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INTERNATIONALES PRIVAT- UND WIRTSCHAFTSRECHT

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**RECHTSVERGLEICHENDE  
UNTERSUCHUNG DES VERBRAUCHERINFORMATIONSRICHTS  
IN DEUTSCHLAND, BELGIEN, DÄNEMARK,  
FRANKREICH, GROSSBRITANNIEN, IRLAND, SCHWEDEN  
UND DEN VEREINIGTE STAATEN VON AMERIKA**

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**ABSCHLUSSBERICHT**

**BAND II**  
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## **Anhang 3: Länderbericht Dänemark**

### *The role of consumer information*

1. Some of the general assumptions underlying Danish consumer protection are *that* the relatively weak position of consumers vis-à-vis business is closely related to lack of information, mainly concerning the specific properties of goods and services, and *that* consumers are in a better position to deal in accordance with their own interests and preferences if they have easy access to sufficient information. Accordingly, many of the initiatives taken in order to improve the protection of consumers are comprised of measures which in different ways promote the dissemination of information concerning goods and services to consumers.

Legislation to this effect typically takes the shape of public law regulation ordering business to inform consumers on certain facts as part of a more or less detailed regulatory scheme often supervised by a public administrative agency.

### *Public and Private Consumer Information*

2. Consumer information is one of the main tasks of the National Consumer Agency (*Forbrugerstyrelsen*) which is a governmental agency under the Ministry of Economic and Business Affairs. One of the principal aims of the National Consumer Agency (*Forbrugerstyrelsen*) is to create a platform for a coordinated and active contribution in the field of consumer affairs through information and service activities. - The Agency's other main task is to contribute to the creation and maintenance of a high level of consumer protection as regards quality, safety, health and financial and legal rights by means of mediation and the exercise of influence. The National Consumer Agency (*Forbrugerstyrelsen*) was established in 1988 but is, as far as to information

activities are concerned, to a wide extent a continuance of the former Danish Government Home Economics Council (*Statens Husholdningsråd*) which was established in 1935.

Consumer information concerning food and nutrition is one of the tasks of the Veterinary and Food Administration (*Fødevarestyrelsen*) under the Ministry of Food, Agriculture and Fisheries.

Also the Information Centre for Environment and Health (*Informationscenter for Miljø & Sundhed (IMS)*), established in 2003, focuses on consumer information. It is funded by the state.

Consumer information, including publication of comparative tests of goods and services, is also one of many activities of the Consumer Council (*Forbrugerrådet*) which is an independent organisation articulating consumer interests and acting as watchdog in the interest of consumers. The Consumer Council (*Forbrugerrådet*) dates back to 1947. It is financed by the sale of consumer magazines and state funding decided by Parliament as part of the annual budget. The activities of the Consumer Council (*Forbrugerrådet*) are not controlled by the state.

**3.** A special feature of the public consumer information efforts is found in § 7 a of the Act on Consumer Forum<sup>1</sup> § 7 a<sup>2</sup> and the Foodstuffs Act<sup>3</sup> § 10,(3)<sup>4</sup>. These provisions authorize The National Consumer Agency (*Forbrugerstyrelsen*) and the Veterinary and Food Administration (*Fødevarestyrelsen*) to conduct and publicize on the internet comparative test results based on i.a. anonymous data collection (i.e. the data collector posing as an "ordinary consumer"). In practice, test methods etc. are laid down on the basis of talks with the relevant business and consumer organisations. The business enterprises involved in the tests are given an opportunity to comment on the test results before they are publicized and have access to the data on which

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<sup>1</sup> *Lov om Forbrugerforum*, Act no. 455/2003, as amended latest by act no. 1548/2006.

<sup>2</sup> Effective from 1/2/2007.

<sup>3</sup> *Fødevareloven*, Act no. 526/2005, as amended latest by act no. 488/2009.

<sup>4</sup> Effective from 1/3/2009.

the results are based. This material is also accessible to everybody else according to the Access to Public Documents Act<sup>5</sup> (see 6.3 below)

4. There is a wide range of private and/or voluntary labelling schemes. A booklet<sup>6</sup> published in January 2009 by The Information Centre for Environment and Health (*Informationscenter for Miljø & Sundhed (IMS)*) describes 50 different schemes each having their own environment and/or health related logo. One of the best known logos is the so-called "*Ø-mærke*" signifying that the conditions according to the Danish legislation on organic farming are met under the supervision of the Danish Plant Directorate (*Plantedirektoratet*) (see 7.2 below).

#### *Legal bases of Consumers' Right to Information*

5. There are different legal bases of consumers' right to information concerning production processes or health hazards. Denmark has a rather long tradition of state intervention in the shape of administrative regulation imposing i.a. information duties on business. Thus, generally, rules on consumer information are part of public law in so far that they are enforced by public administrative agencies.

There are rather few private law rules imposing such information duties on business. It is, however, worth noticing that the public law rules in practice interplay with the general principles of private law, in that violation of a duty to inform may trigger civil law remedies according to general contract law principles or statutory rules on non-conformity of goods and services and/or according to general tort law principles on negligence. See for instance 6.4 below.

6. *General principles and rules* concerning consumer information about production processes or health hazards of products, services or work performances are found in mainly the following sources of law:

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<sup>5</sup> *Lov om offentlighed i forvaltningen*, Act no. 572/1985, as amended latest by act no. 433/2009.

<sup>6</sup> Available (in Danish) at [www.miljoeogsundhed.dk](http://www.miljoeogsundhed.dk).

**6.1.** The Marketing Practices Act<sup>7</sup> § 7 contains a general principle of guidance. The act is administered by the Consumer Ombudsman, who is an independent administrative body supervising marketing activities and safeguarding the collective interests of consumers.

*"§ 7. When an offer is made, on entry into an agreement or (depending on the circumstances) at the time of delivery, appropriate guidance shall be given in accordance with the nature of the product or service, where this is of importance for the assessment of the character or properties of the product or service, including in particular its functional properties, durability, hazardous nature and maintainability."*

**6.2.** Also The Product Safety Act<sup>8</sup> § 9(1), 1st sentence, lays down a general duty for enterprises to inform:

*"Anybody who places a product on the market or supplies a service [attached to a product] is obliged to inform in an appropriate manner about any risk of danger and how to prevent it"*

The act is administered by the Safety Technology Authority (*Sikkerhedsstyrelsen*) under the Ministry of Economic and Business Affairs.

§ 14 of the Act lays down a general obligation of the Safety Technology Authority (*Sikkerhedsstyrelsen*), when necessary, to inform the general public (in television, newspapers etc.) about the hazards of a product or a service attached to a product. The risk in question must have been ascertained. It is no condition for such public warnings that the Authority has decided to take (other) legal measures, such as for instance an order of recall of products. The information publicized can contain all the data necessary for identifying the product, including pictures, name and address of dealers and previous commercial links.

§ 20,(2) of the Act exempts, in cases of urgency, measures taken by the Safety Technology Authority (*Sikkerhedsstyrelsen*) from the general right to be heard be-

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<sup>7</sup> *Markedsføringsloven*, consolidated act no. 839/2009.

<sup>8</sup> *Lov om produktsikkerhed*, Act no. 364/1994, as amended latest by act no. 523/2007.

fore a decision is made, cf. § 19 of the Administrative Procedures Act<sup>9</sup> but the business enterprise in question must be given an opportunity to be heard as soon as possible. Otherwise the general rules of the Administrative Procedures Act (*forvaltningsloven*) apply.

One of the rare examples of court rulings concerning the Product Safety Act (*Produktsikkerhedsloven*) is reported in *Ugeskrift for Retsvæsen* 2005 p. 397. In this case the Maritime and Commercial Court of Copenhagen quashed a decision made by the Safety Technology Authority (*Sikkerhedsstyrelsen*) ordering the recall etc. of four different types of hazardous prams. The reasons for the annulment of the decision were a violation of the right to be heard in a case that was not considered urgent, a violation of the general duty to state the reasons for the decision, and a violation of the general principle of equal treatment in that the Safety Technology Authority (*Sikkerhedsstyrelsen*) had not taken any action against similar problems with other types of prams.

In the wake of this decision the business enterprise involved sued the Safety Technology Authority for damages caused by the decision which was annulled. In its decision on the question the damages the Maritime and Commercial Court of Copenhagen stated the fact that all four types of prams, despite of the violation of procedural rules, had suffered from material safety defects. Furthermore, the court stated that the decision made by the Safety Technology Authority (*Sikkerhedsstyrelsen*), in so far as two of the four types of prams were concerned, would have been the same even if the business enterprise had been heard before the decision was made. On the other hand, the court considered it most likely that the business enterprise, had it been given the opportunity to be heard, would have remedied the safety defects related to the other two types of prams and thereby avoided the order of recall. Therefore, the Safety Technology Authority was liable to pay damages covering loss of sales and expenses in connection with the recall of prams sold to consumers. The case concerning damages is reported in *Ugeskrift for Retsvæsen* 2007 p. 1603.

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<sup>9</sup> *Forvaltningsloven*, consolidated act no. 1365/2007, as amended latest by act no. 503/2009.

