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Information Duties

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Marc Dernauer / Harald Baum / Moritz Bälz

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Executive Editors

Prof. Dr. HARALD BAUM
Max Planck Institute for Comparative and
International Private Law
Mittelweg 187
D-20148 Hamburg
E-mail: baum@mpipriv.de

Prof. Dr. MARC DERNAUER
Chūō University
Faculty of Law
742-1 Higashi Nakano, Hachiōji-shi
192-0393 Tōkyō, Japan
E-mail: dernauer@tamacc.chuo-u.ac.jp

Prof. Dr. MORITZ BALZ
Goethe University Frankfurt
Faculty of Law
Theodor-W.-Adorno-Platz 4
D-60629 Frankfurt/Main
E-mail: baelz@jur.uni-frankfurt.de

Prof. Dr. GABRIELE KOZIOL
Kyōto University
Graduate School of Law
Yoshida Honmachi, Sakyō-ku
606-8501 Kyōto, Japan
E-mail: koziol@law.kyoto-u.ac.jp

Editorial Assistance:

ANNA KATHARINA SUZUKI-KLASEN, MICHAEL FRIEDMAN (*Copy Editing*),
JANINA JENTZ (*Final Editing and Layout*)

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Information Duties under German General Contract Law and the German Law of Consumer Contracts

*Carsten Herresthal**

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I. INTRODUCTION: THE AGE OF INFORMATION DUTIES

1. *The Tremendous Expansion of Information Duties in German Contract Law*

Information duties have evolved as modern “golden rule” in German general contract law as well as in certain areas of German private law, particularly consumer law, insurance law, capital markets law and banking law. While the tremendous and still ongoing expansion of information duties in national private law is driven by both the German legislator *and* the German courts, the European legislator also has a substantial impact. This is especially true as information duties are the main instrument of the European legislator in the process of harmonizing member states private law while ensuring a high level of consumer protection. When discussing the reasons for the tremendous expansion of information duties in both general contract law and specialized contract law in the recent decade three main aspects must be mentioned from a German perspective.¹

* Prof. Dr. Carsten Herresthal, LL.M. (Duke), Professor of Private Law, Commercial and Company Law, European Law and Legal Theory, University of Regensburg.

Above all, the increased complexity of the legal, technical and economical context has contributed to the growing number of information duties. This is followed by a substantial professionalization of the field and segmentation of professional activities. The result is a far-reaching asymmetry of knowledge for market participants: the professional or – more generally – one side of the (pre-) contractual relationship often has a huge advantage in terms of specific knowledge and relevant information regarding the subject matter of the (intended) contract.² While one party has the relevant information, which may be easily communicated to the other party at little or no cost, the discovery of that information by the other party may entail substantial cost and effort. Moreover, due to the lack of relevant knowledge, the other party may not even realize the information deficit and thus may not be aware of the need for further information about the subject matter of the contract. It is worth mentioning that the professionalization and segmentation of professional activities has been a very useful and necessary development for the modern economic system. Moreover, this professional and specialized knowledge is usually what the other party lacks. Thus, the issue at hand for the legal system, especially private law, is to define the line between general market knowledge which may be acquired by the parties independently and thus does not need to be communicated, and the special knowledge of one party that must be provided to the other, under certain circumstances.

Additionally, according to the concept of information the (pre-) contractual duty to inform the other party about specific aspects relevant for the contract is a legal mechanism, which usually results in a minor restriction of freedom of contract compared to a binding legal determination of the content of the contract, e.g. with regard to contractual duties. Thus, both the German legislator and the European legislator often refer to the concept of information duties in cases of an actual or alleged market disruption. This is especially true with regard to consumer law, capital markets law and banking law. This protection mainly provides for (pre-) contractual information duties for the party deemed more informed or acting in a professional capacity. In a violation of the duty to inform, the obliged party usually is liable for the damages of the other party that resulted from the ignorance of

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- 1 See C. HERRESTHAL, in: Gsell/Lorenz/Mayer (eds.), *Beck'scher Online-Großkommentar BGB (BeckOGK-BGB)*, 1.1.2018, § 311 BGB marg. no. 385–387; V. EMMERICH, in: *Münchener Kommentar zum BGB* (7. ed., Munich 2016) § 311 marg. no. 64–70; C. BUSCH, *Informationspflichten im Wettbewerbs- und Vertragsrecht* (Tübingen 2008) 126 ff.; H. FLEISCHER, *Informationsasymmetrie im Vertragsrecht* (Munich 2001) 573 ff.
 - 2 E.g. about the benefits and risks of a specific investment, about the drawbacks of an insurance contract or about the risks of a structured loan agreement.

the facts (Sec. 241 para. 2, 311 para. 2, 280 para. 1, 249 ff. BGB). There are however, also specific rules which may provide special remedies in case of the violation of an information duty.³

Finally, unwritten information duties provide “leeway” for the court to bolster the legal position of one party, should the court deem the outcome of the contractual agreement or the contractual rights of one party “unjust” or against good faith. In such cases, the judicial *ex-post* finding of an information duty for one party, as well as the violation of this information duty are often decisive.

2. *The Underlying Legal Principles in a Free Market Order*

a) *Freedom of contract and individual responsibility with regard to information*

The concept of information duties is widely accepted, and legal practice focusses predominantly on their scope and the details. Despite this, the concept of information duties conflicts with two fundamental legal principles in a liberal market order: freedom of contract and the responsibility of each party to obtain sufficient information to make a decision to enter into a contract.⁴

The principle of freedom of contract protects an individual’s decision to enter into a contract.⁵ The party is free to make decisions, whether well informed or otherwise, with protections in place for the parties’ freedom to decide based on the information gathered. Moreover, the party is free to remain silent on the reasons motivating the decision to enter into the contract and the (from his perspective) decisive information. Thus, the legal duty to

3 See *infra* III.1.b).

4 For the importance of those principles in German private law cf. C.-W. CANARIS, *Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner "Materialisierung"*, AcP 200 (2000) 273 (292 ff.); E.-J. MESTMÄCKER, *Über die normative Kraft privatrechtlicher Verträge*, *JuristenZeitung (JZ)* 1964, 441 (443); W. ZÖLLNER, *Die politische Rolle des Privatrechts*, *Juristische Schulung (JuS)* 1988, 329 (330); E. HOPPMANN, *Moral und Marktsystem*, *Ordo* 41 (1990) 3 (5); D. REUTER, *Freiheitsethik und Privatrecht*, in: Bydlinski/Mayer-Maly (eds.), *Die ethischen Grundlagen des Privatrechts* (Wien 1994) 105 (111); for the likewise importance in Japanese private Law cf. K. YAMAMOTO, *Vertragsrecht*, in: Baum/Bälz (eds.) *Handbuch Japanisches Handels- und Wirtschaftsrecht* (Cologne 2011) 461, 467 marg. no. 18; M. DERNAUER, *Vorvertragliche Aufklärungspflichten im japanischen Vertragsrecht*, in: Coester-Waltjen/Lipp/Waters (eds.), *Liber Amicorum Makoto Arai* (Baden-Baden 2015) 210, 212.

5 For freedom of contract in German private law, see Federal Constitutional Court (BVerfG), *Entscheidungen des Bundesverfassungsgerichts (BVerfGE)* 81, 242 (251 f.); CANARIS, *supra* note 4, 278.

provide the other party with relevant information restricts freedom of contract. Those restrictions by the legislator or by the court need to be justified.

Moreover, in a free market order, all parties are responsible for their own knowledge of market conditions. Thus, each party is responsible for the identification and procurement of the information needed for a decision to enter into the contract,⁶ and must bear the risk of failing to do so. Each party must determine business opportunities based on the information available. The market price of a product is a means of conferring information to the market with regard to the product. When making a decision about a contract, both parties can rely on the principle of individual responsibility with regard to information and, in general, do not have to provide information relevant for the contract, unless that information is requested by the other side. This matter of trust needs to be taken into account when considering the imposition of an information duty by the court or legislator.

