recalling the information about the privacy policies the language is adapted depending on the country from which the information is being requested.

One possible explanation for the different approaches of drawing users' attention to privacy policies and terms of use can be that matters of privacy have figured quite prominently in recent media debates, and consequently the level of awareness and the value attributed by consumers and the public to privacy matters is higher. This demonstrates two things: One is that investing effort into creating awareness of, and communicating effective consumer information is **also a matter of incentives** (if privacy is a selling point undertakings have greater incentives to demonstrate that they are serious about privacy and strive for transparency). The second aspect is that **there can be other institutions, too, that create awareness about pre-contractual information**. One example are the media. The **media** fulfill an important role in generating interest in and awareness of particular types of information. This can be information about privacy, but also about other aspects of pre-contractual information, such as DRM use, price information, information about the environmental impact. Obviously, other types of consumer information lend themselves less easily to discussion in the (popular) press, such as questions of choice of law, legal warranties, right of withdrawal, etc.



Screenshot The Guardian Privacy & the media section (28 August 2013)

Consumer organizations have traditionally also played an important role in literacy campaigns and the creation of awareness of topical issues of consumer protection. Examples are campaigns such as the one from the German vzbv: “Verbraucher haben Rechte” , in which the German consumer organization not only informs consumers about their rights but also educates and creates awareness about topical issues such as cookies, data protection, comparison sites, in-app purchases, etc.⁵⁴ Usefully, the vzbv also offers **checklists** that help make consumers aware of the aspects that they should take into account, e.g. when contracting with an online provider.⁵⁵ A comparable checklist on e.g. how to read terms of use could be potentially useful. The Dutch Consumentenbond published a list with tips and important points to consider when concluding contracts with telecom operators. In order to develop the list, the Consumentenbond first tested the offers of different providers to be able to instruct users about the aspects they should pay attention to.⁵⁶ Another interesting solution is that of the UK organization which! that offers consumers a **tutorial** on the most important pieces of consumer legislation, with examples.⁵⁷

But also **businesses** can play an important role in creating awareness and understanding of consumer policies. One interesting example is ebay, which has dedicated considerable efforts to creating awareness for buyer and seller policies, and also to educating users about these policies and what they entail. Informing buyers and sellers about their legal rights and obligations is obviously an important prerequisite for establishing trust in, and the safety and ultimate success of ebay as a platform for online transactions. Ebay’s attempt to create awareness and understanding begins with the presentation of its policies. They are not easy to find (under seller information

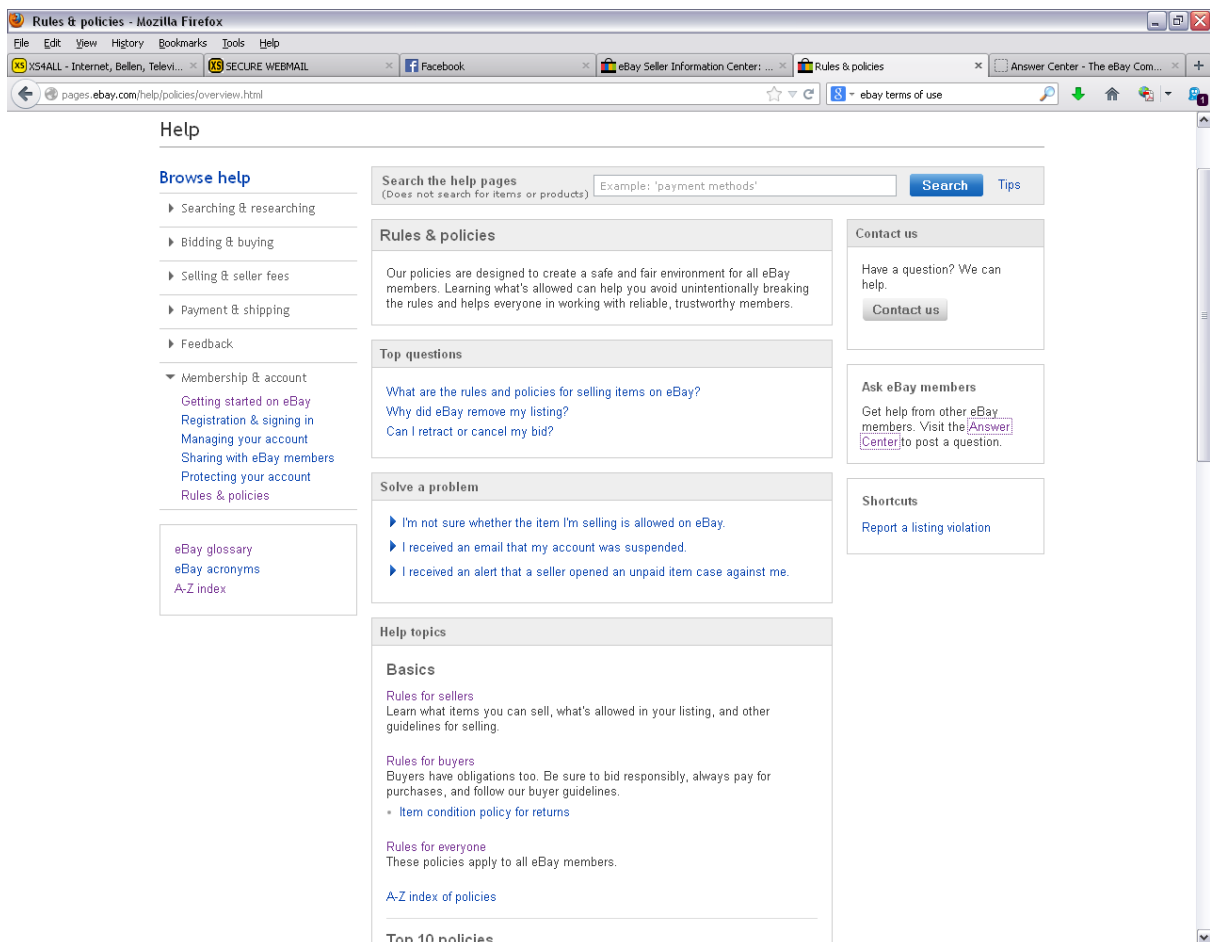
⁵⁴ Vzbv, 2011, ibid.

⁵⁵ http://www.surfer-haben-rechte.de/cps/rde/xbcr/digitalrechte/Checkliste_Onlineshops.pdf

⁵⁶ <http://www.consumentenbond.nl/campagnes/telecomplicaties/wordmobielwijzer/#>

⁵⁷ <http://www.which.co.uk/consumer-rights/regulation>

center), but once there ebay presents its policies in fairly intuitive categories (top ten questions, top ten policies, solve a problem, basics, how to, tutorials, etc.) together with a search function, a glossary and the possibility to ask for help and contact someone from the ebay team or the ebay community. Ebay offers, among others, specialized ‘tutorials’ in the form of Q&As e.g. about its market place policies (“When you're done, you should have a much better idea how to avoid unintended violations and how to interpret eBay's approach to keeping the Marketplace safe.”)⁵⁸ but also ‘legal training’ e.g. on intellectual property law (“Intellectual property is sometimes tricky, so we want to help you understand some of the basics.”).⁵⁹ Other tools offered to increase awareness and educate are video tutorials,⁶⁰ a social answer centre, groups and discussion boards,⁶¹ virtual interactive workshops,⁶² but also the organization of live events and training (the “ebay University”).



Screenshot ebay rules & policies (1 September 2013)

An important aspect that has the potential to play an even more important role in the future is the **tailoring of targeted information** in a manner that invites consumers to read further. There has been a growing body of research into e.g. the communication of health information that

Incentives play a critical role in reading as well as in communicating consumer information effectively.

⁵⁸ http://pages.ebay.com/help/tutorial/marketplacetutorial/js_tutorial.html

⁵⁹ <http://pages.ebay.com/help/tutorial/verotutorial/intro.html>

⁶⁰ <http://pages.ebay.com/sellerinformation/sellerprotection/sellereducation.html>

⁶¹ <http://community.ebay.com/t5/Answer-Center/ct-p/1100000003>

⁶² https://myroom-na.adobeconnect.com/_a1012293661/p1tz1dfbcbid/?launcher=false&fcsContent=true&pbMode=normal

discusses the advantages and drawbacks of tailored messages (see in more detail below). One possible task of tailoring is to **already create incentives for people to read**. In the case of communicating health information, this could be e.g. the message that an individual belongs to a certain risk group and because of that it is important to consider the following health information. Similarly, when downloading a new app from Google's Playstore, Playstore lists rather prominently all the permissions that a particular app requires. Going one step further, apps exist that alert the user to apps with potentially suspect permission requirements. Arguably, similar apps that would warn users about questionable terms of use could do a great deal to alert users and encourage them to engage with terms of use.

5.2 Some words about literacy initiatives

Education and (media) literacy initiatives are another popular policy response that ails consumer markets, and often goes along with calls for more transparency.⁶³ One conclusion from the insights from behavioural research clearly is that in order to truly fortify consumers and enable them to make informed choices it is **not enough to provide them with the relevant information**. Consumers often also need **assistance in interpreting and using that information**. To that extent, literacy initiatives can be an important step in making consumers aware that they do require certain information, but literacy programmes can also provide guidance on how to collect and choose the relevant information as well as to interpret and translate it into action. While the idea of literate consumers is in principle appealing and a necessary addition to transparency policies in a digital age, **it is important not to overestimate the potential of media literacy initiatives** to cure problems with the current information approach. Similar to transparency policies, there is a heterogeneous and largely uncoordinated area of literacy initiatives, on the national and European level, targeting different areas and featuring different, though often equally ambitious agendas. National literacy initiatives in the EU cover areas as diverse and as complex as instructions on how to use bank accounts, budgeting skills, investments, savings and retirement, insurance and risk management, etc.⁶⁴ Then there are initiatives to educate consumers about their rights, about healthy living and food choices, about sustainability and environmental behaviour, etc. While laudable, important and beneficial to society, it is necessary to acknowledge that consumers cannot be expected in general to devote significant portions of their time to self-education. The **consumer-expert will remain the exception**. Media literacy initiatives, moreover, should not result in a situation where the consumers shoulder most of the responsibility for monitoring and safeguarding the fairness, safety and competitiveness of terms of use. Finally, it is important to realize that there are situations in which literacy initiatives could be even detrimental to consumer welfare, for example by stimulating overconfidence.⁶⁵

The consumer expert will remain the exception.