**6. 3.** The Access to Documents Act<sup>10</sup> gives any person a general right to demand the documents on an administrative file. Administrative authorities must respond as soon as possible to such requests and, if this takes longer than ten days, they must state the reasons why the response is delayed and when an answer is expected. - 10 DKK (app. 1,35 euro) must be paid for the first page and 1 DKK for each of the following pages.<sup>11</sup>

The general right of access to "documents" not only applies to case material on paper but also electronic files, tapes, drawings etc. provided that the material contains information concerning the case in question. In order to activate the act the person requesting access must identify the case or the documents wanted for examination.<sup>12</sup>

The Access to Documents Act contains several exceptions from the general access to the case files of the public administration. The main exceptions concern internal documents (in the interest of the administrative decision making process, e.g. recommendations from civil servants to politicians) and different kinds of sensitive information concerning individuals' health etc., including business secrets, as defined in § 12,(2) of the Act:

*"data concerning technical devices or methods or concerning operating conditions or business conditions and the like in so far as it is of major importance to the person or business in question that access to the data is denied."*

The exemption only applies if access to the data according to a concrete assessment is deemed to cause an immediate risk that significant economic loss will be inflicted on the enterprise in question, typically because of the competition.

Furthermore, according to The Product Safety Act (*lov om produktsikkerhed*)<sup>13</sup> § 21,(2), the Access to Documents Act (*lov om offentlighed i forvaltningen*) does not apply to data collected under the Product Safety Act for public control purposes or concerning the quality certification of business enterprises.

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<sup>10</sup> *Lov om offentlighed i forvaltningen*, Act no. 572/1985, as amended latest by act no. 433/2009.

<sup>11</sup> Executive Order no. 647/1986.

<sup>12</sup> Cf. § 4,3 of the Access to Documents Act (*lov om offentlighed i forvaltningen*).

<sup>13</sup> See 6.1.2 above.

A request for access to case material according to the Access to Documents Act (*lov om offentlighed i forvaltningen*) is to be presented to the administrative authority that has the power to decide the case. If the request is sent to the wrong administrative authority the authority in question is obliged to forward the request to the relevant authority.<sup>14</sup> The administrative authority dealing with the access question must respond as soon as possible to a request and, if this takes more than ten days, the authority must state the reasons why the response is delayed and when an answer is expected.

There are no formal requirements to the request. It may be in writing or oral.

The person or business enterprise dealt with in the documents is not considered a party to the case concerning access to the documents and the administrative authority dealing with the case on access has no general obligation to hear the person or business enterprise in question before it decides on the access question. Only in special cases, e.g. when it is not clear whether one of the exceptions from the general right to access applies, the authority has to involve the person or business enterprise dealt with in the documents before a decision concerning access is made.<sup>15</sup>

The request may be granted by supplying copies of the documents<sup>16</sup> or, if the number of documents requested by an applicant is very big etc., by giving the applicant opportunity to see the documents etc. on the premises.<sup>17</sup> The fact that a many persons file identical requests is of no relevance to the question of access to the documents.

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<sup>14</sup> Cf. § 7,2 of the Administrative Procedures Act (*Forvaltningsloven*).

<sup>15</sup> This has been stated in several opinions by the Parliamentary Ombudsman (*Folketingets Ombudsmand*), see e.g. Report 1992.72 (*FOB 1992.72*) and Report 1994.340 (*FOB 1994.340*).

<sup>16</sup> According to Executive Order no. 647/1986. 10 DKK (app. 1,35 euro) must be paid for the first page and 1 DKK for each of the following pages. If the total amount does not exceed 25 DKK nothing is paid.

<sup>17</sup> Cf. § 16,1 of the Access to Documents Act (*lov om offentlighed i forvaltningen*).

A white paper published in late 2009 contains a proposal for a general revision of the Access to Documents Act.<sup>18</sup>

**6.4.** A general contract law principle of loyalty in contractual relations in the form of a general duty to disclose material facts has been developed by the courts. The principle applies generally and its violation may trigger civil law remedies (damages, rescission of contract etc). It was embodied (in 1980) in § 76,(1),(3) of the Sale of Goods Act.<sup>19</sup>

*"§ 76 The goods are not in conformity with the contract if....*

*(3) the seller has failed to give the buyer notice of circumstances that influenced the buyer's assessment of the goods and which were known or ought to have been known by the seller;"*

**6.5.** The Consumer Complaints Act<sup>20</sup> authorizes the Minister for Economic and Business Affairs to lay down rules on the public disclosure of decisions made by complaints boards, and that such

public announcements may be made by electronic means. Administrative rules to this effect are found in Executive Order on Consumer Complaints<sup>21</sup> §§ 20-21:

*"§ 20. The Danish Consumer Agency may publicize information and statistics regarding various circumstances in the consumer complaints area, including decisions made by the Board. Publicizing may be made by electronic means with specification of the names of traders, their business addresses, etc.*

*§ 21.-(1) The Danish Consumer Agency electronically publicizes a list of traders who fail to abide by the decisions of the Consumer Complaint Board. (2) Publicizing pursuant to sub-section (1) may take place when: 1) the trader fails to abide by the decision within the normal time limit of 30 days stated in section 14(7); and 2) the secretariat has expressly informed the trader in writing after the expiry of the time limit referred to in subpara 1 to the effect that failure to abide by the decision will result in its being publicized pursuant to sub-section (1) if the trader does not*

<sup>18</sup> Report no. 1510/2009 on the Access to Documents Act. (*Betænkning 1510/2009 om offentlighedsloven*) published by the Danish Ministry of Justice, available at [www.jm.dk](http://www.jm.dk). A summary (in English) of the white paper is found in chapter 28 of the white paper and is attached as an annex to this report.

<sup>19</sup> *Købeloven*, consolidated act no. 237/2003, as amended by act no. 523/2007.

<sup>20</sup> *Lov om forbrugerklager*, Act no. 456/2003, as amended latest by act no. 517/2009.

<sup>21</sup> *Bekendtgørelse om forbrugerklager* no. 598/2006.

*abide by the decision within a time limit of 14 days from the issuing of the information. (3) If a decision has been brought before the court, publicizing pursuant to sub-section (1) cannot take place before the court has made a final decision. (4) If the name of a trader has been publicized, and the trader subsequently abides by the decision, the information about the trader shall be deleted from the list. (5) Information about a case cannot appear on the list for a period of more than one year."*

Warning and enforcement considerations are the main reasons for the rules on publicizing the result in certain decisions made by the Consumer Complaints Board. Compare 7.1 below concerning public disclosure of food inspection reports.

## **7. Specific Sector Rules.**

**7.1.** The Foodstuffs Act<sup>22</sup> § 56 authorizes the Minister of Food, Agriculture and Fisheries to issue rules on public disclosure of results of inspections of shops, restaurants and other enterprises,

mentioned by name, selling foods and beverages to the public, including the nature and extent of sanctions imposed. The shops, restaurants etc. can be mentioned by name and information on sanctions imposed can be disclosed irrespective of any appeal taken against the sanction. The minister is also authorized to issue rules ordering the way in which the shops, restaurants etc. must disclose inspection results themselves.

Rules issued under § 56 of the Foodstuffs Act (*fødevareloven*) are found in Executive Order on Food Inspection and Disclosure of Inspection Results.<sup>23</sup>

All shops, restaurants etc. are inspected by the regional veterinary and food authorities on a regular basis, typically 1-3 times a year depending on a risk evaluation made once a year. The inspections are unannounced. They cover relevant regulations concerning hygiene and other areas such as food contamination and labelling. At each inspection a number of control areas are checked. The inspection results are stated in brief inspection reports and summarized in one of 5 categories by smi-

<sup>22</sup> *Fødevareloven*, Act no.526/2005, as amended latest by act no. 488/2009.

<sup>23</sup> *Bekendtgørelse om fødevarekontrol og offentliggørelse af kontrolresultater* no. 153/2009.

ley symbols. The smiley given by the inspector equals the result of the worst area. The smileys appear at the top of the official food inspection reports.<sup>24</sup>

#### Inspection reports (positive and negative)

- are to be posted by the enterprise at the entrance to all supermarkets, at groceries, bakeries, butchers, greengrocers, in kiosks, restaurants, pizzerias, canteens, hospital kitchens and elderly homes. After an amendment in 2008<sup>25</sup> the smiley report has to be displayed so consumers can read it from the outside before deciding to enter a shop or a restaurant.

- are to be disclosed by the enterprise on the homepage of the shop, restaurant etc. provided it has any (introduced in 2008)<sup>26</sup> – in the preparatory works of the amendment act it is estimated that less than half of the enterprises inspected (a total of approximately 60.000) have their own homepage; the information requirement can be met (in 5 minutes) by creating a permanent link to the website run by the Veterinary and Food Administration (see below)

- are accessible for the general public on a website run by the Danish Veterinary and Food Administration<sup>27</sup>, under the name of the shop, restaurant etc. in question.

The specific rules on public disclosure of food inspection results and smiley-reports are rather new<sup>28</sup> and can be seen as a part of the legislative response to various "scandals" in the sector (salmonella, old meat etc.) leading to a reorganisation of the regulatory scheme emphasizing that consumers should be able to base their decisions on relevant and updated information gathered by the food authorities and placing greater emphasis on more efficient enforcement methods giving business enterprises in the sector an extra incentive to comply with food regulation rules.