Quite often, the legislator or the courts refer to an (alleged) information asymmetry between the parties to justify an information duty for the more informed party.⁷ However, as professionalization is common and sought after in a free market economy, information asymmetry may not justify an information duty itself but only supplement other reasons. Information duties that follow automatically from an information asymmetry would devalue any substantial investment in professionalization and information procurement. Specialist knowledge is acquired to further the chances of success in a competitive market economy, so it may not trigger *as such* specific information duties. Competition for access to information sources is part and parcel of a market competition, and, significantly, market transactions often follow different assessments of future development based on different information.

b) Trust, market disturbances and structural imbalances

Above all, *disturbances of the market* justify a duty to inform the other party since the market economy and contract law require a functioning market. Thus, insider information usually must be communicated or the party has to abstain from the contract.⁸

6 Thus, the assumption of a national civil code that both parties are equally informed is not an outdated and unrealistic concept but the normative answer to the conditions of a market economy, cf. for the assumption in German law FLEISCHER, *supra* note 1, 577 f.; cf. for the same assumption in Japanese private law Law DERNAUER, *supra* note 4, 212.

7 See *infra* II.4.c).

8 See FLEISCHER, *supra* note 1, 578 f.

Moreover, the information asymmetry resulting from increased professionalism may reduce reliance by the more informed party on the other party providing the necessary information for itself. The less informed party may rely on the procurement of relevant information by the more informed party, especially if the professional party benefits from the asymmetry of information, e.g. asks for higher prices.⁹ Whether an information asymmetry may justify information duties is quite disputed in German private law.¹⁰

Finally, regarding a *structural imbalance* of the parties, there are occasional references to this by the courts.¹¹ This notion was “invented” by the German constitutional court referring to the relationship between the bank and the guarantor in cases of guarantees by low-income family members.¹² Nevertheless, there is no coherent concept of those imbalances yet in German private law; a mere imbalance does not justify information duties for one party.¹³ In the vast majority of the cases, the courts refer to the statutory right of withdrawal and characterize it as a legislative reaction to a structural imbalance.

c) Individual responsibility as a rule and the duty to inform as an exception

In accordance with the fundamental principles of German private law, and in line with majority opinion, the individual’s responsibility to obtain information is still the rule – information duties for one party are the exception. Thus, as a rule, all parties may rely on the fact that the other party will obtain the required information independently; or, ask for the information needed.¹⁴ In principle, no party is obliged to inform the other about aspects relevant for

9 E.g. a professional car dealer may ask for a higher price for used cars due to his professional examination of the car.

10 See *infra* II.4.c).

11 For a recent decision, cf. Federal Court of Justice (BGH), *Neue Juristische Wochenschrift* (NJW) 2016, 2266 marg. no. 26.

12 Federal Constitutional Court (BVerfG), *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE) 89, 214 (230, 235).

13 See M. WELLENHOFER-KLEIN, *Strukturell ungleiche Verhandlungsmacht und Inhaltskontrolle von Verträgen*, *Zeitschrift für Wirtschaftsrecht* (ZIP) 1997, 774; A. TEICHMANN, *Aufklärungs- und Schutzpflichten gegenüber Verbrauchern*, in: Hönn et al (eds.), *Festschrift für Alfons Kraft* (Neuwied 1998) 629, 633; for a different situation in Japanese law cf. DERNAUER, *supra* note 4, 213 f.; MIYASHITA, *Keiyaku kankei ni okeru jōhō teikyō gimū, I*, *Hōsei Ronshū* 2000, 61, 63 ff., 68 ff.; YOKOYAMA, *Keiyaku teiketsu katei ni okeru jōhō teikyō gimū*, *Jurisuto* 1996, 128 ff.

14 See Federal Court of Justice (BGH), *Neue Juristische Wochenschrift* (NJW) 2010, 3362 marg. no. 21; BGH, NJW 1989, 763, 764; BGH, *Wertpapier-Mitteilungen* (WM) 1987, 319 (sub. II 2); BGH, WM 1981, 1224, 1225.

the issue of the contract, the contractual obligations or the contractual risks without it first being requested;¹⁵ the individual responsibility for information still prevails. Thus, an information duty for one party as the exception requires specific circumstances in the fact pattern at hand. Despite this fact, first impressions of German contract law may suggest otherwise.

3. *The Teleological Foundations of Information Duties*

It is worth mentioning that besides the general principles mentioned above, there is no comprehensive teleological basis for *all* information duties in general contract law (no “one fits all”).¹⁶ Regarding the teleological underpinnings of information duties, it is necessary to make a distinction between pre-contractual and contractual/post-contractual duties to inform. Additional lines need to be drawn within those categories.

a) *Pre-contractual information duties*

Under German law the pre-contractual relationship is a statutory obligation (Sec. 311 para. 2 BGB). It provides for a general pre-contractual duty to inform the other party about significant information. The main justification is the use and grant of trust (“Inanspruchnahme und Gewährung besonderen Vertrauens”) in the pre-contractual relationship. This is still true after the codification of the rules on *culpa in contrahendo* in 2002, as referenced both in the intention of the German legislator and the wording of the new rule itself (“high degree of trust”, Sec. 311 para. 3 BGB).

In specific cases, the concept of trust is supplemented by other teleological considerations. These include the principle of consumer protection, the protection of the economically weaker party,¹⁷ (private) investor protection and the protection of legal rights. Those additional aspects may contribute to the arguments that support a specific duty to inform or specify the duty to inform. They may however, also limit or outweigh the arguments in favor of an information duty.

15 See Federal Court of Justice (BGH), Wertpapier-Mitteilungen (WM) 2010, 1283 marg. no. 15; BGH, WM 2007, 1676 marg. no. 11; BGH, Neue Juristische Wochenschrift (NJW) 1997, 3230 (sub. I 4); BGH, NJW 1996, 1206, 1207.

16 See S. BREIDENBACH, Die Voraussetzungen von Informationspflichten beim Vertragsabschluß (Munich 1989) 52 ff.; BUSCH, *supra* note 1, 149 ff.; FLEISCHER, *supra* note 1, 567 ff.; H. FLEISCHER, Vertragsschlussbezogene Informationspflichten im Gemeinschaftsprivatrecht, Zeitschrift für europäisches Privatrecht (ZEuP) 2000, 272, 274 ff.; G. REHM, Aufklärungspflichten im Vertragsrecht (Munich 2003) 233 ff.

17 This concept is due to the uncertainty to identify the weaker party very doubtful, cf. C. HERRESTHAL, Private Macht im Vertragsrecht (Austauschverträge), in: Möslein (ed.), Private Macht (Tübingen 2016) 145.

b) *Contractual duties to inform*

The reliance on and granting¹⁸ of trust is also used to justify contractual duties to inform, although, reference is more often made to the general concept of good faith. Additionally, other teleological aspects like consumer protection, the protection of the economically weaker party, (private) investor protection and the general protection of legal rights may contribute to the justification of a contractual duty.

4. *The Adequate Allocation of Contractual Risk*

As a rule, information duties may not be used, i.e. abused, to allow one party to set aside a contractual agreement that has become disadvantageous due to the development of the market conditions or that is deemed by a court to be – from the perspective of the court – unreasonable or inadequate. The majority opinion in German private law would subscribe to the statement that information duties are not a means of shifting contractual risks after contracting or withdrawing from the no longer favorable contractual agreement. Thus, the main problem in German private law is to determine those cases that fit with an exceptional duty to inform the other party. There is a thin line between the application of an information duty guided by legitimate parties' interests and an abuse of this instrument to foster policy issues, e.g. consumer protection or protection of private investors. Nevertheless, both the legislator and the courts have displayed a remarkable tendency to extent information duties.