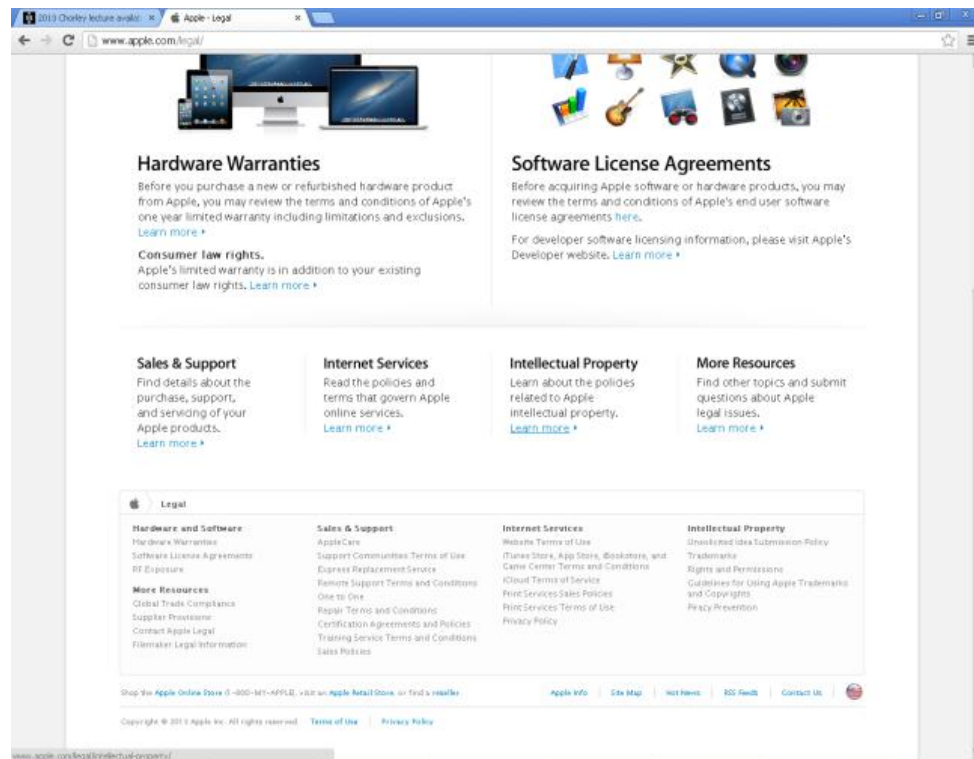
⁶³ See e.g. European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European approach to media literacy in the digital environment, Brussels, 20 December 2007, COM(2007) 833 final.

⁶⁴ European Commission, Communication from the Commission Financial Education, Brussels, 18.12.2007, COM(2007) 808 final, p. 5, online available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0808:FIN:EN:PDF>

⁶⁵ See e.g. the paper by L. Willis, Against Financial Literacy Education, Iowa Law Review, Vol. 94, 2008.

5.3 Ease of access

Another frequently made recommendation stresses the importance of ease of access.⁶⁶ If consumers are already reluctant to read terms of use, they are in all likelihood even more reluctant to search for them. In this context it is important to realize that availability (i.e. the fact that consumer information is provided) does not automatically translate into accessibility. Online technologies (such as deep-linking or search engines) have already greatly improved the possibilities to make terms of use and consumer information easily accessible (for those with an internet connection).⁶⁷ Still, there is room for improvement as this example may demonstrate:



Screenshot from Apple's website that refers consumers to the legal terms (28 August 2013)

As the above example may show, the (easy) availability of too much information can make particular types of consumer information factually inaccessible simply because it is almost impossible for consumers to decide where and how to search for that information. **Findability** as an element and necessary condition for accessibility is an aspect that can be expected to gain only more weight in the future. Aspects of findability include not only the ease with which the relevant information can be found within a website, but also whether it is possible to search and find it, for example with the help of a **search engine** or comparable technologies.⁶⁸

⁶⁶ Vzbv, 2011, p. 36.

⁶⁷ See also Ofcom, 2013, p. 41, pointing out that reliance on online access might exclude a significant minority of the population, e.g. the elderly, consumers in rural (and less connected) areas, etc.

⁶⁸ In a recent investigation the Dutch Data Protection Authority has found that one important aspect of the effective presentation of consumer information is whether it is findable using common search engines, such as Google, College Bescherming Persoonsgegevens, Onderzoek naar de verwerking van persoonsgegevens met of door een Philips smart tv door TP Vision Netherlands B.V., July 2013. (Dutch Data Protection Authority, Investigation into the processing of personal data by means of a Philips smart tv by TP Vision Netherlands BV), p. 67.

Accessibility is also a matter of language, font size and provision of information in a size and format that is **accessible to persons with visual impairments**. As will be shown in section 5, this is an aspect that the information obligations in general consumer law still completely ignore.

5.4 Timing

Still underrepresented in existing information practice and regulation (see section 5) is also the aspect of the **correct timing and contextualization of information**, as a more dynamic aspect of accessibility. It was explained in section 3, that consumers tend to forget information or dismiss it if they do not see its immediate relevancy (section 3.3). It follows that consumers should ideally be presented with the information (and only the information) that they need at the moment when it is relevant. Well-timed information is not only easier to understand. It is also more inviting to read in the first place. Traders should therefore explore the possibilities to further differentiate and offer more accessible information: providing information in the right portions and the right context, and not all information at the same time (e.g., in the terms of use). As Ofcom rightly points out, this can also include **informing consumers repeatedly** of one and the same item of information, as the understanding/remembering of complex and critical information may be reinforced through repetition.⁶⁹ However, doing so also requires additional organization efforts and costs on the side of traders, and it can annoy consumers/customers. Therefore, more research needs to be done to assess in which concrete situations and for which types of information such an approach is feasible.

To give **some examples**, information on the reporting of problems, cancellation policies, and dispute settlement could be organized as a separate button ('report a problem') at the bottom of the first page of the trader's website, and also only provided once the user clicks that button. Information about the price, usage restrictions, and software requirements would be displayed prominently on the occasion of the first visit of a product or service description. Information about the trader and contact details could be part of the 'About' section, and available upon request, etc.

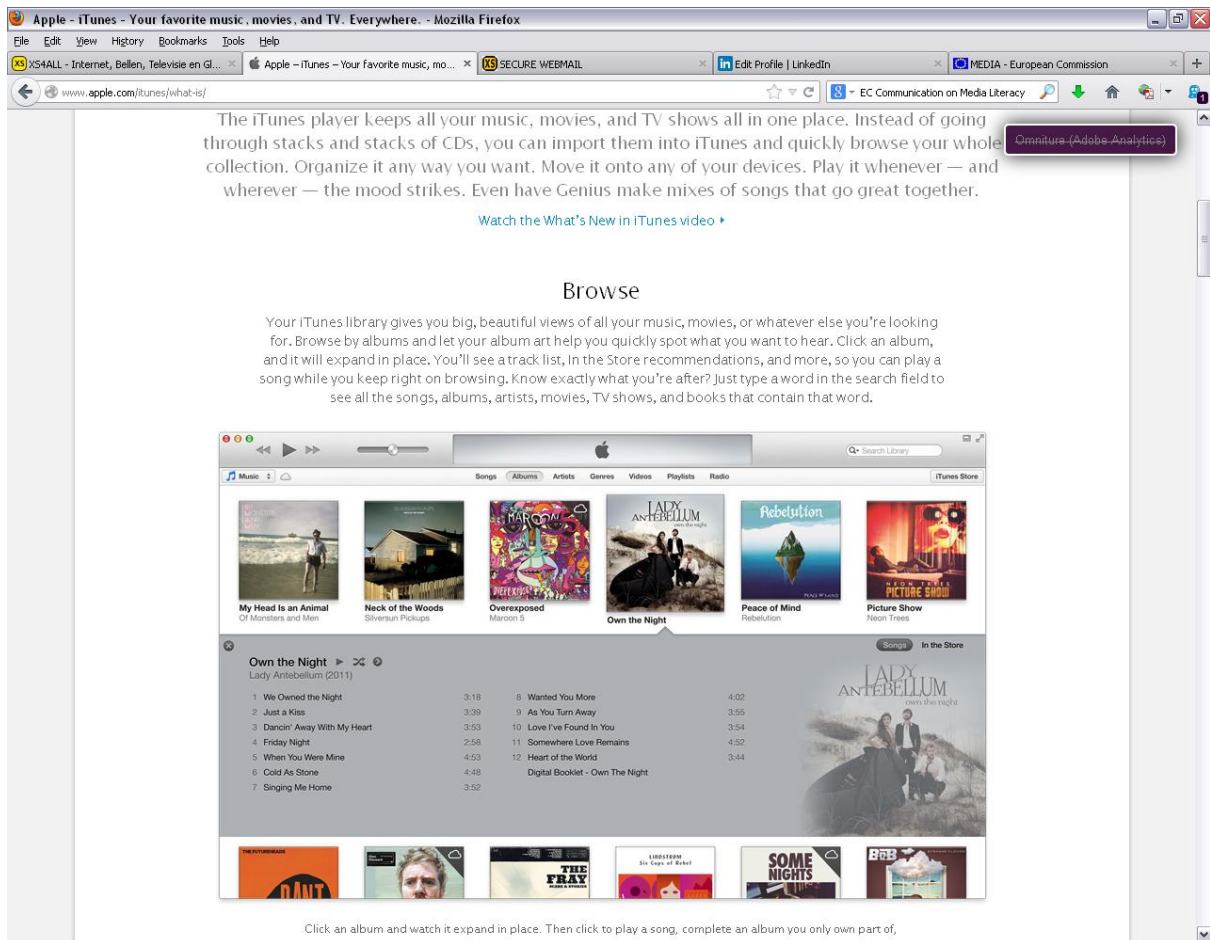
5.5 Form matters

One of the most important conclusions from behavioural research is that not only the content but also the **form in which information is being presented matters**. With badly written and presented consumer information as one of the top reasons for neither reading nor understanding consumer information, it is obvious that more effort to present consumer information in an effective format is needed. The importance of presenting information in an engaging, interesting or even esthetical way in order to enable consumers to collect and process that information⁷⁰ has long been recognized in e.g. the advertising industry. These are insights that can be usefully applied also for the purpose of communicating consumer information.⁷¹

⁶⁹ Ofcom, 2013, p. 47.

⁷⁰ See already K.-E. Wärneryd, The Limits of Public Consumer Information, Journal of Consumer Policy, 1980-2, p. 127-144, p. 132.

⁷¹ In this sense e.g. Better Information Handbook, ibid.