<sup>24</sup> See the Annex (on a separate file) for an example (in English) of an inspection report to be published at the entrance and on the internet.

<sup>25</sup> Amendment act no. 110/2008.

<sup>26</sup> By amendment act 110/2008.

<sup>27</sup> At [www.findsmiley.dk](http://www.findsmiley.dk).

<sup>28</sup> Introduced by act no. 279/2001 amending the former Foodstuffs Act.

The pros and cons concerning the scheme of public disclosure of smiley-reports were (briefly) discussed in the preparatory works of the introducing the scheme.<sup>29</sup>

The main objections voiced concerned the dangers of violating the right to be heard and the dangers of public disclosure of inspection results irrespective of the right to complain against the inspection results and even irrespective of an undecided complaint actually made.<sup>30</sup>

The objections were countered with reference to the fact that it is not possible to establish a system offering consumers updated information to be used before shopping in a store or going to a

restaurant if the information given may date for instance six months back. Furthermore, reference was made to the following facts

- *that* the business enterprise during the inspection has the opportunity to comment on the observations made by the inspector,
- *that* the business enterprise can send its comments to the regional veterinary and food authorities and have them (max. 3000 characters) publicized on the findsmiley website,<sup>31</sup>

- *that* the business enterprise has a right to order a new extraordinary inspection (paid by the enterprise) to take place in no later than two months.<sup>32</sup>

- *and that* the public disclosure consists of the latest four inspection reports thereby reducing the risk that one isolated negative report dominates the information disclosed at a given point of time.

The Veterinary and Food Administration (*Fødevarestyrelsen*) has published data concerning the smiley scheme,<sup>33</sup> showing that 83% of the enterprises received the happy smile in 2008, 13% the small smile, 1% received the straight face and 3% the sour smiley. The smiley-scheme is one of the best-known public schemes in Denmark.

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<sup>29</sup> See footnote 23. The preparatory works (only in Danish) of the amendment act are found at [http://www.folketinget.dk/Samling/20001/lovforslag\\_oversigtsformat/L133.htm](http://www.folketinget.dk/Samling/20001/lovforslag_oversigtsformat/L133.htm).

<sup>30</sup> See text above under 6.5 concerning the public disclosure of decisions made by the Consumer Complaints Board.

<sup>31</sup> Cf. Executive Order no. 153/2009 § 11,(3).

<sup>32</sup> Cf. Executive Order no. 153/2009 § 6.

<sup>33</sup> See [www.findsmiley.dk](http://www.findsmiley.dk).

A survey carried out by the Nielsen research company in November 2007<sup>34</sup> shows that 97% of the consumers agree that the scheme is "a good or a very good idea". Two out of three consumers say that they would reject a restaurant with a bad smiley. And 59% state that they actually have chosen to dine somewhere else because of the face on the smiley. 88% of the enterprises agree that the scheme is "a good or very good idea". 8 out of 10 owners or managers state that they have had discussions with their staff, and many have improved their routines and standards, to secure a happy smiley.

The preparatory works of the act introducing the smiley scheme in 2001<sup>35</sup> estimated that the costs of establishing the system would amount to approximately 7,5 mill. DKK, i.e. 1 million euro, (2001 prices) consisting mainly of IT-development costs and that the scheme would increase the annual operating costs of the food authorities with approximately 1,4 million DKK, i.e. around 186.000 euro, (2001 prices).

**7.2.** The Organic Food Act<sup>36</sup> contains, in § 17 a provision identical to § 56 of the Foodstuffs Act (*fødevareloven*)<sup>37</sup>. Executive Order on Food Inspection and Disclosure of Inspection Results<sup>38</sup> also applies to retail sale of organic food. Organic farmers and other primary producers are subjects to rather strict administrative control by Danish Plant Directorate (*Plantedirektoratet*), under the Ministry of Food, Agriculture and Fisheries, controlling i.a. that the conditions for using the inspection logo ("*Ø-mærket*") are met.

**7.3.** The Act on Complaints and Damages within the Health System<sup>39</sup> § 17 authorizes the Minister for Health and Prevention to issue rules on public disclosure of decisions made by the Patients' Complaints Board and other complaints boards etc. concerning health persons, mentioned by name, being criticized for severe or repeated negligence in connection with cosmetic treatment or dentistry and of sanctions imposed on health persons by the health authorities. Rules issued under this

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<sup>34</sup> See footnote 28.

<sup>35</sup> See footnotes 28 and 29.

<sup>36</sup> *Lov om økologi*, consolidated act no. 196/2009.

<sup>37</sup> See text above under 7.1.

<sup>38</sup> *Bekendtgørelse* no. 153/2009, see text above under 7.1.

<sup>39</sup> *Lov om klage- og erstatningsadgang inden for sundhedsvæsenet*, consolidated act no. 24/2009.

provision are found in Executive Order on Publicizing decisions in Complaint and Supervision Cases with in the Health System.<sup>40</sup> The decisions are made public on the Danish Health Authority's homepage, without naming institutions etc, the patient or other persons, but the health person in question. Decisions in complaint cases are removed after a period of two years.

Warning and enforcement considerations are the main reasons for the rules on publicizing the result in certain decisions concerning health persons.

## 8. Assessment

In my opinion the general level of consumer protection in Denmark is rather high.

I consider the combined information efforts made by legislation and by state agencies and non governmental consumer organisations successful in the sense that they, generally speaking, succeed in making information concerning goods and services rather easily accessible to consumers who are interested to spend the time necessary too seek information. When evaluating the accessibility I take into account, inter alia, that 86% of the Danish population (between the age of 16 and 74) according to Statistics Denmark (*Danmarks Statistik*) have access to the internet from their home.

Especially the food sector smiley-scheme seems to have succeeded not only in establishing a system containing relevant/up to date information on virtually all enterprises selling food to consumers but also in making that information very easy to access for consumers.<sup>41</sup>

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Annexes on separate files:


- Sample of Inspection Report (in English) to be made public at the entrance and on the internet.
- Chapter 28 of Report no. 1510/2009, summary in English of white paper on the the Access to Documents Act.

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<sup>40</sup> *Bekendtgørelse om offentliggørelse af afgørelser i klage- og tilsynssager på sundhedsområdet* no. 1367/2005.


<sup>41</sup> See the data mentioned in the text above under 7.1 from a survey concerning the smiley-scheme.

## Anlage I :



Danish Veterinary and Food Administration

# Inspection Report



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Establishment Restaurant Testy

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Address 117, Nørrebrogade

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Postal Code/City 2200, Copenhagen N

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CVR-No. 87654321

This inspection, date

02-01-2008



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Inspected	Result
Hygiene: Handling of food	▶
Cleaning	▶
Maintenance	1
Own-check system	1
Publication of Inspection Report	1
Hygiene education	▶
Labelling and information	1
Approvals etc.	▶
Special labelling and ID requirements	▶
Food standards	▶
Additives etc.	▶
Chemical contaminants	▶
Packaging etc.	▶
Other	▶

Not all rules are inspected each time

Result	Explanation
1	No remarks
2	Enjoining order
3	Injunction or prohibitory order
4	Administrative penalties, reported to the police or approval withdrawn
Poorest result determines the smiley	
<b>Elite</b>	No remarks on the latest 4 reports and within the latest 12 months

**Previous inspections**

Date	Result
17-10-2007	
24-06-2007	
11-12-2006	

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**Type of inspection**

<input checked="" type="checkbox"/> Ordinary inspection	<input type="checkbox"/> Control campaign
<input type="checkbox"/> Extra inspection	<input type="checkbox"/> Approvals etc.
<input type="checkbox"/> Other inspection	<input type="checkbox"/> On sampling

**Comments from the official inspector**

This inspection has reviewed:

Hygiene: Cold storage, reception of goods, maintenance of freezing room: No remarks.

Own-check system: Own-checks for December reviewed: No remarks.


Publication of Inspection Report: Placement of Report in premises and website reviewed: No remarks.

Labelling and information: Inspected that labelling on delicatessen is in Danish and not sold after "Best before" date: No remarks.


Issued form on inspections in enterprises.

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**Regional Veterinary and Food Administration**

Given to 

**1 hour**  
Kontrolens varighed

Signature of the official inspector 

More on food control and access to complain at [www.findsmiley.dk](http://www.findsmiley.dk)

## **Anhang 4: Länderbericht Frankreich**

### **Teil A. Grundfragen**

#### **I. Systematik des Verbraucherinformationsrechts**

##### **1. Welche Bedeutung kommt der Verbraucherinformation im System des Verbraucherschutzes Ihres Landes zu? Welche Rolle spielt sie gegenüber dem Verbraucherschutz durch Präventivkontrolle oder Zulassungsbeschränkungen (z.B. Gesundheitsnormen oder Importstandards)?**

Die Verbraucherinformation spielt im System des Verbraucherschutzes in Frankreich eine entscheidende Rolle. Dies wird bereits durch die Systematik des Gesetzes deutlich, in dem das allgemeine Informationsrecht als erste Vorschrift des *Code de la consommation* in Art. L 111-1 festgeschrieben ist und das gesamte erste Buch des Code mit dem Titel Informationsrechte überschrieben ist. In weiteren Teilen des Gesetzes wird die Information der Verbraucher häufig als gesetzgeberisches Ziel genannt.