II. INFORMATION DUTIES IN GENERAL CONTRACT LAW

1. *Taxonomy of Information Duties*

In German private law, a systematic approach using a nomenclature or taxonomy is done reluctantly. This is mainly due to the fact that German private law has overcome the so-called conceptual – or conceptionally-led – jurisprudence (“Interessenjurisprudenz”). Actually, it follows interests or values. Moreover, the German civil code does not follow the concept of a *contract* law but codifies general questions in a general part of the law of obligations. As a result, information duties exist on several levels of abstraction, which does not correspond with a concept of contract law. Keeping this in mind, information duties in German general contract law may be classified along the following lines: With regard to the formation of the contract, one may distinguish between *pre-contractual*, *contractual* and

18 See *supra* I.3.a.

post-contractual duties to inform. Regarding the legal basis of information duties, duties that result from contractual obligation may be distinguished from those established by law (statutory obligation or statutory rule).

Another distinction focuses the relevant area of the law. There are *general information* duties, that apply in all pre-contractual relationships (see Sec. 311 para. 2 BGB) and all contractual relationships (Sec. 242, 241 para. 2 BGB). *Specific information duties* are part of specific areas of private law like consumer law, insurance law and capital markets law. Usually, those specific information duties are codified; however, some are based on court decisions.¹⁹ In general, specific information duties and general information duties differ with regard to the subject matter and the form of the information.²⁰ While the general duty to inform (Sec. 242 BGB) neither prescribes a specific form (e.g. in writing) nor specific content of the information, special information duties often require written communication of the information and usually prescribe the information to be communicated in detail. This is especially true in consumer protection law, since there are some rules that require specific wording or a durable medium.²¹ Some rules prescribe specific language for pre-contractual information, e.g. with regard holiday products,²² while other rules order a transcript of the contract including the content of the pre-contractual information (e.g. Sec. 312f BGB).

In German contract law, there is no distinction between *positive and negative duties* to inform.²³ Indeed, a distinction is made between the omission of adequate information unknown to the other party and the duty to refrain from the communication of incorrect information. According to the latter, parties only have a duty to confer adequate information, i.e. the party is obliged to confer information sufficient to answer questions posed by the other party or to refuse an answer due to its own lack of knowledge or reluctance to confer the information.

In German private law, the law of standard terms is quite separated from the rules on information duties.²⁴ There is no duty to inform about the use of standard terms by one party. The incorporation of standard terms into the

19 E.g. duty of the bank to inform the consumer in specific situations cf. HERRESTHAL, in: BeckOGK, *supra* note 1, § 311 BGB marg. no. 713–734.

20 See for the more detailed distinction in Japanese Law DERNAUER, *supra* note 4, 210, 216.

21 See Sec. 126b BGB.

22 See Sec. 483 para. 1 BGB with regard to the language of the place of residence of the consumer as contract language.

23 See for the distinction between positive and negative duties to inform in Japanese Law cf. DERNAUER, *supra* note 4, 210, 215 f.

24 For the different approach in Japanese private law DERNAUER, *supra* note 4, 216.

contract requires specific elements of contract formation.²⁵ On the contrary, standard form contracts that consist completely of standard terms do not fall within the scope of the rules that provide for specific requirements for the formation of contracts, as there is no right to be informed that the contract as such is a standard form contract.²⁶

2. *The Legal Basis of Information Duties*

a) *Consultancy agreements and information agreements*

The overriding source of information duties are explicit and implicit *contractual agreements*, especially consultancy agreements and information agreements. Under German law, courts quite often resort to implicit (consultancy) agreements as the judicial finding of an (alleged) contractual agreement releases the court from considering and balancing the competing interests mentioned above.²⁷ Thus, the court claims an implicit agreement of the parties, which obliges one party to inform the other, an agreement which must merely be interpreted by the court.

The critique is obvious. First, the finding of an implicit contractual agreement quite often results in a mere fiction of the parties' intentions by the court. Second, the courts obviously immunize their finding of an information duty of one party against alternative solutions, as the court does not balance the interests mentioned above but merely "finds" that the parties entered in a contractual agreement giving rise to a (contractual) information duty. This then seems to allow the court to "discover" additional information duties that derive from the parties' agreement without balancing the parties' interests.

The main example is the *consultancy agreement* in banking law. A customer, entering into a consultancy with a bank results – according to the German Supreme Court – in an implicit consultancy agreement, if the subject of conversation is a specific investment decision.²⁸ The factual re-

25 Those rules provide for the explicit reference to those terms (or a clearly visible notice at the place where the contract is entered into) and the opportunity for the other party to take notice of the content of the standard terms, cf. Sec. 305 para. 2 BGB.

26 Federal Court of Justice (BGH), *Neue Juristische Wochenschrift* (NJW) 1995, 190.

27 See I.2.

28 Federal Court of Justice (BGH), *Neue Juristische Wochenschrift* (NJW) 2014, 3360 marg. no. 21; BGH, *Wertpapier-Mitteilungen* (WM) 2014, 1036 marg. no. 14; BGH, *Entscheidungen des Bundesgerichtshofes in Zivilsachen* (BGHZ) 196, 370 marg. no. 17; BGH, *Zeitschrift für Bank- und Kapitalmarktrecht* (BKR) 2008, 199 marg. no. 12; BGH, *Zeitschrift für Wirtschaftsrecht* (ZIP) 1997, 580; BGH, ZIP 1996, 872; BGHZ 123, 126 (128) – *Bond*; BGH, ZIP 1993, 997; BGH, WM 1992, 1031.

quirements are quite low, merely beginning a conversation about the specific investment decision qualifies – according to the court – as an implicit agreement.²⁹ As a result, the *implicit* consultancy agreement is the rule in banking law – information duties following from a pre-contractual relationship (Sec. 311 para. 2 BGB) are the exception.³⁰ Moreover, the German Supreme Court specifies the information duties that result from the implicit consultancy agreement in detail, while asserting only the interpretation of the (implicit) agreement of the parties. According to the court, that results in a standard consultancy agreement, regularly entered into implicitly by the parties, thus obliging the bank to provide the customer with “investor-adequate” information, i.e. suitable to the specific interests of the investor, and “investment-adequate”, i.e. suitable to the specific investment. The specific content and scope of the information duty must be addressed with regard to the particular case at hand.³¹ The echoes of the Anglo-American suitability doctrine³² are obvious.³³

b) *Pre-contractual Information Duties*

aa) *Specific information duties*

In German private law, there are some specific rules providing for the duty to inform in certain areas of the law.³⁴ Regarding insurance contracts, ac-

29 H.-J. BUNTE, in: Schimansky/Bunte/Lwowski (eds.), *Bankrechts-Handbuch* (5th ed., Munich 2017) § 8 marg. no. 15; for a different approach BGH, *Entscheidungen des Bundesgerichtshofes in Zivilsachen* (BGHZ) 100, 117 (118 f.).

30 See M. HANNÖVER, in: Schimansky/Bunte/Lwowski, *supra* note 29, § 110 marg. no. 22; J. SIOL, in: Schimansky/Bunte/Lwowski, *supra* note 29, § 43 marg. no. 7; E. V. HEYMANN/H. EDELMANN, in: Assmann/Schütze (eds.), *Handbuch Kapitalanlagerecht* (4th ed., Munich 2015) § 4 marg. no. 6, 10.

31 See Federal Court of Justice (BGH), *Neue Juristische Wochenschrift* (NJW) 2015, 398 marg. no. 18.

32 L. D. LOWENFELS/A. R. BROMBERG, *Suitability in Securities Transactions*, *The Business Lawyer* 54 (1999) 1557; R. H. MUNDHEIM, *Professional Responsibilities of Broker-Dealers: The suitability doctrine*, *Duke Law Journal*, 1965, 445; H. H. COHEN, *The Suitability Doctrine: Defining Stockbrokers' Professional Responsibilities*, 3 *Journal of Corporation Law* (J. Corp. L.) 533 (1977–1978); N. S. POSNER/J. A. FANTO, *Broker-Dealer Law and Regulation* (Alphen aan den Rijn 2007) § 19; A. N. RECHTSCHAFFEN, *Capital Markets, Derivatives and the Law: Evolution After Crisis* (2nd ed., Oxford 2014) Chapter 13.