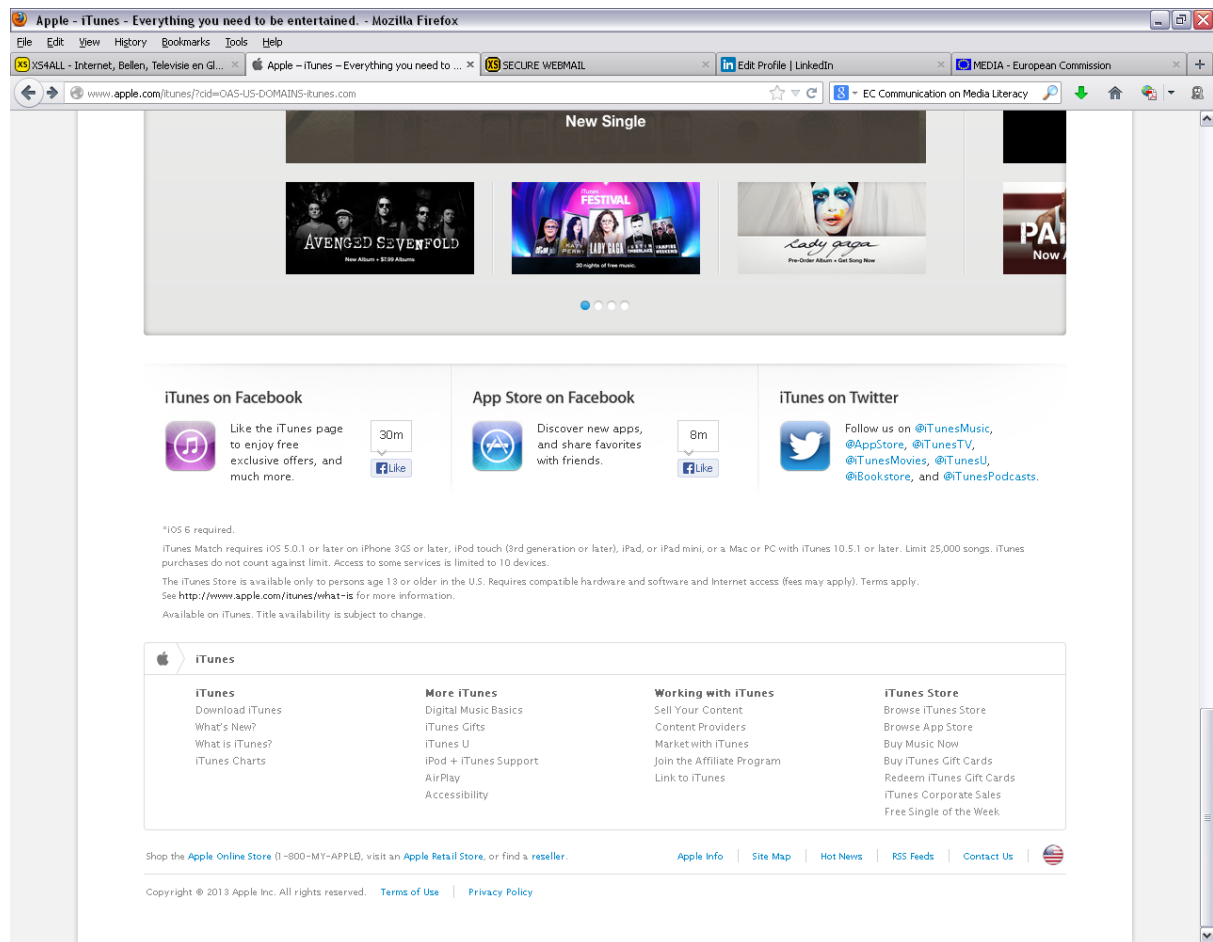


Screenshot of the iTunes-site – ‘What is iTunes’ (28 August 2013)

Professional sites such as the one from iTunes demonstrate quite impressively that it is possible to present even complex information in an enticing, comprehensible and engaging manner. The information about iTunes is not only fun to read, it is also informative. iTunes uses **different letter sizes**: Very large letters for the headings, slightly smaller letters for the summary, and even smaller but still very readable letters for additional information – thereby visually prioritizing and guiding the eyes of the user. The **grammar and sentence construction are varied**, and **the more important the information the shorter the sentence** (“All the music, movies, TV shows, and apps you’ve got. And want to get. All in one place.”)

In between pieces of the text are inserted **pictures, moving pictures, links to video and icons** that invite the user to click on them for further information on particular aspects of the service. The language of the text is personal, using **“you”** to address the reader, relating to her personal interests (“where all your favourite stuff is just a click away”) and using **many examples** of what the service can in practice mean for the reader of the text. Occasionally the text appeals to the **emotions** of the reader (“Music. Discover it. Buy it. Love it”), and in case the reader should fail to understand the importance of what she is reading, iTunes tells her so (“Everything you want. And so much you didn’t even know you wanted.”). In other words, the text, though lengthy and requiring a lot of scrolling, is a **multimedia experience**, and an example of how well written and presented even the complex information about the many different services of iTunes can be. Interestingly, when accessing the website from a smart phone, the link to this elaborate explanation of what is iTunes does not work

(what does work, however, is the link to the iTunes terms of use – in its original, not adapted for mobile phones version).



Screenshot of the bottom of the iTunes-site – ‘What is iTunes’

The **contrast with the presentation of the legal information** could not be bigger (and this is obviously not only true for iTunes). At the very end of the text, and visually separated from the information about the iTunes service, a last bit of text follows in almost unreadable small letter font. This is the text that explains the systems requirements and possible incompatibilities, the fact that the service is only available to 13 year olds and older, as well as that terms apply. Quite sobering is also the contrast in the way in which the actual terms of use are presented: No pictures, no videos, one font size, bold for headings, long sentences full of legalese.⁷² To be able to understand that information consumers not only need to be patient readers and used to a certain level of abstraction, they must also be familiar with very technical legal terms such as “trade dress, copyright, patent and trademark laws, and various other intellectual property rights and unfair competition laws.” To the extent that there are links, they do not use pictograms, but plain text, and link through to more sobering legal text. The language, moreover, is far from appealing to emotions.

⁷² E.g. “All text, graphics, user interfaces, visual interfaces, photographs, trademarks, logos, sounds, music, artwork and computer code (collectively, “Content”), including but not limited to the design, structure, selection, coordination, expression, “look and feel” and arrangement of such Content, contained on the Site is owned, controlled or licensed by or to Apple, and is protected by trade dress, copyright, patent and trademark laws, and various other intellectual property rights and unfair competition laws”.

Instead, it speaks of legal responsibilities, and is full of “you agree” and “you may” and even more “you may not.” It is also quite obvious from the text that iTunes does not invite feedback or commentary from its users on its terms of use: “Any feedback you provide at this site shall be deemed to be non-confidential. Apple shall be free to use such information on an unrestricted basis.”

What can be concluded from this little case study (and a review of other sites from other services confirms the picture) is that it is, **at least in theory, possible to communicate even complex information to the consumer**, providing the instance issuing that information is willing to invest time and costs in doing so. Another question that goes beyond the scope of this study is how much the user actually remembers the information and finds it useful in her decision (not) to conduct a transaction. The case study also reconfirms that the decision to invest (considerable) efforts in communicating consumer information effectively is also a matter of the necessary expertise but also (commercial or legal) **incentives** to do so.

Communicating consumer information effectively requires **research, expertise and a wide variety of different skills** – skills that company lawyers (who will usually be the ones burdened with the task of drafting terms of use and making sure suppliers comply with the legal information obligations) commonly do not have.⁷³ That the effective framing of information can be a **costly and time-consuming** process is also demonstrated by projects such as the US Form Development Project. In 274 pages (excluding annexes) the final report of the project describes experiences with and insights from a project dedicated to the development of a Prototype Financial Privacy Notice.⁷⁴

It is worth noting that the growing number of **guidelines and recommendations on how to improve the presentation of consumer information** makes the necessary knowledge more broadly available, also to lawyers and smaller businesses that cannot afford the required in-house expertise.⁷⁵ These guidelines show how longer texts can be structured through headings, highlighted keywords and summaries, and be presented in different forms or frames, such as by using tables of content, FAQs, checklists, flowcharts⁷⁶ and other forms of interpretative presentation. Common to the different guidelines and recommendations is also the stress on the possible benefits of digital technologies. **Digital technologies** have further greatly improved the possibilities for and feasibility of presenting information in other non-textual ways, for example, in the form of instruction videos, pictures, banners, call-outs, integrated life chats or interactive buttons.

But even in the light of the availability of such guidance, the fact remains that mandating disclosure, at least when it is supposed to be effective, **also means burdening the intended suppliers of consumer information with the organizational efforts and investments needed** to make that information work. In the absence of strong incentives to do so (either in the form of economic

⁷³ An impressive documentation of this is a US project, commissioned by the FTC, on designing a prototype of a financial privacy notice. The project involved 12 months of testing with 66 participants over eight test rounds, and the results of that project were documented in a report of no less than 274 pages (without appendices), see Kleimann Communication Group, Inc. Evolution of a Prototype Financial Privacy Notice, 28 February 2006, available online at: <http://www.ftc.gov/privacy/privacyinitiatives/ftcfinalreport060228.pdf>

⁷⁴ Kleimann Communication Group, Evolution of a prototype financial privacy notice. A report on the Form Development Project, 28 February 2006.

⁷⁵ See Vzby, 2011; Ofcom 2013; Better Regulation Handbook.

⁷⁶ See e.g. <http://pages.ebay.com/sellerinformation/sellerprotection/dedicatedresources.html>

interests or effective regulation⁷⁷) it is unlikely, or at least unclear to what extent suppliers indeed will (or can afford to) invest the time and effort needed to present information effectively, and whether the costs of doing so would not outweigh the benefits. On a more general policy level, this means that it is not enough to simply prescribe disclosure requirements but that, in addition, law makers need to consider who has the incentives of providing this information, what are the costs (of providing the information as well as enforcing information obligations), how the effectiveness of the information can be monitored, and if there are not alternative, possibly cheaper and more effective policy measures available.

When designing disclosure obligations, aspects such as incentive structures, costs, feasible monitoring of compliance and the availability of cheaper and more effective measures matter.

5.6 About the importance of framing

Probably the most important conclusion from the behavioural research into use and effects of consumer information regards **the importance of framing**. Consumer information, to be effective, must be presented in a form and in a context that allows consumers to make a link with their actual situation, their information needs and experiences.⁷⁸ Or to put it differently, in order to be effective consumer information must not be written from the perspective of the law maker, a business or the company lawyer, but **from the perspective of the consumer**. It is important to understand that this involves a **fundamentally different approach to consumer information**. Instead of stakeholders and policy makers deciding what information consumers should have in order to make informed decisions in particular areas, a more user-centric approach to framing consumer information will need to understand first how consumers take particular decisions, which information they need for this in which form and at which moment in the decision-making process. This requires research into actual consumer behaviour. Framing can also involve a different approach to consumer information policy, as it can be a vehicle of overcoming cognitive biases, and ‘nudging’ people towards socially, political, etc. desirable choices.⁷⁹

The right framing of consumer information is critical to its success.