Dabei schließen sich Präventivkontrolle und Verbraucherinformation nicht gegenseitig aus und können zumindest im französischen System auch nicht klar abgegrenzt werden. Die Präventivkontrolle ist in den Art. L 221-1 ff Ccons geregelt und in diesem Kapitel findet sich auch in Art. L 221-1-2 die Informationspflicht der Hersteller über die Produktsicherheit. Die Informationspflicht ist im französischen System Teil der Präventivkontrolle.

Im übrigen gilt in Frankreich weitgehend das sog. Vorsichtsprinzip<sup>42</sup>, nach dem das Inverkehrbringen von Produkten, von denen man das Risiko in Bezug auf Langzeitauswirkungen nicht einschätzen kann, nicht erlaubt werden darf.

##### **2. Auf welche Anspruchsgrundlagen können sich Verbraucher stützen, um Informationen über Herstellungsprozesse oder Gesundheitsgefahren von Produkten, Werk- oder Dienstleistungen zu erhalten?**

Die beiden grundlegenden Anspruchsgrundlagen sind

<sup>42</sup> « *principe de précaution* », siehe Guy Raymond, *Droit de la consommation*, 2008, S. 56 ; Yves Picod, Hélène Davo, *Droit de la consommation*, 2005, Nr.322, S.195 ; Z.B. Conseil national d'alimentation, Gutachten Nr. 30 vom 20. Sept. 2001 für Lebensmittel, BOCC v. 21. Jan.2002, S.44

- Die allgemeine Auskunftspflicht der Verkäufer oder Anbieter einer Dienstleistung gegenüber Verbrauchern nach Art L 111-1 Ccons ;
- Das spezielle Auskunftsrecht der Verbraucher direkt gegen den Hersteller betreffend die Sicherheit von Produkten nach Art L 221-1-2 Ccons.

Diese beiden Vorschriften sind allerdings als Verpflichtung der Unternehmen formuliert, den Verbraucher zu informieren. Inwieweit dieser Verpflichtung ein einklagbarer konkreter Auskunftsanspruch über Produktsicherheit des individuellen Verbrauchers gegenüber dem einzelnen Hersteller und Händler gegenübersteht bleibt fraglich. In der Rechtsprechung sind Klagen von einzelnen Verbrauchern gegenüber Herstellern und Händlern auf Erteilung bestimmter Informationen bisher nicht bekannt geworden. Es gibt allerdings Fälle, in denen das Informationsrecht der Verbraucher inzident bei Schadensersatzklagen wegen unterlassener Information von der Rechtsprechung behandelt wird (siehe unten Teil A I 2a S.12 f.).

Diese Zweiteilung des Auskunftsrechts entspricht der Unterscheidung im französischen Vertragsrecht zwischen der Vertragsmäßigkeit der Produkte<sup>43</sup> und der Mangelhaftigkeit<sup>44</sup> der Produkte. Das allgemeine Auskunftsrecht des Art 111-1 Ccons sowie auch die vorvertraglichen Auskunftspflichten entsprechen der Anforderung der Vertragsmäßigkeit der Produkte, wogegen das spezielle Auskunftsrecht zu der Produktsicherheit in den Bereich der Mangelhaftigkeit der Produkte fällt, da ein Sicherheitsdefekt oder Risiko als Mangel anzusehen ist.

Nach Art L 221-1-4 Ccons. besteht dieses Auskunftsrecht zur Produktsicherheit nicht nur gegenüber Herstellern sondern auch gegenüber den verschiedenen Händlern der Vertriebskette bezüglich der Informationen, die diese in ihrer Eigenschaft als Händler erfahren.

Nach Art L 221-3 Ccons können Unternehmen auch weitere Informationspflichten zugunsten von Verbrauchern durch Verordnung (Dekret) auferlegt werden, wenn für ein Produkt oder eine Dienstleistung ein Sicherheitsrisiko festgestellt wurde (siehe unten Teil B V 1 S.25).

Neben diesen privatrechtlichen Auskunftsansprüchen, hat jeder Bürger in Frankreich freien Zugang zu Verwaltungsunterlagen nach dem Gesetz NR. 78-753 vom

<sup>43</sup> « *conformité des produits* », Art 1604 Cciv.

<sup>44</sup> „*Garantie de vices cachés*“, Art 1641 Cciv.

17. Juli 1978<sup>45</sup> (im folgenden *Gesetz über freien Zugang zu Verwaltungsunterlagen*). Es handelt sich hierbei jedoch um ein verwaltungsrechtliches Akteneinsichtsrecht und kein Recht auf Informationserteilung in weiterem Sinn.

**3. Sind diese Regelungen zwingender Natur oder kann der Verbraucher auf Informationsansprüche (pauschal) verzichten?**

Die Regelungen sind zwingender Natur.

**4. Wurden die oder einzelne Informationsansprüche von der Rechtsprechung entwickelt? Wenn ja: Sind Sie zwischenzeitlich kodifiziert?**

Ja, die Informationsansprüche wurden zunächst von der Rechtsprechung entwickelt und durch die Verordnung vom 9. Juli 2004 in den Code de la consommation aufgenommen.<sup>46</sup>

**5. Stehen die in Frage A.I.2. und A.I.4. beschriebenen Informationsansprüche zueinander in einem Subsidiaritätsverhältnis oder gelten sie konkurrierend nebeneinander („Anspruchsgrundlagenkonkurrenz“)? Sind sie (heute) aufeinander abgestimmt, eventuell gar in einer einheitlichen Kodifikation zusammengefasst?**

Der Informationsanspruch über die Produktsicherheit in Art. L 221-1-2 ist eine spezielle Ausformung der allgemeinen Informationsverpflichtung des Unternehmers nach Art L. 111-1. Art. L 221-1-2 ist als speziellere Vorschrift für alle Fälle, in denen die Sicherheit der Verbraucher betroffen ist, vorrangig.

Die privatrechtlichen und verwaltungsrechtlichen Ansprüche bestehen gleichberechtigt nebeneinander, da sie verschiedene Adressaten und einen unterschiedlichen Inhalt haben (zum einen Informationsrecht und zum anderen Akteneinsichtsrecht).

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<sup>45</sup> *Loi n° 78-753 du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal*

<sup>46</sup> Cass 2e civ., 9. Dez. 1975: JCP G 1977, II, 18588;

Cass 1re civ., 10. Juni 1980 : Gaz. Pal. 1980, 2, Somm., S.569 ;

Cass Com., 25. Nov. 1963, Soc ardennaise de peintures c/ Bonin : RTD civ. 1964, S.574.

**6. Sofern es in Ihrem Land gesetzliche Regelungen der Verbraucherinformation gibt: Sind sie primär dem Zivil-, dem öffentlichen oder dem Strafrecht zuzuordnen? Weshalb hat man sich für diese Regelungsoption entschieden?**

Die speziellen verbraucherrechtlichen Auskunftsansprüche nach den *Code de la consommation* sind dem Zivilrecht zuzuordnen, weil die Ansprüche sich gegen den Hersteller oder andere Mitglieder der Vertriebskette richten und nach französischem Recht sämtliche Ansprüche innerhalb der Vertriebskette vertraglicher Natur qualifiziert werden, obwohl zwischen Verbraucher und Hersteller kein direkter Vertrag besteht.

Akteneinsichtsansprüche nach dem Gesetz über freien Zugang zu Verwaltungsunterlagen sind verwaltungsrechtlicher Natur.

**7. Soweit die Regelungen zur Verbraucherinformation dem Zivilrecht zuzuordnen sind, handelt es sich primär um vertrags- oder deliktsrechtliche Normen?**

Es handelt sich primär um vertragsrechtliche Regelungen. Die Verbraucherinformationspflicht ist ein Teil der Sicherheitspflicht und diese ist eine vertragliche Nebenpflicht des Verkäufers. Daher wird sie als vertragliche Regelung eingestuft, obwohl es sich im eigentlichen Sinne nicht um eine Pflicht handelt, die ausschließlich gegenüber dem Vertragspartner gilt, sondern vielmehr um eine allgemeine Pflicht, Dritte vor Schäden zu schützen<sup>47</sup>. Diese Einordnung ist jedoch strittig. Es gibt in der höchstrichterlichen Rechtsprechung auch Entscheidungen, in denen eine deliktische Haftung nach den Grundsätzen der Produkthaftung bei Verletzung der Informationspflicht angenommen wurde<sup>48</sup>.

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<sup>47</sup> Yves Picod, H el ene Davo, *Droit de la consommation*, 2005, Nr.318, 319, S.191, 192

<sup>48</sup> Cass 1<sup>re</sup> civ., 1. M arz 2005, Bull.Civ.I, Nr.109

**8. Welche Möglichkeiten haben Verbraucher über die in Fragen A.I.2 und A.I.4 bezeichneten Informationsansprüche hinaus von Behörden oder Privatpersonen Informationen über die Qualität von Produkten, Werk- und Dienstleistungen sowie über Rechtsverstöße, Herstellungsprozesse oder Gesundheitsgefahren zu erhalten?**

Es gibt in Frankreich zahlreiche Behörden, die sich mit dem Verbraucherschutz und somit auch mit der Verbraucherinformation befassen. An der Informationsverbreitung sind außerdem auch die Verbraucherschutzvereinigungen beteiligt, die aber eine geringere Rolle als in Deutschland spielen.