33 See for a likewise statutory duty to inform in Japanese law cf. DERNAUER, *supra* note 4, 216.

34 For consumer protection law cf. *infra* III.1; for information duties in the law of unfair commercial practices cf. BUSCH, *supra* note 1, 55 ff.; G. ELSKAMP, *Gesetzesverstoß und Wettbewerbsrecht* (Baden-Baden 2008); M. KIEFFER, *Die Informati-*

ording to Sec. 6 VVG, the insurer must inform the other party prior to the formation of the contract about decisive aspects and any aspects that may frustrate the contract for the other party. Pre-contractual deception by the other party is governed by Sec. 19 ff. VVG.

bb) The broad general rule (Sec. 311 para. 2, 241 para. 2 BGB)

In German private law, the general pre-contractual duty to inform the other party is based on the general rules in Sec. 311 para. 2 and Sec. 241 para. 2 BGB. According to Sec. 241 para. 2 BGB, a contractual or non-contractual obligation obliges each party to take account of the rights, legal interests and other interests of the other party, while Sec. 311 para. 2 BGB qualifies a pre-contractual relationship between two parties as a legal obligation/non-contractual obligation. The rule in Sec. 311 para. 2 BGB is quite broad, since every business contact which exposes its own interests and rights to a violation by the other party triggers this rule, resulting in a duty to consider the interests of the other party. Thus, usually there is – at least since the implementation of Sec. 241 para. 2 BGB during the fundamental reform of the German law of obligation in 2002 – no further need to refer to the rule of good faith (Sec. 242 BGB).³⁵ Both Sec. 311 para. 2 and Sec. 241 para. 2 BGB are interpreted by the courts to mean every party to a pre-contractual relationship has the general duty to inform the other party about those issues that might defeat the purpose of the contract for the other party, which are thus are an apparent crucial consideration influencing the decision of the other party to enter into the contract. This is supplemented by a normative aspect – the duty to inform the other party must be in accordance with the generally prevailing opinion (“Verkehrsauffassung”). It is understood, that the specific circumstances of the case at hand are decisive for the scope and content of the information duty. Additionally, according to the courts, these statutory provisions also provide a duty for parties in a pre-contractual relationship not to provide false information that may influence other parties’ decision about entering into the contract.

There is comprehensive case law applying this broad general rule, which shapes several groups of cases, applying a more specific version of the general rule.³⁶ More precise versions of the broad general rule that cover all types of contracts include the duty to inform the other party about those

onspflichten des § 5a UWG und die Bedeutung des Informationsmodells für das Privatrecht (Munich 2014) 59 ff.; B. ZECCA-JOBST, Informationspflichten im Lauterkeits- und im Vertragsrecht (Berlin 2015) 54 ff.

35 For the reference to the general rule on good faith in Japanese Law cf. YAMAMOTO, *supra* note 4, 474 marg. no. 43.

36 See HERRESTHAL, in: BeckOGK, *supra* note 1, § 311 marg. no. 402–406.

aspects that might endanger the purpose of the contract,³⁷ the duty to inform about aspects that might endanger the execution of the contract³⁸ and the violation of an information duty of consumer protection.³⁹ In addition, the courts have shaped several specific pre-contractual information duties for different types of contracts.

Besides these, there are more specific rules on information duties with regard to specific types of contracts,⁴⁰ like sales contracts, contracts for labor, leases, corporations and guaranties. Those specific rules are derived from the broad general rule and thus are also based on Sec. 311 para. 2, 241 para. 2 BGB.

c) Contractual information duties

Consultancy agreements form the main legal source for contractual information duties.⁴¹ There are also specific types of contract that provide for statutory duties to inform the other party.

Moreover, the information duties that follow from Sec. 241 para. 2 BGB focus on the pre-contractual relationship as legal grounds. Nevertheless, since the reforms of 2002, according to the BGB, every contractual relationship provides for duties that take account of the rights, legal interests and other interests of the other party⁴² and also covers information duties. Those duties are quite similar to the duties resulting from Sec. 241 para. 2 BGB in the pre-contractual relationship and also arise from a valid contract. Those duties are therefore contractual (information) duties; the former, i.e. the statutory qualification of those duties asserted prior to the reform of the law of obligation in 2002 is no longer in accordance with statutory provisions, especially with Sec. 241 para. 2 BGB.⁴³ Thus, there is an obligation

37 Federal Court of Justice (BGH), *Neue Juristische Wochenschrift* (NJW) 2007, 3057 marg. no. 35; BGH, NJW 2001, 2163.

38 Federal Court of Justice (BGH), *Entscheidungen des Bundesgerichtshofes in Zivilsachen* (BGHZ) 56, 81, 88 (duty to inform about the economic situation of the house builder).

39 Cf. the official reasoning of the German government, BT-Drs. 16/11643, 69; Federal Court of Justice (BGH), *Neue Juristische Wochenschrift* (NJW) 2008, 1585 marg. no. 18; BGH, *Entscheidungen des Bundesgerichtshofes in Zivilsachen* (BGHZ) 169, 109, 120 f. = NJW 2007, 357.

40 Cf. HERRESTHAL, in: BeckOGK, *supra* note 1, § 311 marg. no. 407–452.

41 See *supra* II.2.a).

42 G. BACHMANN, in: *Münchener Kommentar* (7th ed., Munich 2016) § 241 BGB marg. no. 110 ff.

43 Likewise T. BODEWIG, *Vertragliche Pflichten post contractum finitum*, *Juristische Ausbildung* (Jura) 2005, 505 (508); C. GRÜNEBERG, in: *Palandt, Bürgerliches Gesetzbuch*, 77. ed. 2018, § 241 marg. no. 7; C. FELDMANN/M. LÖWISCH, in: *Staudin-*

to inform the other party to the contract about those issues that are – from the perspective of the other party – crucial for the contractual performance or his legal interests.⁴⁴ This is especially true with regard to those issues that might defeat the purpose of the contract for the other party.⁴⁵ One line of cases provides for the duty to inform the other party about legal obstacles unknown to the other party.⁴⁶ Moreover, a duty to inform may arise given a specific (high) level of trust in the other party as a result of knowledge or position. This specific trust may reduce the conflict of interests between parties to a contract and the “debtor of trust” may not act in his own interests without taking those of the other party in account. This may also result in an information duty. Finally, the duty to inform the other party may follow from the personal relationships of the parties.

Intentional or negligent misinformation by one party is also a violation of a duty to inform under Sec. 242 para. 2 BGB. Nevertheless, German law makes a substantial distinction between those cases and cases in which one party withholds an information.

d) Subsequent information duties

Finally, there are subsequent duties to inform the other party.⁴⁷ Similar to the distinction between pre-contractual and contractual information duties, subsequent information duties may be divided in those which apply after a pre-contractual relationship (Sec. 311 para. 2 BGB) and those applicable after a contract (post-contractual duties).

Regarding the pre-contractual relationship which is a legal obligation/non-contractual obligation (Sec. 311 para. 2 BGB)⁴⁸ – as mentioned above – Sec. 241 para. 2 BGB applies. Thus, each party must consider the rights, legal interests and other interests of the other party.⁴⁹ Without doubt, those obligations of protection and consideration do not necessarily cease with

ger, Kommentar zum BGB (Berlin 2012) § 311 marg. no. 112; cf. also K. LARENZ, Schuldrecht – Allgemeiner Teil (14th ed., Munich 1987) § 9 I b; J. GERNHUBER, Das Schuldverhältnis (Tübingen 1989) § 2 IV 4; W. FIKENTSCHER, Schuldrecht (9th ed., Berlin 1997) marg. no. 76.

44 See Federal Court of Justice (BGH), Entscheidungen des Bundesgerichtshofes in Zivilsachen (BGHZ) 64, 46, 48 ff. = Neue Juristische Wochenschrift (NJW) 1975, 824.

45 Federal Court of Justice (BGH), Neue Juristische Wochenschrift (NJW) 2001, 1167; BGH, NJW 2007, 3057; BGH, NJW 2010, 858.