The tone determines the message

The insights from behavioral research can, for example, be used to determine **the right tone** or form of presentation, depending on the goal information is supposed to achieve (this requires that the goal is clear). Insights such as the fact that consumers are more readily impacted by the presentation of information about risks and losses (rather than gains) and respond differently to positive than to negative framing of messages can be used in particular to influence the action that consumers take, based upon that information.⁸⁰ While the importance of framing is evident, it is also evident that there is a thin borderline between framing and manipulation.

⁷⁷ For example, it has been suggested to reverse the burden of proof and require that suppliers do not only demonstrate that they informed consumers, but that they have done their reasonable best to do so effectively, M. Loos, N. Helberger, L. Guibault and C. Mak, et.al., Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital

content contracts, Final Report, European Commission, DG Sanco, June 2011.

⁷⁸ In this sense also Vzbv, 2011; OECD, 2010, p. 87; Better Regulation Executive and National Consumer Council, 2007.

⁷⁹ See Larrick, 2004, aao; C. Jolls & C. Sunstein, Debiasing through law, J. Legal Studies, 2006-35, p. 199-241.

⁸⁰ See also OECD, 2010, p. 87.

Providing context, examples and explaining real-life implications

To quote from the Better Information Handbook: “A lot of information focuses on what the law says, and doesn’t do enough to provide a **route to a solution**”.⁸¹ In order to provide a ‘route to a solution’ it is often not enough to present consumer information in the form of abstract concepts and a neutral frame, leaving it up to consumers to interpret that information and fill it with meaning for their personal situation. A more useful (from the perspective of consumers) approach is to frame the information in a way that hints to actual **real-life implications**. For example, information about software requirements and compatibility can be given in the form of a very specific list of software requirements. Alternatively, traders can inform consumers that a particular digital content is compatible with the hardware and software that is commonly in use at the time of the purchase. While the first approach may be more specific, the second one is probably more useful for the user. This is because in the second example very technical information is framed in a way that the consumer can actually understand and relate it to her own situation: “Will the digital content work on my computer?” Similarly, instead of informing consumers that “copy protection is in place” or simply showing a label indicating that this content is copy protected, the information that “this e-book cannot be copied, printed and transferred to other devices” (which could eventually also be conveyed in the form of labels) is far more instructive.

Consumer information needs to be designed from the perspective of consumers.

Giving **examples** is another useful way of helping consumers to interpret the information they see. For instance, when informing consumers about the consequences of a violation of the terms of use, the Dutch ebay-like selling platform Marktplaats lists by way of example eleven situations that are in conflict with its user policy.⁸² Similarly, ebay uses examples when explaining its “Guidelines for buyers” to potential buyers⁸³ (as opposed to the presentation of the rules for sellers).⁸⁴ Within the guidelines for buyers, consumers can click on certain legal terms (e.g. illegal activity, invalid bid retraction, intellectual property), which will lead them to a page with a more elaborate explanation, including examples.⁸⁵

Making information comparable

Every day, consumers are invited to read the terms and conditions and consumer information of a diverse range of services. Different suppliers use differing methods, terminologies, languages and technical standards to provide consumer information. The resulting diversity of information is problematic if one considers that the ultimate goal of consumer information is to enable consumers to make **informed choices**. Being able to make informed choices is not limited to deciding in favour of or against one particular product or service. Informed choices also involve the ability to compare different digital products (‘making a choice’) and how they support compatibility, allow the making of copies, printing, and other uses, protect the users’ privacy, etc. This comparison is only possible if the information about the various products is comparable. In other words, **making information**

⁸¹ Better Information Handbook, p. 3

⁸² <http://www.marktplaats.nl/i/help/over-marktplaats/voorwaarden-en-privacybeleid/>

⁸³ <http://pages.ebay.com/help/policies/buyer-rules-overview.html>

⁸⁴ <http://pages.ebay.com/help/policies/user-agreement.html>

⁸⁵ See e.g. <http://pages.ebay.com/help/policies/encouraging-illegal-activity.html> or <http://pages.ebay.com/help/policies/intellectual-property-ov.html>

about prices and product characteristics comparable is a very important way to help users actually act upon information and be better able to choose.

Standardizing the content and (technical) format of information plays a crucial role in that context.⁸⁶ Standardized forms of presenting consumers with information do not only facilitate comparison by consumers. Standardization also facilitates the activities of third parties, such as consumer organizations, experts, the media and regulatory authorities. Furthermore, standardization is an enabling factor in the establishment of **third-party recommendation services** that help users find the optimal choice, though it has been pointed out rightly that comparison sites open up an entire new set of challenges for consumers and law makers, many of them related to the comprehensiveness, independence and trustworthiness of the comparison service, but also how to promote and facilitate their activities.⁸⁷ Finally, product comparison modalities like reviews on the Internet can considerably decrease information search costs enabling increased competition, and the benefits from that competition may flow to consumers.⁸⁸ This does require, however, that standardization takes place at different levels: terminology, organization of content as well as technical standardization (e.g. provision of information in machine-readable formats). First attempts to standardization are on the way,⁸⁹ though a comprehensive project of standardizing consumer information that can count on broad stakeholder support still needs to be tackled.

In order to be able to make choices, information needs to be comparable.

Personalization

At present, mandatory consumer information is targeted at “the consumer”. In reality, “the consumer” stands for a large number of **extremely heterogeneous** individuals, each with different information needs as well as ways of collecting, processing and integrating information into her decision-making routines. Ideally, the effective communication of consumer information would take into account on a far more granular level the individual information needs, level of experience, background knowledge, education but also preference for different forms of communication (video, text, etc.).⁹⁰ Taken to its extreme, in order to be truly effective, the process of providing consumer information would turn into a process of information personalization or even individualized consumer coaching.

There is evidence that **personalized or targeted information** can be, under certain circumstances, more persuasive and effective in bringing a message across. It has been shown that the personalized nature of a message can have a positive effect on the persuasive character of the message and its perceived relevancy, but also on its relation to the source of the more personalized information, as it would give users a greater sense of ownership, involvement and positive association with the source

⁸⁶ In this sense also e.g. Ofcom, 2013, p. 43.

⁸⁷ Ofcom, 2013, p. 44; OECD, 2010, p. 84.

⁸⁸ However, information comparisons may at the same time facilitate collusion among firms, as well as open the door to misinformation and manipulation.

⁸⁹ See e.g. the classifying information project from advice now, <http://www.advicenow.org.uk/better-information/classifying-information/> but also Truste’s Privacy Policy Generator, <http://www.truste.com/blog/2011/07/12/privacy-policy-generator-3-0/>

⁹⁰ This requires, among others, consumer research before and in the process of launching new information, see OFCOM, 2013, p. 47.

of the personalized content.⁹¹ Personalization can also be a means of presenting consumers with information that they would have otherwise not sought out, or were not even aware that it existed (and was relevant to them). This aspect of personalization is of particular importance in the light of the fact that consumers often do not even read consumer information, or are not aware of its particular importance.⁹² Accordingly, it has been frequently suggested that the road towards more effective consumer information is personal(ization) (see also below under smart transparency),⁹³ though personalization of consumer information can raise its own set of concerns, as the following section (4.7) explains.

5.7 The role of digital technology in making consumer information smarter

Digital technologies can help in many ways to present consumer information more effectively and in ‘**smarter**’ ways that better link to the individual information needs of consumers. **Examples** abound: the integration of deep-linking and multi-layered presentations, the use of video and audio tutorials, interactive chat sessions and online workshops, interactive Q&As, the provision of glossaries and electronic indexes, transparency, educational and comparison apps and flowcharts, defaults, online comparison sites as well as the targeted search for terms and conditions with the help of search engines, but also widgets or applications that alert consumers – or even consumer devices - to potentially problematic terms or ‘need-to-know’ information.⁹⁴

The following section will single out one particular way of using digital technologies to make information smarter, and discuss the new trend towards “**smart disclosure**” as a way to provide consumers with more targeted, ‘smarter’ information, based, inter alia, on insights about their personal situation. Smart disclosure has been defined as “**the timely release of complex information and data in standardized, machine readable formats in ways that enable consumers to make informed decisions**”.⁹⁵ In the US, smart disclosure is a policy priority, and a “Task Force on Smart Disclosure” has been established with the goal to develop guidelines based on best practices for making data from consumer markets available and useful for consumers, and to identify the relevant legal, economic, social and political issues.⁹⁶ With the “Smart Disclosure Community”, the US Government has moreover created a portal in which it provides information about smart disclosure

⁹¹ S. Kalyanaraman and S. S. Sundar, Customised Web Portals, *Journal of Communication* 56 (2006) 110–132; R.E. Petty & J.T. Cacioppo, *Communication and persuasion: Central and peripheral routes to attitude change*, Springer Verlag, New York 1986; J. D. Jensen, A. J. King, N. Carcioppolo, L. Davis, Why are Tailored Messages More Effective? A Multiple Mediation Analysis of a Breast Cancer Screening Intervention, *Journal of Communication* 2012-62, 851–868; L. Brighta and T. Daughertyb, Does customization impact advertising effectiveness? An exploratory study of consumer perceptions of advertising in customized online environments, *Journal of Marketing Communications*, 2012-18, p. 19-37, also, however, pointing towards possible problems with consumer acceptability of personalized communication.

⁹² For a more extensive discussion of this see N. Helberger, Diversity by Design, *Journal of Information Policy*, 2011-1, p. 441-469.

⁹³ Better Information Handbook, p. 9 subsq.

⁹⁴ See e.g. the German “Terms of Service, Didn’t Read” project, www.tosdr.org. The project (which started in June 2012) aims at reviewing and labelling terms of use and privacy policies. When requesting a rated site, a browser add-on will make permissions available. Another interesting project is the augmented shopping car, see J. Bird, V. Kalnikaite and Y. Rogers, The Augmented Shopping Trolley: An Ambient Display to provide shoppers with non-obvious product information. More generally about the use of the Internet of Things and augmented reality, see *Augmented Reality and Freedom of Contract*, p. 742-745, S. Peppet, Freedom of contract in an augmented reality: the case of consumer contracts, *UCLA L. Rev.* 2012-59, p. 676-745.

⁹⁵ R. Thaler and W. Tucker, Smarter Information, smarter consumers, *Harvard Business Review*, January-February 2013.