Es bestehen folgende Behörden, die auch durch Verbraucher oder Verbrauchervereinigungen mit Informationsverlangen angerufen werden können. Teilweise können sich die Verbraucher individuell mit Anfragen an die Behörden richten und teilweise können die Informationssuchen nur von den Verbrauchervereinigungen ausgehen.

**Die Agence française de sécurité sanitaire des produits de santé ou des aliments (AFSSA)** (Art L 1326-6 s. Code de la santé public)<sup>49</sup>. Diese Behörde, die für die Sicherheit von Lebensmitteln und Gesundheitsprodukten zuständig ist, diene als Modell für die Gründung einer entsprechenden europäischen Behörde. Sie schätzt die sanitären und ernährungsbedingten Risiken ein, die Nahrungsmittel für Menschen und Tiere aufweisen können.

Verbrauchervereinigungen können die Agence nach Art. D. 1323-30 *Code de santé publique* anrufen, um ein Gutachten über sanitäre oder Lebensmittelrisiken zu erhalten.

Die Agence ist Konsultativorgan für den *Conseil d'Etat*, der sie nach Art. L221-10 Ccons anrufen muss, bevor er eine Verfügung nach Art L 221-3 Ccons bezüglich einer von einem Lebensmittelprodukt ausgehenden Gefahr für Verbraucher erlässt.

**L'institut national d'origine et de la qualité (INAO)**<sup>50</sup> nimmt an der Informationsverbreitung in dem Bereich teil, in dem es die freiwilligen Kontrollsysteme und Kennzeichnungen verwaltet und für die Vergabe und Kontrolle von Qualitätskennzeichen und die Zertifizierung von Produkten und Dienstleistungen zuständig ist (siehe unten Frage III1).

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<sup>49</sup> [www.afssps.fr](http://www.afssps.fr)

<sup>50</sup> [www.inao.gouv.fr](http://www.inao.gouv.fr)

Die ***Commission de la sécurité des consommateurs*** (CSC)<sup>51</sup> spielt im Bereich der Produktsicherheit eine wichtige Rolle. Sie ist nach Art. L 224-1 und Art. R 224-1 Ccons zusammengesetzt aus Mitgliedern des *Conseil d'Etat*, von Richtern der Verwaltungs- und ordentlichen Gerichte, Vertretern der Verbrauchervereine und Berufsstandsorganisationen, sowie sechs Sachverständigen, die von dem Minister für Verbraucherschutz ernannt werden und des weiteren mit einem Regierungsvertreter. Die Kommission erstellt und veröffentlicht Gutachten und kann Maßnahmen zur Verbesserung der Produktsicherheit vorschlagen.

Die Kommission kann von jedem einzelnen Verbraucher durch ein einfaches Schreiben, in dem die Fakten dargelegt sind, angerufen werden. Die Kommission kann dann ein Untersuchungsverfahren einleiten, in welchem sie sich sämtliche Informationen und Dokumente, die ihr erforderlich erscheinen, vorlegen lässt. Ihrem Informationsersuchen kann durch die betroffenen Unternehmen die Tatsache, dass es sich hierbei um ein Geschäfts- oder Fabrikationsgeheimnis handelt, nicht entgegengehalten werden. Sie kann auch Sachverständigengutachten zu der betreffenden Frage anfordern.

Die Kommission hat hierfür eigene weitreichende Untersuchungsbefugnisse und kann unter anderem alle Personen anhören, die Informationen für die Untersuchung liefern können.

Die Kommission hat aber keinerlei Entscheidungskompetenz. Sie kann nur beratend wirken. Auf der Grundlage ihrer Gutachten können aber die zuständigen Verwaltungsbehörden die erforderlichen Maßnahmen treffen. Daher sind die Gutachten der Kommission auch nicht mit Rechtsmitteln angreifbar.

Die Gerichte können die Kommission auch um ein Gutachten im Rahmen laufender Gerichtsverfahren anrufen. Ebenfalls sind ihre Gutachten für den Erlass von Verordnungen erforderlich, die den Verkauf bestimmter Produkte, die eine Gefahr für die Sicherheit aufweisen, verbieten oder reglementieren sollen.

Die Gutachten der Kommission werden dem Antragsteller zur Kenntnis gebracht. Diejenigen die auf Antrag von Verbrauchern erfolgen, werden dem Verbraucherschutzministerium, dem Antragsteller und interessierten Unternehmen zugestellt.

Die Kommission kann nach Beendigung des Verfahrens die Öffentlichkeit von dem Gutachten informieren, indem es das vollständige Gutachten oder nur die Informati-

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<sup>51</sup> [www.securiteconso.org](http://www.securiteconso.org)

onen, die ihr im Interesse der Bürger erforderlich erscheinen, der Öffentlichkeit zugänglich macht.

Insbesondere veröffentlicht sie auch einen Jahresbericht über die in dem betreffenden Jahr erstellten Gutachten. Sie kann auch Kommunikués oder Dokumente, die die Öffentlichkeit vor Gefahren warnen soll, verbreiten.

Außerdem wurde ein **Warnsystem** für Verbraucher eingerichtet. Dieses Warnsystem ist aber im Prinzip anonym, d.h. es wird nur die Produktart, aber keine Unternehmen oder Marken genannt. Dies kann nur durch eine Warnung aufgrund einer Verwaltungsentscheidung nach Art L 221-5 Abs 1 Ccons erfolgen oder durch die Unternehmen selbst, die dazu aufgrund der allgemeinen Sicherheitsverpflichtung nach Art 221-1 Ccons verpflichtet sind.

Das Verfahren ist vertraulich und die Mitglieder der Kommission stehen unter Schweigepflicht.

Das « **Institut national de la consommation** » (INC)<sup>52</sup> ist eine Körperschaft öffentlichen Rechts mit weitreichender Autonomie, die unter anderem die Aufgabe hat, an der Aufklärung der Verbraucher mitzuwirken. Sie arbeitet eng mit den Verbraucherschutzvereinigungen zusammen (siehe unten Frage II3).

Der „**Conseil national de la consommation** » (CNC)<sup>53</sup> Art D 511-1 bis 511-17 Ccons. ist ausschließlich Konsultativorgan. Auch er verfügt über eigene Untersuchungsbefugnisse. Er kann sich sämtliche Dokumente von Unternehmen vorlegen lassen oder diejenigen einsehen, die er für seine Untersuchungen für erforderlich hält, ohne dass ihm die Einsicht aus Gründen des Schutzes von Geschäfts- oder Betriebsgeheimnissen verweigert werden darf. Er kann Personen anhören und Sachverständigengutachten anfordern.

Die « **Direction générale de la concurrence, de la consommation et de la répression des fraudes** » – DGCCRF ist eine hierarchische vom Wirtschaftsministerium abhängige Verwaltungsbehörde, die neben der Generaldirektion in Paris in jedem französischen Departement eine Außenstelle hat. Sie ist damit nächster Ansprechpartner der Verbraucher für alle Fragen, die die Qualität und Sicherheit von Produkten und die Einhaltung der Verbraucherschutzvorschriften betreffen.

Die Direktion ist nicht mit der Weitergabe von Informationen an die Verbraucher beschäftigt, sondern vielmehr mit der Tatsachenerfassung bezüglich aller Verstöße

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<sup>52</sup> [www.conso.net](http://www.conso.net)

<sup>53</sup> [www.minefi.gouv.fr/conseilnationalconsommation/](http://www.minefi.gouv.fr/conseilnationalconsommation/)

gegen verbraucherschützende Gesetze. Sie besitzt hierfür die erforderlichen Untersuchungsbefugnisse, finanziellen Mittel und Beamten, um in größeren Umfang Untersuchungen in Unternehmen durchzuführen.

**9. Werden die in Frage A.I.8 beschriebenen Stellen selbst staatlich gefördert oder erhalten sie für die konkrete Information(-Beschaffung) eine staatliche Vergütung oder Aufwandsentschädigung?**

Es handelt sich bei den beschriebenen Institutionen ausschließlich um staatliche Behörden, die entweder als unabhängige Verwaltungsbehörden ausgestaltet sind oder sich aus staatlichen Mitgliedern, Verbrauchervertretern und Wirtschaftsvertretern in Kommissionen zusammensetzen, aber auch staatlich finanziert sind.

Nur das INC ist nicht vollständig staatlich finanziert, sondern finanziert sich teilweise selbst durch den Verkauf seiner Veröffentlichungen („100 millions de consommateurs“) und tritt hiermit in Wettbewerb zu den Verbraucherschutzvereinen. Es bekommt außerdem punktuelle und projektgebundene staatliche Subventionen.