46 Federal Court of Justice (BGH), Wertpapier-Mitteilungen (WM) 1976, 1114, 1115 f.

47 See for a comprehensive discussion of post-contractual duties C. HERRESTHAL, Nachwirkende Leistungstreue- und Rücksichtnahmepflichten, in: Arnold/Lorenz (eds.), Gedächtnisschrift für Hannes Unberath (Munich 2015) 181.

48 See *supra* II.2.b).

49 See *supra* II.2.b).

the end of the pre-contractual relationship. They may oblige one party subsequently to the pre-contractual relationship as long as there is – compared with tort liability – an increased possibility that the rights and interests of the other party may be violated due to the former pre-contractual relationship and the other party may legitimately rely on this consideration. These obligations clearly include the duty to inform. Thus, Sec. 241 para. 2, 311 para. 2 BGB may be interpreted in a way that the subsequent obligations after the termination of the pre-contractual relationship also may require informing the other party in specific circumstances. Nevertheless, it has to be emphasized that an actual *subsequent* duty to inform the other party requires the termination of the pre-contractual relationship, i.e. the end of the contract negotiations or of the business contact. There are some duties that continue on into the contract stage (and beyond), for example, if one party to a former pre-contractual relationship (e.g. contract negotiations) comes to know that he suffered from a highly contagious and life-threatening infectious disease during the contract negotiations he may be obliged to communicate this risk to the other party even after termination of the contract negotiations.

The same is true with regard to a contractual relationship. The contract provides for obligations of protection and consideration according to Sec. 241 para. 2 BGB. These obligations comprise the duty to inform the other party about specific issues.⁵⁰ Clearly, these obligations may oblige one party subsequently to the contractual relationship, e.g. the exchange of the goods and the money in a sales contract. The teleological underpinnings similarly offer an increased likelihood that the rights and interests of the other party may be violated due to the former contractual relationship and the legitimate reliance of the other party. Even though the legal grounds of those duties subsequent to a contract are disputed, the majority opinion agrees they are contractual duties.⁵¹ They follow from the contractual agreement, as under Sec. 311 para. 2 BGB, every contractual agreement provides implicitly

50 See *supra* II.2.b).

51 Likewise BODEWIG, *supra* note 43, 508; GRÜNEBERG, in: Palandt, *supra* note 43, § 241 marg. no. 7; FELDMANN/LÖWISCH, in: Staudinger, *supra* note 43, § 311 marg. no. 112; seemingly also in BACHMANN, in: Münchener Kommentar, *supra* note 42, § 241 marg. no. 100; see further B. MARKESINIS/H. UNBERATH/A. C. JOHNSTON, *The German Law of Contract. A Comparative Treatise* (2nd ed., Oxford 2006) 126 (duties of care are rationalized also in terms of collateral contractual obligations); for a different opinion, H. C. GRIGOLEIT, in: Heldrich/Pröller/Koller et al (eds.), *Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag* (Munich 2007) 275, 281 ff.; K. KUHLMANN, *Leistungspflichten und Schutzpflichten* (Berlin 2001) 78; not quite clear, W. ERNST, in: *Münchener Kommentar zum BGB* (7th ed., Munich 2016) § 280 BGB marg. no. 111.

for those obligations. There is no reason to resort to a statutory legal basis with regard to subsequent obligations, particularly given those obligations are shaped and limited by the contractual agreement. Thus, even a statutory foundation for those obligations would have to take account of the content of the contractual agreement to specify the obligation.

3. *The Legal Consequences of a Violation of the Duty to Inform*

The legal consequences vary in case of a violation of a duty to inform. Statutory duties to inform usually provide for specific legal consequences like invalidity of contract (e.g. Sec. 494 I BGB) or an amendment of the contractual obligations of the obliged party (see Sec. 494 para. 2, 3, 4, 5, 6 BGB). An important legal consequence is that the statute of limitation does not apply to a right of referral if the information duty giving rise to the right of referral is not complied with (see Sec. 356 para. 1 sentence 1, 356a para. 3 sentence 1, 356b, 356c, 356d sentence 1 BGB).

Moreover, both the statutory and contractual duties to inform are obligations of one party of the legal relationship. Thus, in case of a violation of this duty the general rules on the violation of obligations apply, i.e. the creditor may ask for damages if there is fault on the side of the debtor (Sec. 280 para. 1 BGB). According to the general rule on damages (Sec. 249 para. 1 BGB), the intent is to put the party in the same position he would have been had the violation of the obligation not occurred. This covers any expenses of the creditor frustrated by the violation of the information duty or that were incurred as result of the violation of the duty. Moreover, the creditor may withdraw from the contract if proper communication of the information by the debtor would have led the creditor to decide not to enter into the contract. As a result, for a debtor seeking to withdraw from an unwanted and often disadvantageous contract, the violation of an information duty is a frequently-used opportunity to do so.⁵²

4. *Current Issues with regard to Information Duties in General Contract Law*

With regard to information duties in general contract law there are currently several controversial issues in German private law.

a) *Limits to implicit contracts for information*

Regarding implicit contracts for information, especially regarding investment consulting in banking law, the issue is whether there are legitimate

52 See for a general treatise, S. LORENZ, *Der Schutz vor dem unerwünschten Vertrag* (Munich 1997) 124.

grounds for the assumption of such a contract or whether those agreements are a mere fiction of contractual agreement by the courts. Firstly, it has to be mentioned, that the significance of implicit agreements is continuously being reduced by the extension of statutory duties to inform the other party in banking law and consumer protection law. Nevertheless, those implicit agreements still have a lingering function as a means for the judiciary to react to new developments and new lines of cases. With regard to swaps and the use of those financial instruments in bank-to-consumer-relationships, e.g. to structure a synthetic fixed rate lending by combining a swap with a loan agreement with variable interest rates, there are – as yet – no specific statutory information duties. Thus, the courts fill in the (alleged) gaps in statutory duties to inform and interpret the general duties arising from an implicit information agreement⁵³ in a way that the bank is contractually obliged to⁵⁴ inform the client that, firstly, swaps are linked to an unlimited risk of loss also for the client, and secondly, the risk-opportunity-profile of the swap is not balanced but provides an advantage for the bank. Moreover, the bank has a contractual obligation to inform the client about a negative market value of the swap at the time it is contracted. The courts interpret the implicit agreement in a way that the bank is obliged to inform the client about the bank's net profit and the gross margin.⁵⁵

Moreover, implicit duties to inform the consumer or client are a means in German private law to avoid conflicts with EU law, as Member States may not raise the level of consumer protection in areas of the law covered by EU directives that follow the concept of full harmonization. Thus, the German legislator may not provide for information duties in an area of private law covered by an EU directive. Nevertheless, German courts achieve the same result, i.e. a national level of consumer protection or client protection that exceeds the level of the EU directive by interpreting the (alleged) implicit agreement in a way that the agreement gives rise to those information duties. According to the courts, this higher level of protection does not violate EU law even though the national level of consumer/client protection exceeds the level of the EU Directive, as the national information duty is a contractual

53 See *supra* II.2.a).

54 Federal Court of Justice (BGH), Entscheidungen des Bundesgerichtshofes in Zivilsachen (BGHZ) 189, 13 marg. no. 29 = BGH, Neue Juristische Wochenschrift (NJW) 2011, 1941.