⁹⁶ Charter of the Task Force on Smart Disclosure: Information and Efficiency in Consumer Markets, Committee on Technology, National Science and Technology Council, available online at:

http://www.whitehouse.gov/sites/default/files/microsites/ostp/tfsd_charter_signed.pdf And Executive Office of the President National Science and Technology Council, Smart Disclosure and Consumer Decision Making: Report of the Task Force on Smart Disclosure, May 2013, available online at:

http://www.whitehouse.gov/sites/default/files/microsites/ostp/report_of_the_task_force_on_smart_disclosure.pdf

but also open data sets on a range of issues (education, energy, health, finance, food and nutrition, safety, telecommunications) for consumers as well as third parties that plan to develop new consumer information services or applications. The ‘Smart Disclosure Community’ also serves as a platform for a range of smart disclosure apps, such as the “search for college” app, the alternative fuel locator, the national broadband app, or the credit card agreement database.⁹⁷ In the UK, a similar initiative has been launched in the form of the “midata” project.⁹⁸ The midata project is based on a public-private partnership in which companies commit, on a voluntary basis, to making usage data accessible, as part of the UK Consumer Empowerment Strategy.⁹⁹ The ‘midata’ project focuses, until now, in particular on the areas of banking, energy, and mobile usage. But also in other European countries, smart disclosure initiatives are seeing the light.¹⁰⁰

Common to both the US smart disclosure initiative and the UK midata project is that both initiatives seek to **exploit the potential of Big Data** and open data to help consumers make better-informed decisions. The data in question can be data provided by the public sector, by non-governmental organizations, by commercial parties but also by individual users (usage data). It can include publicly available government data about bus schedules, public schools but also compliance and enforcement histories, information from commercial companies (e.g. product or nutrition information that is mandatory, but also legal information). At the heart of the smart disclosure initiative is the idea that **information about individual usage patterns** and preferences can be used by consumers but also, and maybe even more importantly, by third parties, such as search engines, comparison sites or consumer apps, to provide consumers with information that is personally relevant to them. In so doing, smart disclosure has the potential to be **effective in all four stages of the information pathway**: it can not only help to make consumers aware of certain problems or patterns, it can also help them to collect relevant information, interpret that information as the basis for action, as well as inform them about potential changes, or adapt the information to the changed needs of consumers.

Smart disclosure could also have an **important role in the effective communication of legally mandated consumer information and terms of use**. Obviously, the availability of data about potential or actual usage patterns can help also in this context to target consumer information and help consumers to find the right services or products, but also the ‘best’ terms and conditions. Price comparison sites or sites such as www.bellen.com (a Dutch site that helps consumers to search for the right mobile phone scheme) that tailor their recommendations to individual usage patterns are already early examples of smart disclosure tools that help consumers to collect and evaluate information about prices, terms of use, etc. Similarly, it can be envisaged that ‘smarter’ ways of informing consumers can be used to adapt consumer information to the age of the consumer, her education, internet proficiency, or to her special needs or particular risk profiles, etc. Smart disclosure tools could detect changing consumption habits, and provide complementary information on alternative service packages, but also in the

The future of consumer information is smart.

⁹⁷ <http://www.data.gov/consumer/community/consumer>

⁹⁸ <http://webarchive.nationalarchives.gov.uk/+/http://www.bis.gov.uk/policies/consumer-issues/personal-data>

⁹⁹ <https://www.gov.uk/government/topics/consumer-rights-and-issues>

¹⁰⁰ For example, in Germany petrol stations are obliged to make information about location, opening times but also fuel prices available to a so-called “Transparenzstelle”, so that apps can be developed that help consumers to compare prices in real time, see Heise.online, Pressrelease, 31.8.2013, <http://www.heise.de/newsticker/meldung/Tankstellen-muessen-Daten-fuer-Benzin-Transparenzstelle-liefern-1946299.html>

terms of use (e.g. if a consumer has not used a service for a certain time, a smart disclosure tool could highlight the conditions for cancellation). Smart disclosure applications could also help consumers to better understand the implications of consumer information for their own situation, e.g. by offering calculation tools or pre-sort and reduce the amount of information consumers are required to process (e.g. by informing consumers only about the service packages that are relevant for that particular consumer).

The potential advantages of ‘smarter’ routes to informing consumers about products and services, but also their rights are obvious. As mentioned already, this far more individual, targeted approach would correspond to the recent insights from behavioural research about the **usefulness and persuasiveness of more targeted information measures**. It also could offer a practicable solution to the various recent demands for better and more tailored information. It can even spur entirely new categories of consumer services or “choice engines”,¹⁰¹ as well as provide more transparency, and ultimately competition to consumer markets.

There are concerns, too, that need addressing. **Data protection and security issues** are among the most prominent ones, especially as certain types of information, such as meta data or usage information, may not necessarily fall under existing definitions of personal data. Then there are concerns regarding the **security and confidentiality of personal information** about consumers and their usage habits, and the extent to which it will be shared with e.g. professional retailers or third party advertisers. On a more fundamental level, smart disclosure could lead to an instrumentalization of (private) usage data, causing the borderlines between private or personal data and public/open data to be further blurred for the sake of public policy or commercial interests.¹⁰²

Smart disclosure, as a way of identifying but also predicting personal usage patterns and preferences **should not be used in a way to unfairly discriminate** between different consumers, deny some consumers access to services that are open to others, or lock-in consumers in once identified (or predicted) preferences. The general concerns against personalization, e.g. in the media or in advertising, are potentially also valid in this context, namely that once a user profile has been established, this is being used to selectively push certain kinds of information at certain consumers, and not others (e.g. information about particular pricing options or service packages). It is true that businesses do enjoy freedom of contract, which also means that they are principally free to choose their contracting partners. Yet, this should not lead to socially undesirable outcomes. Also the accuracy of the prediction of user preferences and personal profiles is an issue that deserves attention.

Another important concern relates to the **quality and trustworthiness of the information** provided. Because personalized information can have a more persuasive effect, it is not only potentially more useful but also more **misleading** for consumers, in case the information provided is not accurate or biased. This is particularly so where consumers are not only presented with neutral information, but information that is being framed in the form of advice or recommendations. The effective protection

¹⁰¹ Report of the task force on smart disclosure, 2013, p. 7.

¹⁰² As suggested e.g. by Brodi, who demands that “policymakers should make product-use information disclosure mandatory”, E. Brodi, “Product-attribute information” and “product-use information”. Smart disclosure and new policy implications for consumers’ protection, Draft, 4 September 2012, available on ssrn.

of users' **trust** against false and misleading information is therefore particularly important in this context.

In part these are concerns already known from the area of comparison websites and that have triggered calls for regulation within that context.¹⁰³ Eventually, even though smart transparency might reduce the amounts of information that users are required to process to some extent, it can also create the need for other forms of transparency, this time about the origin and quality of the information provided, the conditions under which it is being issued, as well as the trustworthiness/motives/goals/independence of the instance issuing that information. In the worst case, the problem of (in)transparency could simply shift from the level of contract terms and consumer information to the level of information about the identity, practices, price and terms and conditions of providers of smart transparency applications.

Finally, the question is what policy measures may be needed **to advance and support the development of smart disclosure tools**, for example through the provision of open data, the mandatory sharing of information with third parties, issues of standardization, interoperability and the right format in which to provide consumer information, etc.

5.8 Information reduction

Information reduction is the **ultimate form of simplification**. All evidence points to the need for reducing the information that consumers are required to process. Information overload, as was shown, is an important reason why consumers either do not read consumer information or are not able to make sense of it or translate it into action. And yet, paradoxically, despite the fact that many consumers do not read consumer information and indicate that they are deterred by too much information, they do continue to express demand for (more) information.¹⁰⁴ What to make of this apparent contradiction?

It is important to realize that satisfying consumers' need for information and information reduction do not need to sit at odds with each other. Information reduction can also be an aspect of better, **more condensed presentation**, without necessarily conveying less content or meaning.¹⁰⁵ For example, much of the information in many terms of use is a **repetition of legal information**, such as extensive information about the right to withdraw. Arguably, legally mandated consumer rights (e.g. right of withdrawal, remedies, unfair terms control) are a form of standardization, with the consequence that suppliers should only need to inform consumers where they deviate from these standards.¹⁰⁶ Put differently, the terms of use should not be the place to educate consumers about the law. Also, instead of requiring users to periodically review terms of use, one could argue that it would be far more effective if suppliers informed consumers exclusively about **what has changed** since the consumer last read the terms of use, and ideally also explained the real-life implications of

¹⁰³ See e.g. J. Malbon, Taking Fake Online Consumer Reviews Seriously, *Journal of Consumer Policy* 2013-36, p. 139-157.