**10. Werden die in Frage A.I.8 beschriebenen Stellen reguliert oder werden die von ihnen herausgegebenen Informationen (stichprobenartig) vom Staat kontrolliert?**

Da es sich größtenteils um staatliche Behörden handelt, werden die Informationen durch die Behörden selbst gesammelt. Wichtigste Rolle bei der Informationssammlung kommt dabei der DGCCRF zu, die dezentralisiert in jedem französischen Departement vertreten ist (mit 97 Außenstellen), weitreichende Untersuchungsbefugnisse hat und zum Verwaltungsunterbau des Wirtschaftsministeriums gehört. Es handelt sich hierbei um eine Art Wettbewerbspolizei, da ihre Zuständigkeit über den Verbraucherschutz hinaus auch im Bereich des unlauteren Wettbewerbs und des Kartellrechtes liegt.

## II. Historische Entwicklung

### 1. Wann, in welchem Kontext und aus welchem Anlass sind die in Fragen A.I.2 bis A.I.10 bezeichneten Informationsansprüche und Verbraucherinformationsinstitutionen geschaffen worden?

Die grundsätzliche Informationspflicht des Verkäufers ergibt sich zunächst aus Art 1602 Cciv.. Dabei handelt es sich jedoch nicht um eine spezielle Pflicht gegenüber Verbrauchern, sondern um die allgemeine Informationspflicht jedes Verkäufers gegenüber seinem Vertragspartner ihn über seine vertraglichen Pflichten aufzuklären. Die allgemeine Informationspflicht gegenüber Verbrauchern wurde dann erst durch Gesetz vom 18. Jan. 1992 eingeführt und durch Gesetz Nr. 93-949 vom 26. Juli 1993 in Art L 111-1 Ccons mit der Einführung des *Code de la consommation* in diesen aufgenommen.

Die spezielle Informationspflicht nach Art L 221-1-2 Ccons bezüglich der Produktsicherheit wurde dagegen durch Verordnung Nr. 2004-670 vom 9. Juli 2004 in den *Code de la consommation* eingefügt.

Das Gesetz über freien Zugang zu Verwaltungsunterlagen datiert bereits vom 17. Juli 1978. Es wurde daher außerhalb jedes Kontextes der Anpassung an Gemeinschaftsrecht und auch außerhalb der Aspekte des Verbraucherschutzes erlassen. Es hatte vielmehr das Ziel in den traditionellen Gebieten des Verwaltungsrechts Transparenz des Verwaltungshandelns zu schaffen. Dieses Gesetz wurde seit dem mehrfach geändert und reformiert. Die letzte Änderung erfolgte durch Verordnung vom 29. April 2009<sup>54</sup>. Es blieb jedoch trotz der verschiedenen Anpassungen immer in dem Zusammenhang des allgemeinen Einsichtsrechts in Verwaltungsunterlagen, um die Beziehungen zwischen der Verwaltung und der Öffentlichkeit zu verbessern und die Transparenz des Verwaltungshandelns zu garantieren.

### 2. Lassen sich in Ihrem Land bestimmte Wellen in der Entstehung von Informationsrechten ausmachen? Wurden Sie gemeinsam in einem zeitlichen/sachlichen Kontext erlassen?

Das Gesetz vom 1. August 1905 stellt den Beginn des gesetzlichen Verbraucher-

<sup>54</sup> Ordonnance n°2009-483 vom 29. April 2009

schutzes in Frankreich dar. Aufgrund dieses Gesetzes konnten die Behörden die Zusammensetzung von Produkten, insbesondere Lebensmitteln zwingend bestimmen. Dieses Gesetz enthielt auch erste Vorschriften zu freiwilligen Kennzeichnungen von Waren. Die Qualitätskennzeichen wurden dann später in dem Gesetz Nr. 78-23 vom 10. Januar 1978 als ein Informationsmittel zugunsten der Verbraucher eingeführt.

**3. Gab es Phasen des Gegensteuerns/Nachbesserns? Wurde zu einem bestimmten Zeitpunkt der Anwendungsbereich der Informationsansprüche oder der einbezogene Personenkreis stark erweitert, eingeschränkt, modifiziert oder konkretisiert?**

Nein.

**4. Was waren die Anlässe für das gesetzgeberische Tätigwerden?**

Zunächst war es die Schaffung eines allgemeinen Gesetzes für den Verbraucherschutz, den *Code de la consommation* im Jahre 1993. Anlass der Reform vom 9. Juli 2004 war die Umsetzung der europäischen Richtlinie vom 3. Dezember 2001 Nr. 2001/95/CE. Diese Umsetzung wurde durch eine Verordnung (*ordonnance*) vom 22. August 2008<sup>55</sup>, die den *Code de la consommation* abgeändert hat, vervollständigt.

**III. Private Informationsquellen**

**1. Welche Rolle spielen freiwillige Produktangaben der Unternehmer im System der Verbraucherinformation in Ihrem Land? Wie viel Prozent der Unternehmer machen solche Produktangaben oder beteiligen sich an freiwilligen Kontrollsystemen und/oder Kennzeichnungen? Sollte die Beteiligung gering sein, was ist der Grund?**

Die Beteiligung der Unternehmen an freiwilligen Kontrollsystemen ist sehr zahlreich. In Frankreich sind die Verbraucher sehr an Geschmack, Freude am Essen, Vielfalt

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<sup>55</sup> Ordonnance du 22 août 2008 complétant la transposition de la directive 2001/95/CE du 3 déc. 2004 relative à la sécurité des produits.

der Produkte, traditionellen Herstellungsweisen und Qualität interessiert. Daher gibt es besonders im Lebensmittelbereich zahlreiche Produzenten, die sich freiwilligen Kontrollen und besonderen Qualitäts- und Herstellungsanforderungen unterwerfen. In Art L 640-1 Code Rural ist als politisches Ziel erklärt, dass die Gesetzgebung bezüglich der Qualität und des Ursprungs der Produkte, die Information der Verbraucher erhöhen soll.

Der französische Gesetzgeber hat daher bereits seit Beginn des 20. Jahrhunderts ein detailliertes System an freiwilligen Kennzeichnungen von Waren vorgesehen. Aufgrund der verschiedenen Reformen, die dieses System insbesondere aufgrund der Notwendigkeit seiner Anpassung an die Erfordernisse des europäischen Rechts erfahren hat, gibt es heute ein System an Kennzeichnungen, das eine Mischung aus spezifischen Kennzeichnungen aus dem französischen Recht und neueren europäischen Vorschriften ist.

Das französische Produktkennzeichnungssystem basiert auf drei Grundsätzen :

- Die Unternehmen verpflichten sich individuell oder kollektiv freiwillig zu einer bestimmten Qualität, die zwingend durch ein Leistungsverzeichnis oder eine Beschreibung der Anforderungen<sup>56</sup> festgelegt wird. Diese Anforderungen werden gemeinschaftlich durch die betroffenen Unternehmen ausgearbeitet und staatlich kontrolliert. Sie definieren auch die Besonderheiten des Produktes und die Herstellungs- oder Umwandlungsanforderungen (wie z.B. den Produktionsbereich für Produkte mit Ursprungsbezeichnungen);
- Unabhängige Organismen, die von dem *Institut National des Appellations d'Origine* (INAO) zugelassen werden, kontrollieren regelmäßig die Einhaltung dieser Qualitätsanforderungen;
- Staatliche Stellen überwachen die Anwendung des Systems :
  - Das INAO (Art L 115-19 Ccons) behandelt die Anträge auf geographische Ursprungsbezeichnungen, Label rouge und biologische Landwirtschaft, kontrolliert die Anwendung der Kennzeichnungen und beteiligt sich an der Werbung für die betroffenen Produkte.
  - Das Landwirtschafts- und Fischereiministerium überwacht die Anwendung des Systems bezüglich der Lebensmittelqualität und der Ursprungsbezeichnungen. Es führt auch die Aufsicht über das INAO.

Bei den Kennzeichen werden drei Arten für Lebensmittel und Landwirtschaftsprodukte unterschieden:

- Kennzeichen für Qualität und Ursprung :
  - Qualitätsbezeichnungen, die an den geographischen Ursprung und die

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<sup>56</sup> *Cahier des charges*

Herstellungstradition gebunden sind : *Appellation d'origine contrôlée (AOC – Art L 115-1 ff. Ccons)*, *Appellation d'origine protégée (AOP)*, *Indication géographique protégée (IGP)*, *Specialité traditionnelle garantie (STG)*. Bis auf die AOC, die eine rein französische Ursprungsbezeichnung ist, sind die anderen Bezeichnungen alle europäisch harmonisiert. Die AOC ist das älteste Qualitätszeichen in Frankreich, denn es wurde bereits durch ein Gesetz aus dem Jahre 1905 eingeführt (Beispiele hierfür sind „korsischer Honig“, „Bayonner Schinken“ etc.).

- Eine Qualitätsbezeichnung, die gemessen an einem Standardprodukt eine höherwertige Qualität garantiert: *Label Rouge* (Art L 115-19 f. Ccons, Art L 641-1 ff. Code rural). Der Label rouge ist eine rein französische Kennzeichnung, die durch die *loi d'orientation agricole* vom 5. August 1960 eingeführt wurde. Eine Reform durch Verordnung vom 7. Dezember 2006 hat den Wert der Qualitätskennzeichen, vor allem des Label Rouge, erhöht und stellt dieses nunmehr gleichwertig mit der AOC und den anderen europaweiten Ursprungsbezeichnungen. Beispiele für das Label Rouge sind : Fleisch, das von Tieren stammt, die besonders ernährt wurden, freilaufende Hühner, Kalb, das von Muttermilch ernährt wurde.
  