55 Federal Court of Justice (BGH), Wertpapier-Mitteilungen (WM) 2016, 821 marg. no. 10; BGH v. 7.2.2017 – XI ZR 379/14 = BeckRS 2017, 106801 marg. no. 10; for the exception in cases with a linked underlying transaction cf. BGH, WM 2015, 1273 marg. no. 42, citing BGH, Entscheidungen des Bundesgerichtshofes in Zivilsachen (BGHZ) 189, 13 marg. no. 26 = WM 2011, 682.

duty, and EU law is not violated by the Member State where an agreement of the parties exceeds EU requirements. This approach is heavily criticized.⁵⁶

Finally, it is worth mentioning that the assumption of information duties based on implicit contractual agreements fulfills the same functions as the general statutory information duties based on Sec. 311 para. 2, 241 para. 2 BGB. As a result, the majority opinion prefers those rules as a base of pre-contractual (statutory) duties to inform. The main difference between the two approaches, implicit contractual information duties and statutory information duties, is that courts do not need to balance the interests of the parties in case of a contractual information duty. Interpreting Sec. 311 para. 2, 241 para. 2 BGB to provide for a statutory duty to inform requires a balancing of the fundamental principles of the market economy, as mentioned above. On the contrary, by the mere referral to the parties' agreement, the German Supreme Court may set its own standard of duty to inform. Thus, the majority opinion opposes the approach of the German Supreme Court.

b) Rule of thumb for formulating specific duties to inform

Currently, efforts are being made to provide a rule of thumb to derive specific duties to inform from the general rule in Sec. 241 para. 2 BGB in specific situations.⁵⁷ Above all, there is increased legal uncertainty regarding statutory and contractual information duties due to the strong tendency in German private law to protect the consumer, client etc., often referred to as “weaker party” in a legal relationship. Moreover, there is an inclination to judicial hindsight bias resulting in a retrospective affirmation of a duty to inform about specific circumstances, and a claim for damages where this duty is violated, which has driven the judiciary's continuous increasing of the level of information duties.

The general test for information duties is whether the other party to the contract or the pre-contractual relationship has legitimate expectations of the other party that specific information be provided. This test is quite

56 See C. HERRESTHAL, Die Weiterentwicklung des informationsbasierten Anleger-schutzes in der Swap-Entscheidung des BGH als unzulässige Rechtsfortbildung, *Zeitschrift für Wirtschaftsrecht (ZIP)* 2013, 1049; C. HERRESTHAL, Die Rechtsprechung zu Aufklärungspflichten bei Rückvergütungen auf dem Prüfstand des Europarechts, *Wertpapier-Mitteilungen (WM)* 2012, 2261; C. HERRESTHAL, Kritik der aktuellen Ausdifferenzierungen in der höchstrichterlichen Kick-back-Rechtsprechung, *Zeitschrift für Bankrecht und Bankwirtschaft (ZBB)* 2010, 305.

57 BREIDENBACH, *supra* note 16, 52 ff.; BUSCH, *supra* note 1, 149 ff.; FLEISCHER, *supra* note 1, 567 ff.; FLEISCHER, *supra* note 16, 274 ff.; REHM, *supra* note 16, 233 ff.

vague and promotes hindsight bias. Thus, there are some efforts to identify more precise aspects which may be balanced by an information duty. Those aspects include the costs for the obliged party to determine the specific information, the possibility of the other party to secure the specific information, the cost of communication of the information for the obliged party and the position taken by the obliged party. The intended contractual obligation is also relevant. One party carrying the responsibility for obtaining its own information is characteristic of an exchange contract with competing interests and thus an information duty is the exception. In cooperation contracts with parallel interests of the parties, like corporation contracts, the duty to inform the other party is more often justified. The same is true for contracts, which provide for long-term obligations of the parties while one-off exchange contracts argue against an information duty. Additional aspects, which may contribute to an information duty, include the previous behavior of the parties, the accessibility of the information, information asymmetry between the parties, and the intellectual and economical superiority of one party. Aspects that may limit information duties include the fundamental principle that no party is obliged to self-incrimination and that the communication of personal information may be required only after a thorough balancing of the interests of the parties.

These elements are – according to the majority opinion under German law – elements of a “bewegliches System” (movable system). Thus, no single aspect is decisive nor are those aspects always present in a case. Instead, it is necessary to weigh those aspects that are present in the fact pattern at hand.

c) The importance of information asymmetry

The significance of information asymmetry between the parties to a pre-contractual or contractual legal relationship is still subject to a quite controversial discussion. As a starting point, there is quite often an information asymmetry between the parties to legal relationships, e.g. between a consumer and a business or a bank and a client. This information asymmetry is often referred to as the main consideration for justifying an information duty for the more informed party.⁵⁸ Moreover, due to the risk of substantial legal uncertainty, the information duty in those situations is based on the assumption of an information asymmetry in a typical situation. Thus, the actual knowledge of the consumer or client in the specific situation is irrelevant for the information duty of the other side if – according to the courts – the consumer or client is presumed to be less informed than the other party.

⁵⁸ See for the information asymmetry as one reason for information duties in Japanese Law DERNAUER, *supra* note 4, 201.

There are substantial arguments against information asymmetry as the decisive factor for an information duty. Firstly, there is a lack of precision regarding the fact pattern of the supposed typical situation. In any given situation, the level of information held by both parties may vary. Thus, an information duty for the party presumed to be better informed is not justified. Moreover, the main relevance of those information duties is the claim for damages including the cancellation of the agreement with *ex tunc*-effect in case of a violation of the information duty. Quite often, the “uninformed” party resorts to those claims where the contract becomes disadvantageous. This is especially true in bank-client relationships with regard to investment contracts.

Moreover, often the information asymmetry is the result of a professionalization in a market economy and thus a common appearance. Special knowledge is necessary in a market economy that relies largely on the prosperity and wealth generated by the specialization of the different professions. Hence, there is a fundamental contradiction between the legal duties and the concept of the market economy if any information advantage results in an information duty. Market transactions are devaluated if the parties are obliged to communicate their information about the subject matter of the contract, as different assessments of a product by market participants are often based on different information. Additionally, any efforts to acquire special knowledge is – at least in part – devaluated if it is linked with a duty to inform the other party even though the concept of the market economy requires the parties to acquire knowledge to persist in market competition. While the availability of information sources provides for an advantage in market competition, the rules of contract law would reduce the value of this advantage by an unquestioned duty to inform.

Thus, information asymmetry is a prerequisite for an information duty but not a sufficient condition. Particularly when dealing with market knowledge, information asymmetry cannot be a justification. The knowledge of the general market conditions, which all market participants may acquire, does not have to be communicated to the other party. The knowledge of the relevant market and its conditions is part of the individual responsibility of each market participant. Moreover, expert knowledge and special knowledge do not have to be revealed in a case of a mere information asymmetry, i.e. only substantial additional reasons may justify an information duty and balancing the parties’ interests, while the principle of market economy speaks against an information duty. Finally, it has become clear that the scope of an information duty based only on an information asymmetry is quite unprecise.

d) *The adequate allocation of the burden of proof for a violation of the information duty*

Under German law, the general rule with regard to the burden of proof is that each party has to prove those facts that are advantageous for its case. For a violation of information duty, the creditor has to prove the existence of the information duty, its violation and that the violation caused damages. The latter aspect is especially difficult as the creditor has to prove that his decision to enter into the contract or to invest in a certain asset was caused by the violation of the information duty, i.e. he would not have entered into the contract or invested his money had the debtor not violated the information duty. For the creditor, it is difficult to prove the internal facts behind supposed aberrant behavior as the burden of proof lies in the conviction of the court. However, the same is true for the debtor regarding proof that the creditor would have entered into the contract or invested money in the same way had the information been provided.

Nevertheless, there are some rules in consumer law that shift the burden regarding fulfillment of an information duty to the business (Sec. 361 para. 3 BGB). In addition, the courts operate with the presumption that a creditor would have acted reasonably had performance of the information duty been adequate (“aufklärungsrichtiges Verhalten”), i.e. that he would not have entered into the contract or invested money. The earlier line of decisions added an important restriction to this presumption: The presumption did not apply if there was conflict in decision-making for the creditor – i.e. for actions other than presumed rational behavior, the alternative presented by, or, in the case of a failure to provide information, the alternative not presented, must have been vastly preferable. This restriction was dropped in 2012, and the courts do not presume a violation of an information duty has resulted in creditor behavior that differs from that which would have happened. The debtor may assert and prove that the creditor nevertheless would have behaved in the same way even with the information owed, e.g. because he ignored similar information in other circumstances. This new approach of the courts is heavily criticized.