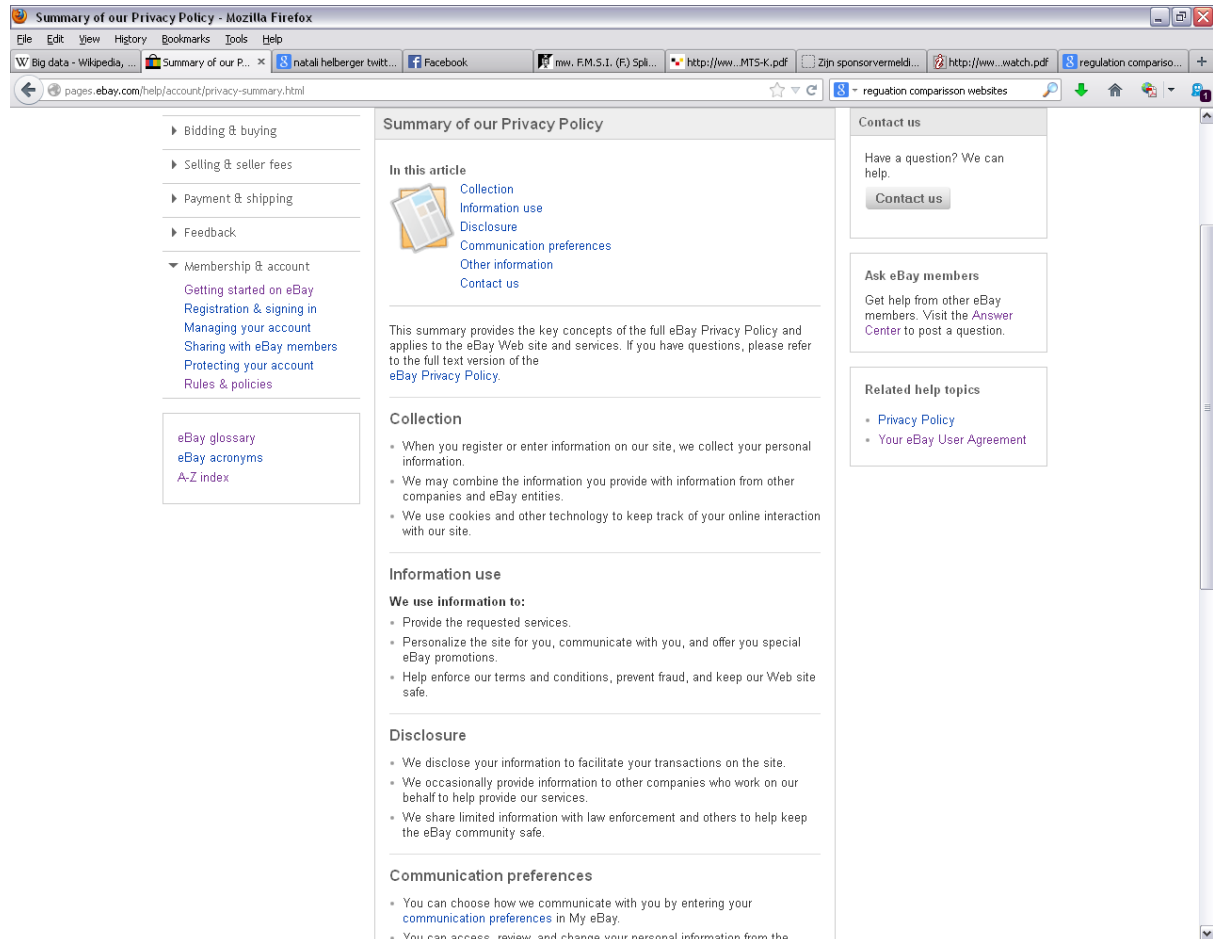
¹⁰⁴ Europe Economics, 2011; I. Schönheit, Was Verbraucher wissen wollen, Ergebnisse und Thesen zu einer empirischen Studie, http://www.imug.de/images/stories/pdfs/verbraucher/hp_imug_Schoenheit_VerbraucherInformations_Bedarf_2004_06_17.pdf, finding that consumers are not in favour of reducing the legally prescribed catalogue of information, and even expressed demand for additional information.

¹⁰⁵ See e.g. the examples in VzBV, 2011, p. 24.

¹⁰⁶ In this sense e.g. the VzBV suggested to ban repetitions of legal texts in terms of use, 2011, p. 25.

this. **Information discipline** and **intelligent reduction** are important principles that should accompany any initiative to inform consumers.

Information reduction can also be a matter of presentation: another frequently cited example of information reduction is the provision of **layered information notices**. For example, ebay provides the information about its privacy policies in two layers: in the form of a summary of ebay's privacy policy, and a link to the extended policy.



The idea behind layered information is to provide information in reasonable portions, with the most important information featuring first. Information prioritization is useful and important. Yet, information reduction at the level of presentation can also have potentially disturbing side effects. One such side effect is that consumers may be satisfied with reading the prioritized information, and have **even less incentives to read the rest of the information**. A possible consequence is a **two-layer information strategy**, in which some types of information are presented rather prominently, with some chance of being read, while the remaining information is degraded to a **factual status of obscurity**, and in the worst case, a place where less ethical suppliers can **hide away even more easily unfavourable terms of use**. If some information is more easy to ascertain than other (eg. price, as compared to the user-friendliness of terms and conditions), there is also a risk that **competition will** take place on the basis of this easily

The concept of trust will in many instances replace ideal notions of the well-informed circumspect consumer. It is for law and policy to draw the necessary conclusions.

observable information, and not on the basis of more complex, less accessible but maybe, from the perspective of consumer surplus, even more important conditions that are packaged away in unreadable terms of use. The result may very well be that competition is being skewed towards cheaper products with worse terms of use.

This is also why the next section (section 4.10) will argue that a more appropriate form of information reduction could be **to differentiate between the ideal targets of different types of consumer information**. While acknowledging that ‘priority information’ such as price, duration, product characteristics, etc., is usefully targeted at consumers, other types of information are probably better suited to being submitted to the scrutiny of dedicated third parties, such as experts, consumer representatives, the media, regulatory authorities, etc. More generally, it is important to understand that information reduction also involves certain risks and always **balances on a thin line between information simplicity and oversimplification**, as the example of labels shows. Though particularly powerful tools in conveying condensed portions of critical information when well designed, badly designed labels confuse rather than inform and consumers are also here not free from the danger of ‘label overload’.¹⁰⁷

Not only the amount of existing consumer information can be reduced. Ideally information reduction begins **at an earlier stage**, already when designing laws and/or calling for additional information obligations. For the time being, mandatory **information obligations are seldom informed by a broader theoretical framework** that indicates the situations in and conditions under which consumer information is potentially effective in achieving a regulatory goal.¹⁰⁸ Because of the lack of such a theoretical framework, many instances of informational regulation are case-driven and consumers as well as suppliers are the addressees of an overwhelming variety of diverse, often overlapping and not always very consistent instances of mandatory information (obligations). At the centre of such a framework should be the realization that consumers have only limited attention to spend, and that therefore more coordination but also diligence in calling for even more information is needed. What is also still lacking is an overarching approach of monitoring and coordinating the different instances of mandated information.

Next to the need for more coordination and better informed law making, the question is of course whether for certain types of problems and market failures **alternative solutions**, in the form of bans, defaults, etc., are not more effective and, in the light of what has been said before, even less costly. This, too, is a form of information reduction. In this context it is important to remember that users exhibit a considerable amount of trust in legislators, regulatory authorities or the suppliers of services – and that this **trust** can be a reason why consumers do not even bother to read consumer information. Of course, this cannot mean that there is not a role, and even **responsibility, on the part of consumers** to invest efforts in searching for and reading the relevant information that enables them to take accurate decisions. However, the realities of (digital) markets are that with the increasing complexity and diversity of products and services, the concept of trust will in many instances replace (ideal) notions of the well-informed circumspect consumer who takes her

¹⁰⁷ See Vzbv, 2011, p. 18.

¹⁰⁸ One of the notable exceptions is the US Transparency project, a multi-year project that examined in a number of case studies the conditions that need to be fulfilled for information provisions to be effective. See e.g. Fung, A., Graham, M., & Weil, D. (2004). The political economy of transparency: what makes disclosure policies sustainable? KSG Working Paper No, available online from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=384922

decisions after having weighed all the relevant information. It is for law and policy makers to draw the necessary conclusions.

5.9 Re-organizing the transparency web

It was demonstrated that consumer information is not a single act, it is a process that follows a behavioural pathway. Along this pathway, consumers can gather information from a diversity of sources, including governments or regulatory authorities, experts, friends and family, suppliers, NGOs, the media, etc. Accordingly, when considering how to inform consumers effectively it is important to look not only at single acts or actors of information processing, as current mandatory disclosure obligations often do, but at the **entire information pathway**, and the roles that the different actors can take along the way.

Also, some information is intended not so much for consumers but rather for third parties, such as the consumers' lawyer. An example are the provisions about choice of law or exclusion of liability. Not understandable to most laymen and relevant primarily in case of conflict, many provisions are clearly not written for consumers. To that extent, sorting through the information that is provided in the terms of use and elsewhere, and deciding who is the real and logical addressee of that information can also be a rather effective way of reducing the amount of information available. In other words, what is needed is a more systemic view on consumer information, one that acknowledges that informed consumers are the result of a complex interplay of players, and that consumers are **not the only and often also not the best recipient of certain items of information**. As the evidence from behavioural and cognitive sciences demonstrates, **the real, living consumer – as opposed to the paper construct – does not live up to the conception of the informed and circumspect consumer**. It is this ideal notion of the well-informed and circumspect consumer, however, that is still the reference point for many disclosure obligations. As a result, existing information obligations do not take sufficiently into account that information does not necessarily empower the consumer, it can also **overwhelm, confuse, distract and, what is worse, deter her**. Also, consumers are often not free to act autonomously and reasonably circumspectly. They are constrained by external factors (e.g. too much choice) as well as internal aspects in the form of behavioural biases, irrational preferences, etc. It is time that these insights are also reflected in a **more effective organization of the transparency web**.

An important aspect to take into account in this regard is the question of who has the **incentives** to invest time and effort in communicating which kind of information effectively, as well as the resources and knowledge to do so in an optimal way. As mentioned earlier, the effective communication of consumer information is a costly and complicated process, and in order to avoid prohibitive enforcement costs and/or ineffective regulation it is important to take a more critical look at information obligations, also when determining the targets and beneficiaries of disclosure obligations.

6. What the law has to say about the form

The previous sections have argued that the form and manner in which information is being communicated to consumers is a pivotal aspect of the effective disclosure of consumer information. They also discussed some suggestions on how to improve the presentation of consumer information, based on insights from behavioural studies. In particular, the study has highlighted

- the importance of identifying the right addressees of information obligations,
- of improving the accessibility of information, but also the
- better presentation of information, including aspects such as timing, framing, making information comparable and
- using digital technologies to inform consumers in a more effective and ‘smarter’ way,
- as well as the need for information reduction.

More generally, the previous sections have argued that the communication of consumer information is a dynamic process, rather than a single act, and that it involves a complex web of different actors with different functions. This section will examine to what extent considerations of form and effective communication of consumer information are already accounted for in the existing regulatory framework. The focus of the analysis will be on European law, and here in particular on the areas of consumer protection and, by way of example, telecommunications law and financial services law.¹⁰⁹ This is not to say that there are not other areas of law that could provide useful examples of how to improve mandatory disclosure requirements and make them more effective and user-friendly.¹¹⁰ The study, however, had to restrict itself to a few areas. The reason why in addition to consumer law the areas of telecommunications and financial services regulation have been chosen is that these are two areas of European law in which the thinking about not only transparency, but the effective communication of consumer information is already more advanced.

¹⁰⁹ And here in particular the following directives: **Consumer law:** Directive 2011/83/EU of the European Parliament and of 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 Text with EEA relevance

Official Journal L 304 , 22/11/2011 P. 0064 - 0088 (Consumer Rights Directive); Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ L 80, 18.3.1998, p. 27–31 (Unit Prices Directive); Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29–34 (Unfair Contract Terms Directive); 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 (Unfair Commercial Practices Directive), OJ L 149, 11.6.2005, p. 22–39; Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36–68; 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, OJ L 178, 17.7.2000, p. 1–16 (E-Commerce Directive) **Communications law:** Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) OJ L 108/51 (24.04.2002), as amended by Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ L 201, 31.7.2002, p. 37–47 (ePrivacy Directive), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws OJ L 337/11 (18.12.2009) **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, OJ L 133, 22.5.2008, p. 66–92 (Directive on Credit Agreements); 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 Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, Official Journal L 271 , 09/10/2002 P. 0016 – 0024 (Distance Marketing of Financial Services); European Agreement on a voluntary Code of Conduct on Pre-Contractual Information for Home Loans (Home Loans Agreement)

¹¹⁰ For example in energy law, food law or health law.