- Eine Qualitätsbezeichnung, die den biologischen Anbau garantiert: *Agriculture biologique (AB)*.
  
- Außerdem gibt es spezielle französische reglementierte Kennzeichen, die den spezifischen Charakter der Produktionsmethode herausstellen :
  - „Produit fermier“: für Produkte, die von einem Bauernhof stammen;
  - „Produit de Montagne“ : für Produkte, bei denen der gesamte Produktions- oder Fabrikationsvorgang in einer Bergregion stattfindet<sup>57</sup>;
  - „produit pays“ : nur für Produkte, die auf den französischen überseeischen Departements kommerzialisiert werden und die ausschließlich aus Rohstoffen hergestellt werden, die von den betroffenen Inseln stammen und nicht eingeführt wurden<sup>58</sup>;
  - „vin de pays“ : für französische Weine, die keine geographische Ursprungsbezeichnung haben.
  
- Die kontrollierte Zertifizierung von Produkten, die einen Fabrikationsprozess unter die Kontrolle einer unabhängigen Zertifizierungsstelle unterwerfen und Normen (Art 115-25 Ccons, Art 641-20 bis 641-24 Code rural). Die Akkreditierung der Zertifizierungsstellen erfolgt durch das *Comité français d'accréditation (COFRAC)*. Dieses attestiert, dass die Kontrollstelle sich der Norm EN 45011 (*organisme certificateur*) oder der Norm ISO/CEI 17020 type A (*organisme d'inspection*) unterwirft.

<sup>57</sup> Memento Pratique Francis Lefevre, Concurrence Consommation, 2009-2010, Rdn.77340

<sup>58</sup> Memento Pratique Francis Lefevre, Concurrence Consommation, 2009-2010, Rdn.77450

Die Qualitäts- und Herstellungsvorgaben enthalten auch die Anforderungen an die Art und Weise der Darstellung der Informationen, die für den Verbraucher als wesentlich anzusehen sind. Diese Vorgaben werden im Gesetzesblatt (*Journal Officiel*) veröffentlicht.

**Existieren freiwillige Selbstverpflichtungen von Unternehmen bestimmte Informationen bereitzustellen?**

Nein, nur im Rahmen des beschriebenen Gütezeichensystems.

**2. Sofern freiwillige Selbstverpflichtungen zur Informationsherausgabe im Sinne von Frage A.III.2 in Ihrem Land existieren:**

**Wie werden die Informationen den Verbrauchern zur Verfügung gestellt?**

**Werden Sie vom Staat (stichprobenhaft) auf ihre Richtigkeit überprüft?**

**Teil B. Gesamtschau der Verbraucherinformationsregelungen**

**I. Über einzelne Anspruchsgrundlagen hinausgehende Fragen**

**1. Allgemeine Überlegungen**

*a. Sofern es in Ihrem Land verbraucherspezifische Informationsregelungen gibt:*

*Auf welche Sachbereiche finden sie Anwendung? Sofern die Verordnung (EG) Nr. 178/2002 in Ihrem Land anwendbar sein sollte: Erstreckt sich das spezifische Informationsrecht für Verbraucher auf weitere Felder als das dort geregelte Lebensmittelrecht?*

Die Informationsansprüche der Verbraucher nach den Art. L 111-2 und L 221-1-2 CCons sind allgemein gehalten und beziehen sich nicht auf eine bestimmte Art von Waren oder Dienstleistungen. Es werden daher alle Produkte und Dienstleistungen erfasst, vor allem, wenn für den Verbraucher ein Sicherheitsbedürfnis besteht. Die Informationsrechte nach diesen beiden Vorschriften sind subsidiär und daher nicht anwendbar, wenn nach spezielleren Vorschriften Auskunftspflichten (oder Etikettierungspflichten) der Unternehmer bestehen, wie z.B. bei Lebensmitteln, Medikamenten, Alkohol und Zigaretten.

Darüber hinaus besteht nach dem Gesetz über freien Zugang zu Verwaltungsunter-

lagen ein Recht des Bürgers auf Akteneinsicht. Dieses Recht gilt nicht nur für Lebensmittelkontrollen, sondern für sämtliche Bereiche des Verwaltungshandelns. Es ist auch kein spezifisches Verbraucherschutzrecht, sondern ein Recht jedes Bürgers im Verhältnis zur öffentlichen Verwaltung.

Der Zugang des Bürgers zu Verwaltungsdokumenten ist nach Art. 2 Abs. 2 des Gesetzes über freien Zugang zu Verwaltungsunterlagen beschränkt auf endgültige Entscheidungen der Verwaltung. Auf alle vorbereitenden Akte und Dokumente besteht kein Informationsanspruch. Genauso wenig besteht ein Anspruch auf Einsicht in Dokumente, die bereits veröffentlicht wurden.

Anspruchsberechtigt ist grundsätzlich jede natürliche oder juristische Person, ohne dass sie ein konkretes Interesse nachweisen muss. Wenn allerdings in den verlangten Dokumenten persönliche Daten enthalten sind, hat nur die von den Daten betroffene Person einen Anspruch auf Einsicht. Das Einsichtsrecht für Dritte ist in diesem Fall ausgeschlossen.

In Frankreich besteht bezüglich der Form des Auskunftersuchens kein besonderes gesetzliches Erfordernis. Der Antrag muss nicht unbedingt schriftlich gestellt werden, er muss auch nicht begründet werden. Jedoch muss der Antrag klar und präzise sein und das beantragte Dokument bezeichnen. Auch die Form der Beantwortung des Auskunftsverlangens ist variabel. Nach Art 4 des Gesetzes über den freien Zugang zu Verwaltungsunterlagen kann die Information entweder durch kostenfreie Einsicht bei der Behörde, durch kostenpflichtige Photokopien oder durch kostenfreie Kommunikation durch elektronische Post erfolgen.

Bei dem Antrag auf Akteneinsicht muss der Antragsteller die Schriftstücke, in die er Einsicht nehmen will, genau bezeichnen. Ein allgemeines Einsichtsrecht in unbestimmter Weise besteht dagegen nicht. Der Antragsteller muss daher bevor er den Akteneinsichts Antrag stellt, das verlangte Dokument genau identifizieren und bezeichnen können.

*b. Statuiert in Ihrem Land eine Norm eine Informationspflicht für den Fall, dass einer Person Produkte, Dienst- oder Werkleistungen angeboten werden, die den jeweili-*

*gen Sicherheitsanforderungen nicht gerecht werden?*

Ja, die Informationspflicht nach Art. L 221-1-2 Ccons. betrifft speziell die Sicherheitsanforderungen für alle Produkte und Dienstleistungen. Nach Art. L 221-1-3 Ccons hat der Unternehmer, dem Sicherheitsrisiken eines Produktes bekannt sind, die zuständigen Verwaltungsbehörden hiervon zu unterrichten.

Die Informationspflicht bezüglich der Produktsicherheit umfasst vor allem die Verpflichtung, die Etikettierung der Produkte den Sicherheitsanforderungen anzupassen, insbesondere die Gebrauchsanweisung, die Beschreibung der Zusammensetzung und der Risiken des Produktes (z.B. Entflammbarkeit, Risiko des Verschluckens von Kleinkindern, etc.).

Hierzu gehören alle Informationen, die es dem Verbraucher ermöglichen, die Risiken des Produktes während seiner normalen Gebrauchsdauer und der von dem Unternehmer vorhersehbaren Gebrauchsweise einzuschätzen und Vorkehrungen zu treffen, die es ihm ermöglichen, den Gefahrentritt zu verhindern. Zu der vorhersehbaren Gebrauchsweise gehört nicht nur die vertraglich vorgesehene Gebrauchsweise sondern auch die Verwendungsart des Produktes, die nicht seiner Bestimmung entspricht, aber dennoch vorhersehbar ist.

Die Etikettierung und Gebrauchsanweisung muss für in Frankreich angebotene Produkte in französischer Sprache und damit für den Durchschnittsverbraucher verständlich sein<sup>59</sup>. Bei besonders gefährlichen Produkten wird darüber hinaus ein allgemein verständliches Piktogramm vorgeschrieben, das auch für Verbraucher, die der französischen Sprache nicht mächtig sind oder Analphabeten, verständlich ist (z.B. Totenkopf für giftige Produkte, siehe unten VI 1.)

Darüber hinaus ist der Verkauf von Waren oder das Anbieten von Dienstleistungen, die nicht den erforderlichen Sicherheitsanforderungen entsprechen nach Art L 221-2 Ccons verboten oder reglementiert. Die Händler sind verpflichtet, keine Produkte zu liefern, von denen ihnen bekannt ist, dass sie nicht den Sicherheitsanforderungen entsprechen.

*c. Gibt es eine Frist, nach deren Ablauf der Informationen nicht mehr herausgegeben werden müssen oder dürfen, da sie als zu alt betrachten werden? Wenn ja: Wie*

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<sup>59</sup> Art 2 Abs1 des Gesetzes vom 4. August 1994

*lang ist diese?*

Für die privatrechtlichen Informationsansprüche ist gesetzlich keine Frist gesetzt. Die Information muss solange erfolgen, wie die Gefahr für die Sicherheit der Verbraucher besteht. Wenn die Gefahr beseitigt ist und das Produkt die erforderliche Sicherheit aufweist muss die Information nicht mehr gegeben werden.