III. INFORMATION DUTIES IN CONSUMER CONTRACTS

1. *Scope of Information Duties in Consumer Contracts*

a) *Objects of information duties*

In German consumer law, there is an increasing number of specific information duties for equally specific types of consumer contracts and/or kinds of contracts (e.g. doorstep selling). Those information duties result mainly

from a transformation of EU Directives into national law. Since the major revision of the German law of obligation in 2002, those rules on consumer contracts have been included in the German Civil Code and thus also the duties to inform the consumer.⁵⁹

Regarding the EU directives, there is a tendency in EU law to enact Directives that follow the concept of the so-called “full harmonization”.⁶⁰ According to this concept, Member States are not allowed to increase the level of consumer protection provided by the Directive within the area covered by the rules of that Directive – for the purposes of this discussion, meaning that the Member States may not increase the information duties prescribed by the Directive within this area. This means they may not provide for additional information duties or stricter formal requirements regarding the information duties of the Directive. It is worth mentioning that there is some discussion in German private law about the identification of the “area covered by the rules of the Directive” since this area determines the scope for Member States’ own additional rules. The issue is, for example, whether the Member States may impose a general information duty under Sec. 241 para. 2 BGB⁶¹ also for contracts that are thoroughly covered by an EU Directive like consumer credits. Member States do, unquestionably, retain the right to extend the information duties prescribed by an EU Directive to legal areas not covered by it.

Duties to inform the consumer are structured according to pre-contractual information duties⁶² and contractual information duties.

Pre-contractual information duties in consumer contracts, i.e. contracts between a consumer (Sec. 13 BGB) and a business (Sec. 14 BGB), carry a duty under to Sec. 312a para. 2 BGB and Art. 246 EGBGB to inform the consumer about the main conditions of the contract and the main characteristics of the product. Regarding *specific kinds of contracting* there are information duties regarding consumer contracts negotiated away from business premises and distance contracts (Sec. 312d BGB, Art. 246a EGBGB). The same is true for consumer contracts in e-commerce (Sec. 312i BGB). Additionally, there are information duties for *specific kinds of consumer contracts*. Those information duties cover contracts for timeshare or long-

59 For a different situation in Japan cf. DERNAUER, *supra* note 4, 212 f.

60 Also called “maximum harmonization”, cf. for a thorough analysis of the concepts of harmonization of the member states law C. HERRESTHAL, *Mindestharmonisierung, Vollharmonisierung, ‘targeted harmonisation’ – Harmonisierungskonzepte und ihre Folgen für das deutsche Vertragsrecht*, in: von Bar/Wudarski (eds.), *Deutschland und Polen in der europäischen Rechtsgemeinschaft* (Munich 2012) 25.

61 See *supra* II.2.

62 See for information duties related to the right of withdrawal in Japanese Law DERNAUER, *supra* note 4, 219 f.

term holiday products (Sec. 482 para. 1 BGB), consumer credits (Sec. 492 II BGB), deferred payment and other similar financial accommodation (Sec. 492, 506 para. 1 BGB) and installment delivery contracts (Sec. 507 BGB, Art. 246 para. 3 EGBGB). Finally, there is the duty to inform about the right of withdrawal if the contract provides for a statutory right of withdrawal (Sec. 356 para. 3 BGB).

Post-contractual duties in consumer law include the duty to inform the consumer about the content of the contract in a specific form for consumer contracts negotiated away from business premises and distance contracts (Sec. 312f BGB) and the duty of the lender to provide to the borrower with a copy of the contract (Sec. 492 para. 3 BGB).

If the general information duties apply, pre-contractual information must be provided according to Sec. 311 para. 2, 3, 241 para. 2 BGB and the contractual duty to inform the other party that arises under Sec. 241 para. 2 BGB.

b) Legal consequences of a violation of the duty to inform

aa) The claim for damages

The consequences of a violation of the duty to inform the consumer are the general consequences, i.e. the violation of an information duty is a breach of duty and thus results in a claim for damages of the consumer (Sec. 280 para. 1, 249 ff. BGB).⁶³ The consumer can ask for frustrated expenses or additional costs due to the violation of the duty to inform by the other party, as is consistent with the principle of restitution in kind as the main principle of the German law of damages. The question is whether the consumer can ask for the annulment of the contract if he would not have entered into the contract had proper communication of the information occurred. According to the principle of restitution in kind and the general concept of German private law, the violation of an information duty may result in the annulment of the contract. On the other hand, the right of withdrawal in consumer contracts is limited to specific cases and situations and is significantly expanded if the violation of any information duty results in an annulment of the contract. The solution is provided by the appropriate application of the rules governing the burden of proof. Consistent with the general rules on the burden of proof, the consumer must prove that he would not have entered into the contract if the other party had complied with the duty to inform. The consumer must convince the court that the violation was not

63 See the official reasoning of the German government, BT-Drs. 16/11643, 69; Federal Court of Justice (BGH), *Neue Juristische Wochenschrift* (NJW) 2008, 1585 marg. no. 18; BGH, *Entscheidungen des Bundesgerichtshofes in Zivilsachen* (BGHZ) 169, 109 (120 f.) = NJW 2007, 357.

trivial – i.e. it is not sufficient to claim a violation of the information duty with regard to minor aspects like the address or phone number of the business or the way of handling of complaints. However, in specific circumstances the consumer may meet the burden of proof and thus achieve the annulment of the contract.

bb) Specific legal consequences

There are also specific consequences triggered by the violation of information duties in consumer contracts. One specific consequence is the *unenforceability of specific contractual rights*. According to Sec. 312a para. 2 sentence 2 BGB, Sec. 312e para. 2 BGB, the business has no right to ask for any freight, delivery, or postal charges and other costs, if the information duty concerning those costs was violated by the business.

Some rules provide for an *amendment of the contractual agreement* should the information duty be violated. Thus, even though a consumer credit is void in case of a violation of the information duty by the business according to Sec. 494 para. 1 BGB, there is a valid contract if the consumer made use of the credit. Nevertheless, the rule provides for a statutory amendment of the contractual agreement in those cases. According to this amendment, the lending rate, on which the consumer credit agreement is based, is reduced to the statutory rate of interest if there is no information on the lending rate, the effective annual rate of interest or on the total amount. In a similar manner, the instalment payment transaction is void if the requirement of written form is not observed or if one of the items of required information is omitted in the contract (Sec. 507 para. 2 BGB). However, according to this rule, the instalment payment transaction becomes valid if the item is delivered to the consumer or the service performed. However, if the information on the total amount or the effective annual rate of interest was lacking, the statutory rate of interest applies as maximum rate of interest on the cash payment.

Finally, there are rules that provide for an extension of the withdrawal period in case of violation of an information duty (Sec. 485a, Sec. 356a para. 2, Sec. 356b para. 2, Sec. 356c para. 1 BGB).

2. *Rationale for Information Duties in Consumer Contracts*

The rationale of information duties in consumer contracts is to eliminate an information asymmetry between consumers and businesses.⁶⁴ The rules intend to put the consumer in a position to make an informed decision with regard to entering into a specific contract and the content of this contract.

⁶⁴ See *supra* I.3.

Thus, information duties identify central aspects that are typically relevant for deciding whether or not to enter into a contract. Moreover, some information duties ensure that the consumer is aware of specific duties resulting from the contract.

Regarding information duties that originate from EU directives, EU law also intends to harmonize and to favor the position of the consumer throughout the EU. This will increase consumer cross-border demand in the EU and strengthen the single market. The basic assumption is that a consumer who is aware of the identical consumer rights throughout the EU will seek to form contracts within the single market. Seeking to strengthen the single market through consumer protection, the EU directives on consumer protection are usually based on the competence of the single market.

3. *Current Issues for Information Duties in Consumer Contracts*

a) *Information overload; one-page limitation*

In EU law, as well as in German contract law, there is a substantial discussion about the risk of consumer information overload.⁶⁵ The question is whether there is a diminishing marginal utility related to the continuous expansion of information duties, and even a serious lack of understanding on the part the consumer due to the amount of information provided. There is no need to repeat the discussion here, but it is worth mentioning that the EU legislator as well as the national legislator have resorted to one-page information sheets linked to a presumption of an adequate information for the consumer.