This is demonstrated by the fact that, for example, the European Commission has already in 2008 published a study on pre-contractual information obligations and possible lessons to be learned from behavioural economics.¹¹¹ The section that follows does not claim to provide a complete analysis of the information obligations in these areas. Rather, it provides anecdotal evidence of situations in which considerations of form did play a role and could inspire further initiatives in the area of consumer law.

Does form matter in consumer law? The short answer is yes, albeit to a (very) limited extent. In this context it should also be mentioned that the Consumer Rights Directive prohibits, at least for the areas it harmonizes, the imposition of any more elaborate conditions on the form in which information should be provided. According to its Articles 7(5) and 8(10) member states may not impose any further formal pre-contractual information requirements. This provision stands in stark contrast to the way information obligations are dealt with e.g. in communications law: here National Regulatory Authorities are explicitly entitled to specify additional requirements regarding the form in which such information is to be published.

In the following, a more detailed discussion of the instances in which form does matter in consumer information obligations is offered. In so doing, the section concentrates in particular on (best practice) examples of provisions that already do reflect the suggestions for improvement identified in section 4. It should be noted that it would go beyond the scope of this study to make observations about the actual effectiveness of the provisions mentioned. Assessing the effectiveness and usefulness of the different information obligations is certainly an important area for further (empirical) research.

Re-organizing the transparency web

Most instances of mandatory disclosure in consumer law target information flows between suppliers and consumers. According to Articles 5 and 6 of the Consumer Rights Directive, “the trader shall provide the consumer with the following information...”. Other directives do not specify who must inform whom, though it can be concluded from the context that the disclosure requirement concerns sellers and consumers.¹¹² Article 7 of the Service Directive, not strictly speaking consumer law, introduces an additional information resource: the single point of contact, through which certain information must be available to both consumers and sellers, though this information is more of a procedural nature than consumer information in the classical sense.¹¹³ In other words, the directive refers to an external, centralized expert instance to provide specialized information. An external, expert institution also figures prominently in the information obligations from Article 5 of the E-Commerce Directive, according to which service providers are obliged to issue information to recipients of services and “competent authorities”, without however qualifying what the role of the competent authorities is in this context.

¹¹¹ Optem, Pre-contractual Information for Financial services, Qualitative study in the 27 member states, report to the European Commission, January 2008, available online at: http://ec.europa.eu/consumers/rights/docs/PCI_final_report_22Feb2008_en.pdf

¹¹² Article 3 of Directive 98/6/EC on price indication, though it does not explicitly mention the seller, and Art. 5 Unfair Contract Terms Directive.

¹¹³ Including information about the requirements concerning the procedures and formalities to be completed in order to access and to exercise service activities; the contact details of the competent authorities; the means of, and conditions for, accessing public registers and databases on providers and services; the means of redress which are generally available in the event of dispute between the competent authorities and the provider or the recipient, or between a provider and a recipient or between providers; the contact details of the associations or organizations, other than the competent authorities, from which providers or recipients may obtain practical assistance.

The example of the information obligations in the Universal Service Directive¹¹⁴ is instructive. According to the directive, suppliers of publicly available communication services and networks must provide end-users with information, inter alia, about prices, tariffs, standard terms and conditions, description of services, maintenance services, etc., as well as information about service quality.¹¹⁵ At least the information about service quality needs also to be shared with National Regulatory Authorities (NRAs), and in advance of its publication.¹¹⁶ Regarding the quality of service information, National Regulatory Authorities are entitled to specify

“the content, form and manner of information to be published, in order to ensure that end-users have access to comprehensive, comparable and user-friendly information”.¹¹⁷

More generally, NRAs are entitled to specify which information has to be published, as well as in which manner, “in order to ensure that consumers are fully informed”.¹¹⁸ Interestingly, NRAs can also decide which information is to be made available by suppliers of communications services or networks or by NRAs themselves.¹¹⁹ In other words, the regulation takes into account the fact that some information may be more usefully published by other instances than suppliers. The Universal Service Directive also acknowledges the importance of an instance monitoring, and where necessary, intervening not only to make sure that particular kinds of information are made available, but also that they are communicated in an effective form. Arguably, the involvement of NRAs introduces expertise and gives more flexibility than prescribing form requirements directly in the law.

Vice versa, the Directive on Consumer Credit Agreements acknowledges that consumers may receive information not only from creditors, but also from private third parties, in this case credit intermediaries, and that therefore some of the information requirements should also apply to such intermediaries.¹²⁰ Interestingly, the directive distinguishes between the situation where the conclusion of credit agreements is the intermediary’s main activity (in which case the full information obligations also apply to them) or where it is only an ancillary activity (in which case the directive does not consider it appropriate to burden them with the obligation). The role of private intermediaries in providing consumers with information has also been acknowledged in communications law, though here the provisions target in the first place suppliers of interactive guides and comparison services (see more extensively later in the text).¹²¹

Ease of access

The accessibility of consumer information is another underdeveloped area. Commonly, at least in general consumer law it is prescribed that the information is to be given on paper or another durable medium.¹²² Only the E-Commerce Directive requires that consumer information be issued

¹¹⁴ And here in particular Art. 21.

¹¹⁵ Art. 21 (1) (2), Annex II and 22 (1) of the Universal Service Directive.

¹¹⁶ Art. 22 (1) of the Universal Service Directive.

¹¹⁷ Art. 22 (2) of the Universal Service Directive.

¹¹⁸ Annex II of the Universal Service Directive.

¹¹⁹ Annex II of the Universal Service Directive.

¹²⁰ Recital 24 and Art. 5 (1) of the Directive on Credit Agreements.

¹²¹ Art. 21 (3) of the Universal Service Directive.

¹²² Art. 7 of the Consumer Rights Directive, Art. 5(1) of Directive 2008/48, Art. 5 (1) of Directive 2002/65.

online, and that this be done in a form that is “easily, directly and permanently” accessible.¹²³ While the aspect of permanence is an important one, “easily” and “directly” accessible are still fairly vague terms that are wide open to interpretation.

Completely underrepresented in general consumer law, and elsewhere, is the aspect of accessibility for disabled persons. This is an aspect that, for example, plays an important role in communications law. The Universal Service Directive requires that at least information about the accessibility for disabled persons is being provided, though also here, no mentioning is made that the information itself should actually be provided in a format (e.g. spoken) that also disabled persons can access it.¹²⁴

Equally, the accessibility in a language that the consumer can actually understand has been mentioned by the Consumer Rights Directive. The language question takes on added importance in the case of cross-border services and the realization of an Internal Market for digital content. In this light it is somewhat surprising to see that the directive leaves the language question essentially to the member states.¹²⁵

Timing

Still underrepresented in existing information rules is the aspect of the correct timing and contextualization of information. Ideally, consumers should be presented with the information (and only that information) that they need at the moment when it is relevant. So far, the law stipulates rather globally that information must be provided at specific times such as before the conclusion of a contract, during the performance of a contract, at the time of delivery, before the collection and processing of personal data, etc. One interesting and more differentiated example are the information obligations in the Services Directive, some of which have to be provided unsolicited and others only upon consumer request.¹²⁶ Other than that, the standard requirement throughout consumer law is that pre-contractual information should be provided “before being bound by contract”.¹²⁷ For the time being, none of the regulations examined have taken into account more sophisticated timing options, such as ‘just-in-time’ and ‘time-released’ publication of consumer information, or repetition of consumer information, as well as the need to inform consumers explicitly about changes made.

This is different than e.g. in the case of the Directive on Credit Agreements, which requires to inform consumers specifically about particular changes in the conditions (namely the credit borrowing rate), and also foresees the periodical provision of updated information.¹²⁸ A certain dynamic component can also be found in communications law, requiring suppliers to provide consumers with “up-to-date” information.¹²⁹ Moreover, communications law requires providers of electronic communications services to regularly inform disabled subscribers of details of products and services

¹²³ Art. 5(1) of the E-Commerce Directive.

¹²⁴ Art. 22 (1) Universal Service Directive.

¹²⁵ According to Art. 6 (7) Member States can “maintain or introduce their national law language requirements regarding contractual information, so as to ensure that such information is easily understood by the consumer.”

¹²⁶ Art. 22 (1), (2), and (3) Services Directive.

¹²⁷ Arts. 5 (1) and 6(1) of the Consumer Rights Directive.

¹²⁸ Art. 11 (1)(2) of the Directive on Credit Agreements.

¹²⁹ Art. 21 (2) Universal Service Directive

designed for them.¹³⁰ Taking into account that not only the communication of information is a process, but that it also often concerns dynamic and long-lasting service relationships, an obligation to inform not once but repeatedly, particularly after changes have occurred, is useful.

Form and framing of information

The aspect of framing consumer information from the perspective of consumers, and in a way that is actually useful for them is very much underrepresented. Again, at least in consumer law, obligations with respect to the form are usually restricted to the observation that information should be presented in a “clear and comprehensible manner”,¹³¹ and be unambiguous, easily identifiable and clearly legible.¹³² For example, the Consumer Rights Directive requires rather vaguely that the information must be legible and in plain, intelligible language.¹³³ The fact that the information must be legible cannot be more than an absolute minimum requirement, and whether the language is plain and intelligible is very much in the eyes of the beholder (is it the perspective of the company lawyer that counts or that of the consumer)? The E-Commerce Directive goes one step further by stipulating that at least price information should be indicated “clearly and unambiguously”.¹³⁴ But again, what is ‘clear and unambiguous’, ‘clear and unambiguous for whom’, and does this also include the framing of the information in a way that makes sense from the perspective of a consumer? Also, for the time being the opportunities and challenges of more personalized modes of communicating consumer information is an aspect that has found little space for reflection in the context of mandatory consumer information. Having said that, if information is presented in a form that is unreadable (small print), too difficult to find or misleading, the provisions of the Unfair Commercial Practice Directive may apply.

Only on a few occasions a reference is made to particular categories of consumer with particular information needs, as for example in the Unfair Commercial Practices Directive.¹³⁵ Other instances of mandatory disclosure target particular interest groups of consumers, e.g. digital consumers, consumers of financial or food products, etc. (though here the focus is commonly on the different information needs rather than different presentational needs).

Financial services law has obviously given more thought to the question of form and framing, and the Consumer Credits Directive requires, for instance, information to be given “in a clear, concise and prominent way by means of a representative example”.¹³⁶ Giving examples is certainly one way to help consumers to understand and interpret consumer information. Furthermore, the directive requires creditors to offer consumers additional assistance over and above the information provided, and to explain, where necessary, a product in a “personalized manner” so that the consumer can understand the effects on her economic situation. As the directive explains

“[d]espite the pre-contractual information to be provided, the consumer may still need additional assistance in order to decide which credit agreement ... is the most appropriate for his needs and personal situation. Therefore, Member States should ensure that creditors

¹³⁰ Art. 21 (3) of the Citizen Rights Directive.

¹³¹ Art. 5 (1) Consumer Rights Directive.

¹³² Art. 4 (1) of Directive 98/6/EC on price indication; Art. 5 (2) E-Commerce Directive.

¹³³ Art. 7(1) of the Consumer Rights Directive.

¹³⁴ Art. 5 (2) of the E-Commerce Directive, see also the comparable language in Art. 22 (2) and (4) of the Services Directive.

¹³⁵ Art. 5 (3) Unfair Commercial Practices Directive.

¹³⁶ Art. 4(2) of Directive 2008/48.

provide such assistance in relation to the credit products which they offer to the consumer. Where appropriate, the relevant pre-contractual information, as well as the essential characteristics of the products proposed, should be explained to the consumer in a personalized manner so that the consumer can understand the effects which they may have on his economic situation.”¹³⁷

This need for additional assistance and personalized explanation of pre-contractual information is certainly not reserved to consumers of credit card agreements. What is important to take away from this example is that it demonstrates a very different approach to consumer information than the one taken under current consumer law. Essentially, the Directive on Credit Agreements acknowledges that information is a process and that those issuing consumer information have a responsibility beyond the act of publishing the information. The regulations in the area of financial services more generally stipulate a general responsibility of suppliers for keeping consumers informed throughout the entire commercial relationship, that is both before and after concluding the contract, e.g. in the form of education and the issuing of warnings,¹³⁸ taking into account the principles of good faith when informing consumers, including in relation to particular groups of consumers, such as minors.¹³⁹

Also, the Directive on Credit Agreements acknowledges the importance of translating general purpose information to the consumer’s personal situation, as only in this way consumers are able to make truly informed decisions. This approach has its costs as well, for example in the form of personal information that consumers are required to submit (in the case of the Directive on Credit Agreements on their personal creditworthiness).¹⁴⁰ Article 7(2) of the Services Directive contains a provision that goes in a similar direction, though here it is the task of the national single points of contact to provide, upon request, “assistance ... consisting in information on the way in which the requirements ...are generally interpreted and applied. Where appropriate, such advice shall include a simple step-by-step guide. The information shall be provided in plain and intelligible language.”

Moreover, unlike the E-Commerce Directive or the Consumer Rights Directive, the Consumer Credit Directive places the aspect of comparability in a central role.¹⁴¹ For the area of financial services, the European Agreement on a voluntary code of conduct on pre-contractual information for home loans determines that information must be presented in a standardized format – the European Standardized Information Sheet. This is a first constructive step towards making information comparable for consumers and third parties, such as comparison sites, and as such could serve as useful inspiration also for consumer law. The aspect of technical standardization and machine-readability has yet to be addressed, but this may also be explained by the fact that the Agreement dates from 2001. Research commissioned by the European Commission seems to indicate that the standardized form has been generally well received by consumers, even if there may be criticism on a detail level.¹⁴²

¹³⁷ Recital 27 of the Directive on Credit Agreements and Art. 5 (6).

¹³⁸ Recital 25 of the Directive on Consumer Credit Agreements.

¹³⁹ Art. 3(1) of the Directive concerning the Distance Marketing of Consumer Financial Services.

¹⁴⁰ Art. 8 (1) of the Directive on Credit Agreements.

¹⁴¹ Art. 5(1) of the Directive on Credit Agreements: “provide the consumer with the information needed to compare different offers in order to take an informed decision”.

¹⁴² Optem, 2008, *ibid*.

The aspect of comparability is also central in communications law, though here the legislator has chosen a somewhat different approach. European telecommunications law entitles the NRAs for the communications sector to not only require the provision of selected items of consumer information about the quality of communications services, but also to stipulate that this information needs to be ‘comparable, adequate and up-to-date’.¹⁴³ Importantly, NRAs may encourage the provision of comparable information to enable end-users and consumers to make an independent evaluation of the costs of alternative usage patterns, for instance by means of interactive guides or similar techniques.¹⁴⁴ This is one of the few, and clear references to the potential of ‘smarter’ forms of informing consumers (see more extensively below).

The role of digital technologies and smart transparency

References to the potential of digital technologies to improve the presentation and communication of consumer information are scant. According to the E-Commerce Directive, “[c]ontract terms and general conditions provided to the recipient must be made available in a way that allows him to store or reproduce them.”¹⁴⁵ Also, codes of conduct should be made available electronically.¹⁴⁶

By contrast, communications law acknowledges the opportunities of digital technologies, for example in the form of interactive guides or similar techniques to help consumers make sense of consumer information and compare it. Remarkably, the directive is also the only regulation examined to encourage the development and operation of such third party expert services. If they do not exist, NRAs may even make them available themselves or procure them.¹⁴⁷ Moreover, the suppliers of interactive guides and similar services enjoy an explicit right to “use, free of charge, the information published by undertakings for purposes of selling or making available” such services.¹⁴⁸

The latter is an important point. The fact that only a fraction of consumers actually read consumer information and that many of the aspects digital consumers need to be informed about are technically and/or legally complex suggests that consumers are not necessarily the only or the most suitable addressees of consumer information. Arguably, providing that information to third parties who then process that information and present it to consumers in a way that is meaningful to them could be the more appropriate approach. It is, for example, the approach chosen by the US Government in the context of its smart transparency initiative. Developing an array of comparison services is essential in assisting consumers in processing, comparing and deciding upon consumer information. Such services deserve encouragement, even beyond the communications sector. Accordingly, it is submitted here that it is not enough to stipulate that consumer information be clear and unambiguous. In addition, consumer information needs to be provided in a form and manner that encourages and facilitates comparison and the development of third party comparison services.

¹⁴³ Article 21 (1) of the Universal Service Directive.

¹⁴⁴ Article 21 (3) of the Universal Service Directive.

¹⁴⁵ Art. 10 (3) of the E-Commerce Directive.

¹⁴⁶ Art. 10 (2) of the E-Commerce Directive.

¹⁴⁷ Art. 21 (3) of the Universal Service Directive.

¹⁴⁸ Art. 21 (3) of the Universal Service Directive.

Information reduction

Information prioritization as a form of gradual information reduction stands at the centre of Article 8(2) of the Consumer Rights Directive. For services that are provided by electronic means the supplier is required to make the consumer aware in a clear and prominent manner, and directly before the consumer places his order, of the information about the main characteristics, price, duration and minimum-duration of the consumer's obligations. Note that this obligation only applies to remunerated services. It is difficult to understand why consumers of 'non-remunerated' services should receive a lower level of protection and care, taking into account that even in the case of non-remunerated services consumers 'pay' a price (in the form of attention, personal data, trust, etc.). Arguably, the fact that consumers pay with data or attention instead of money requires even more mindfulness of eventual hidden costs, obligations, understanding of the specific characteristics of a product or service, because of the lack of a standardized and transparent currency, such as money is. This is also true for the following obligation in Article 8(2): 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'. In case of non-compliance, the consumer shall not be bound by the contract. Again, the question arises why this obligation should be restricted to remunerated services. Arguably, a more prominent button 'order with the obligation to share data' could also help to make consumers aware of this underlying exchange.

In a situation consumers are presented with an unnecessary excess of information of, or badly organized information it can be argued that the unfair commercial practice law may apply. Much hinges on the notion of professional diligence, and to what extent the standard of special skill which can be reasonably expected from a trader also includes basic knowledge of the role that the form of information plays for its accessibility and comprehensibility. Vice versa, even where information is factually correct but is presented in a way that misleads consumers about the nature or main characteristics of the product, this can be considered an unfair commercial practice.¹⁴⁹

Information prioritization is particularly relevant in situations in which consumers are presented with consumer information on a limited space, such as the screen of a mobile phone. The Consumer Rights Directive continues the approach from the former Distance Selling Directive, according to which consumer information must be made available 'in any way appropriate to the means of distance communication used'.¹⁵⁰ In addition, the Consumer Rights Directive adds that for information accessed via devices with small screens, the key information should be made available online at first, while providing a link and/or address where consumers can find the remainder of the information. As laudable as the provision is, it begs the question why information prioritization should remain restricted to devices with small screens. Arguably, it would be to the benefit of consumers to require more generally suppliers to ensure that the key information consumers need to make informed decisions – such as information about prices, additional charges, or usage restrictions – not be hidden away in the terms of use but be presented prominently.

On a more positive side, at least the Directive on Price Indications determines that member states can limit the maximum number of prices to be indicated.¹⁵¹ Also, according to its Article 5(1) it is

¹⁴⁹ Art. 6 (1) of the Unfair Commercial Practice Directive.

¹⁵⁰ Art. 8 (1) of the Consumer Rights Directive.

¹⁵¹ Art. 4(1) of the Directive on Price Indications.

possible to waive the obligation to indicate the unity price of products for which this indication would not be useful because of the products' nature or because doing so would be "liable to create confusion". Though potentially opening the door to abuse, the provision does acknowledge that, under certain circumstances, too much information can harm consumers as much as too little information.

Concluding it can be contented that considerations of form and the effective communication of consumer information have, so far, played only a very marginal role in general European consumer law. The picture is, by the way, not much different at the level of most many Member States.¹⁵² What is more, the Consumer Rights Directive even prevents member states from imposing additional form requirements for the pre-contractual information obligations that fall under the directive. This is not to say that form and effective communication have not played a role in other pieces of (specialized) consumer protection legislation. This study has scanned provisions in the area of financial services and communications services and networks, and found a number of interesting examples that will hopefully inspire also consumer law and policy. Having said that, even here there is room for improvement, and further revisions as well as future initiatives should strive to learn the lessons that can be learned from behavioural research.

¹⁵² See CECL & IViR, 2012, Digital content services for consumers: Comparative analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content services, Report 1: Country reports, Centre for the Study of European Contract Law (CSECL) & Institute for Information Law (IViR), http://www.ivir.nl/publications/helberger/Digital_content_services_for_consumers_1.pdf and here in particular the answers of ten national correspondents on question 5.6.



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