65 See P. MÜLBERT, *Anlegerschutz und Finanzmarktregulierung*, *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (ZHR)* 177 (2013) 160 (187); J. KOCH, *Grenzen des informationsbasierten Anlegerschutzes – Die Gratwanderung zwischen angemessener Aufklärung und information overload*, *Zeitschrift für Bank- und Kapitalmarktrecht (BKR)* 2012, 485, 486; W. SCHÖN, *Zwingendes Recht oder informierte Entscheidung – zu einer (neuen) Grundlage unserer Zivilrechtsordnung*, in: *Festschrift Canaris (Munich 2007)* 1191, 1211; I. KOLLER, *Die Abdingbarkeit des Anlegerschutzes durch Information im europäischen Kapitalmarktrecht*, in: *FS Huber (Tübingen 2006)* 821, 824; T. M. J. MÖLLERS/E. KERNCHEN, *Information Overload am Kapitalmarkt*, *ZGR* 2011, 1 ff.; N. CHATER/S. HUCK/R. INDERST, *Consumer Decision Making in Retail Investment Services: A Behavioural Economics Perspective (Brussels 2010)* 51 f., 231; for critics cf also E. M. KIENINGER, *Verhandlungen des 69. Deutschen Juristentages (Munich 2012)* Vol. II/1, 29 ff.; H. WIEDEMANN/R. WANK, *Begrenzte Rationalität – gestörte Willensbildung im Privatrecht*, *JuristenZeitung (JZ)* 2013, 340, 345; C. STAHL, *Information overload am Kapitalmarkt (Baden-Baden 2012)*.

b) *Malfunctioning of information duties*

Regarding the information duties in e-commerce,⁶⁶ at least in German law, the huge gap in relevance between this duty in competition law and contract law has caused somewhat of a malfunction. Those information duties are subject to extensive adjudication triggered by competition law. The reason is that the violation of an information duty is a violation of a statute and thus triggers the rules on unfair competition due to a violation of the law. Thus, other competitors may pass a written warning to this competitor, which imposes a duty on the latter to compensate the competitor for his legal expenses and a duty to refrain from the use of the wrongful information sheet. Thus, there are numerous cases on the statutory information duties in e-commerce and their precise content triggered under competition law. Nevertheless, the content of the statutory information duty in those cases is only a preliminary question of an issue of competition law. On the other hand, there are only a few decisions, if any, about the content of the information duties that originate under consumer protection law, i.e. there are only a few cases where a violation of those information duties is relevant for damages to the consumer or for the application of the deadline of the right to referral.⁶⁷

Thus, at least for information duties in e-commerce, in part also with regard to those of specific consumer contracts, there is an issue of a malfunctioning of the statutory information duty. The aim of those duties is the protection of consumer while their practical application and adjudication is predominantly anchored in competition law. There is an assumption that the small number of those information duties for the consumer parallel the small number of cases in consumer law. Were this not the case, there would be more disputes about the content of those information duties. It is worth mentioning that the German legislator makes efforts to reduce the number of cases in competition law related to the violation of information duties, e.g. by a reduction of the amount in dispute in those cases which decreases the incentive for attorneys to file those claims.

c) *The “Widerrufsjoker” (The ‘wild-card’ – the right of rescission)*

Another issue of information duties in consumer law is the so called right of rescission as a wild-card (“Widerrufsjoker”).⁶⁸ This is based in law on the

66 See *supra* III.1.a).

67 See *infra* III.3.c).

68 C. KROPF, *Widerrufsbelehrungen in Verbraucherdarlehensverträgen – eine Absage an den „Widerrufs-Joker“*, Wertpapier-Mitteilungen (WM) 2013, 2250; H. EDELMANN/T. HÖLLDAMPE, *Der Widerrufsjoker*, Kölner Schrift zum Wirtschaftsrecht

connection between the withdrawal period and the information duty of the business. According to the former legal situation in German consumer protection law, the withdrawal period began after the business correctly informed the consumer about his right of rescission and further information. Hence, should there be a violation of the duty to inform the consumer, the withdrawal period of two weeks has not yet begun and the consumer may withdraw from the contract, e.g. a loan agreement, years after contracting. Thus, the consumer could make use the right of rescission to rescind an agreement should the contract to become economically disadvantageous.

This is especially true for loan agreements as these usually include a ten year fixed interest rate and premature contract termination triggers a prepayment penalty. The tremendous decline of interest rates provided consumers with a very strong interest in terminating previous loan agreements, but seeking to avoid prepayment penalties, which would be calculated on the high interest rates agreed upon. Thus, they resort to claiming a violation of an information duty by the business and the fact that the withdrawal period had not commenced, let alone ended, due to this violation. They may therefore withdraw from the contract even though years may have passed since entering into the contract.

On the one hand, there are arguments in favor of the consumer as the duty to inform the consumer – besides other duties – about the right to withdraw is intended to protect him against rash decisions by providing an opportunity to cancel the contract for a short period after contracting. This protection is surely mitigated if the consumer is improperly informed – if at all – about his withdrawal right. Moreover, there may be an inadequate incentive for the business to violate the information duty if this violation is more or less without consequences. On the other hand, in the vast majority of cases the consumer does not withdraw from the contract because the contract was unwanted at the time of contracting but due to economic reasons, i.e. the conditions of the contract, especially the interest rate, have become disadvantageous for the consumer. While the issue of forfeiture is quite intensively discussed and rejected by the majority of the courts as most cases do not meet the prerequisites for this rule, the issue of abuse of rights, more precisely the abuse of a specific right, has not yet been sufficiently discussed.

(KSzW) 2015, 148; A. FRISCHEMEIER/R. JORDANS, Verwirkung des Widerrufsrechts bei Verbraucherkrediten – der Widerrufsjoker aus Perspektive der Bank, *Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht (DZWIR)* 2016, 101; M. SINGER, Der Widerrufs-Joker im Kreditvertrag: Rien ne va plus?, *Zeitschrift für die Anwaltspraxis (ZAP)* 2016, 101; B. PETERS, in: Schimansky/Bunte/Lwowski, *supra* note 29, § 81 marg. no. 276–282.

The issue addressed here relates to contracts entered into between 1 November 2002 and 11 June 2010, mainly because consumer protection law was amended in Germany with regard to contracts closed after 11 June 2010.

IV. FUTURE PROSPECTS

The concept of information duties in German contract law as well as in German consumer protection law is at a turning point. The tremendous expansion of those duties in recent years, the issue of information overload, the malfunction of specific information duties e.g. in e-commerce, and the misuse of the right of referral triggered by the duty to inform has resulted in large numbers calling for a legislative revision of the concept. This is especially true for the general information duty, which is under a cloud of substantial legal uncertainty. Certainly, the concept of an information duty does have some benefit: restrictions of freedom of contract are limited compared to mandatory rules regulating contract content. Nevertheless, this benefit is substantially reduced if the limitation of the right of referral is linked to the duty to inform and if those duties are misused. While the conceptual dead-end for information duties is increasingly acknowledged in the legal profession, the German and the European legislator still usually draw on the concept of information duties in consumer protection law. The “modern approach” of the legislator to fulfill those information duties by mandatory one-page information sheets and the presumption that this one-page represents sufficient information does not qualify as a substantial development of the concept of information duty but as an act of desperation. The preferable option rests on an implied focus on specific information of substantial importance for the contract at hand. Thus, it is necessary to refocus statutory information duties to those issues that are of typical and substantial importance for the relevant contract. Information duties that are subject mainly to adjudication in areas of the law different from consumer protection law should be repealed. Finally, the German legislator must seek to limit the abuse of the right of withdrawal regardless of the European genesis of those rights, either by using the concept of forfeiture or by limiting the meaning of violation to exclude some duties to inform of minor importance.