Das Gesetz über freien Zugang zu Verwaltungsunterlagen sieht auch keine Fristen für die Ausübung des Akteneinsichtsrechtes vor. Nach Art. 2 Abs. 3 erstreckt sich das Einsichtsrecht auch auf bereits archivierte Unterlagen. Das ergibt sich daraus, dass es bei diesem Recht nicht um die aktuelle Information des Verbrauchers geht, sondern vielmehr um die Transparenz des Verwaltungshandelns, auch bezüglich bereits vollkommen abgeschlossener Vorgänge.

*d. Wird für die Frage, ob ein Informations- oder Auskunftsanspruch besteht, eine Abwägung zwischen dem Interesse des Verbrauchers und dem der Allgemeinheit oder sonstiger Beteiligter, etwa unter dem Gesichtspunkt der Kosten, durchgeführt? Bei welchen Anspruchsgrundlagen ist dies der Fall?*

Nach Art. L 221-9 Ccons gilt der Verhältnismäßigkeitsgrundsatz nicht für die Informationspflicht, sondern nur für die Maßnahmen die zum Schutz der Verbraucher bei Produkten, die nicht die erforderliche Sicherheit aufweisen, von den Behörden getroffen werden, wie z.B. Verkaufsverbot, vorübergehende Schließung eines Dienstleistungsbetriebes oder Rückruf der Produkte.

## **2. Umgang mit (vermeintlich) fehlerhafter oder unvollständiger Information**

*a. Wann liegt die Verletzung einer Informationspflicht vor? Welche Probleme ergeben sich in der Praxis? Gibt es Lösungsvorschläge?*

Wenn der Unternehmer die erforderlichen Informationen nicht bereitstellt, die erteilten Informationen falsch sind oder er dem Verbraucher nicht die für die Benutzung erforderlichen Ratschläge erteilt, liegt bei dem Unternehmer eine Pflichtverletzung vor, für die eine Verschuldensvermutung besteht.

Die Information muss auch klar und für den Verbraucher verständlich sein<sup>60</sup>.

Dabei umfasst die Informationspflicht auch Informationen bezüglich der Produktsicherheit sowie Warnhinweise hinsichtlich der Benutzung des Produktes. In einem solchen Fall hat ein Unternehmer Fertigbeton an einen Verbraucher geliefert ohne diesen auf die Risiken aufmerksam zu machen, die im Kontakt mit dem Beton auf der Haut entstehen können. In diesem Fall wurde der Verbraucher Opfer von schwerwiegenden Gesundheitsstörungen und hat die zivilrechtliche Haftung des Unternehmers geltend gemacht. In zwei ähnlich gelagerten Sachverhalten hat der Cour de Cassation zunächst im Jahre 2005 entschieden, dass hier eine Verletzung der allgemeinen Auskunftspflicht nach Art 111-1 Ccons vorliegt und somit eine vertragliche Schadensersatzpflicht ausgelöst wird<sup>61</sup>. In einer zweiten Entscheidung im Jahr 2006 hat die gleiche Kammer entschieden, dass eine Verletzung der Sicherheitspflicht vorliegt, die die deliktische Haftung nach den Grundsätzen der Produkthaftung nach Art 1386-4 Cciv. begründet<sup>62</sup>.

In dem verwaltungsrechtlichen Akteneinsichtsverfahren geht es nicht um eine spezielle Auskunftserteilung an den Verbraucher, sondern um den Zugang zu Dokumenten. Wenn die Behörde ein Einsichtsverlangen ablehnt, kann der Bürger eine Kommission (die "*Commission d'accès aux documents administratifs*" CADA<sup>63</sup>) einberufen, die einen Entscheidungsvorschlag über das Informationsverlangen macht. Erst wenn die Verwaltung dem Vorschlag nicht nachkommt oder die Entscheidung der Kommission für den Verbraucher negativ ist, kann der Bürger die Verwaltungsgerichte anrufen.

### ***Wer trägt die Beweislast dafür, dass die gegebene Information falsch ist?***

Der Unternehmer trägt die Beweislast dafür, dass die erteilte Information richtig und vollständig ist<sup>64</sup>. Nach der Rechtsprechung handelt es sich auch bei der Informationspflicht, als ein Teil der Sicherheitspflicht, um eine Erfolgsschuldung<sup>65</sup> des Unter-

<sup>60</sup> CA Grenoble, 11. Juni 2007, Contrats, concurrence, consommation. 2008, comm.25

<sup>61</sup> Cass. 1<sup>re</sup> civ., 1. März 2005, Bull.civ. I, Nr.109; JCP G 2005, II, 10164

<sup>62</sup> Cass. 1<sup>re</sup> civ., 7. Nov. 2006, Bull.civ. I, Nr.467

<sup>63</sup> Zu diesem Verfahren Art 20 ff. Gesetz v. 17. Juli 1978, "*Commission d'accès aux documents administratifs*" CADA, [www.cada.fr](http://www.cada.fr)

<sup>64</sup> Cass. 1<sup>re</sup> civ., 15. Mai 2002, Bull.civ. I, Nr.132

<sup>65</sup> *Obligation de résultat*

nehmers<sup>66</sup>.

*b. Wenn die Verletzung der Informationspflicht einen Schadensersatzanspruch auslöst: Ist dieser verschuldensabhängig? Welche anderen Voraussetzungen und Einwendungen sind maßgebend?*

Der vertragliche Schadensersatzanspruch ist im französischen Recht verschuldensabhängig. Das Verschulden des Unternehmers wird aber vermutet<sup>67</sup>. Bei einer Verletzung der Informationspflicht, die Benutzungshinweise oder Risiken betrifft, reicht die Kausalität der Informationspflichtverletzung für den Schadenseintritt aus, um die Ersatzpflicht auszulösen. Daneben kann ein verschuldensabhängiger deliktischer Schadensersatzanspruch bestehen.

Die Verletzung des Akteneinsichtsrechts nach dem Gesetz über freien Zugang zu Verwaltungsunterlagen löst keine speziellen Schadensersatzansprüche aus. Diese richten sich vielmehr nach den allgemeinen Grundsätzen des Staatshaftungsrechts.

*(Wie-) Kann sich die Behörde/das Unternehmen exkulpieren? Wie wird es gehandhabt, wenn sich eine Information nachträglich als falsch herausstellt, diese Information jedoch durch den Erkenntnisstand zum Informationszeitpunkt nahe gelegt wurde?*

Nach Art. L 221-1-3 kann sich das Unternehmen nicht damit exkulpieren, dass es keine Kenntnis der Risiken hatte, die seine Leitungsorgane vernünftigerweise hätten haben müssen. Wenn die Information jedoch nach dem gegenwärtigen Erkenntnisstand nicht anders möglich war, besteht eine Exkulpationsmöglichkeit des Unternehmers.

Die Frage nach der Richtigkeit der Information stellt sich nicht in dieser Form bei dem verwaltungsrechtlichen Akteneinsichtsrecht, da es nur um Einsicht in Dokumente geht und die Verwaltung keine Pflicht zur Nachprüfung oder Aufbereitung dieser Dokumente hat.

*c. Wie wird der Schaden beziffert?*

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<sup>66</sup> Cass. 1<sup>re</sup> civ., 17. Jan. 1995, Bull.civ.I, n°43 ; D.1995 S.350

<sup>67</sup> Cass. 1<sup>re</sup> civ., 15. Mai 2002, Bull.civ. I,Nr.132

*Werden bei der Verletzung von Informationspflichten immaterielle Schäden ersetzt?  
Wenn ja: Unter welchen Voraussetzungen?*

Ja, der gesamte Schaden des Verbrauchers wird ersetzt, auch immaterielle Schäden, unter der Voraussetzung des Nachweises der Kausalität und des konkreten Schadens<sup>68</sup>.

*Werden bei der Verletzung von Informationspflichten eine Art Strafschadensersatz gewährt?*

Nein, der Gesetzgeber hat keine Sanktionen bei einer Verletzung der allgemeinen Informationspflicht nach Art 111-1 Ccons vorgesehen. Er wollte lieber an die Kooperationsbereitschaft und Verantwortlichkeit der Unternehmen appellieren. Dennoch stellt die Nichteinhaltung der Informationspflichten eine Pflichtverletzung dar, die zu einem zivilrechtlichen Schadensersatzanspruch führen kann.

Strafrechtliche Sanktionen können sich allerdings dann ergeben, wenn die Informationsrechtsverletzung gleichzeitig den Tatbestand eines Betruges oder eines Irrtumstatbestandes nach dem Recht des unlauteren Wettbewerbs erfüllt.

Bei der Verletzung der allgemeinen vorvertraglichen Informationspflichten bei bestimmten Vertragsarten, z.B. Bei Haustürgeschäften<sup>69</sup> nach Art L 121-28 Ccons ist ebenfalls eine Bussgeldsanktion vorgesehen, die aber nicht dem verletzten Verbraucher zugutekommt.

*d. Ab welchem Zeitpunkt beginnt die Verjährung von Ansprüchen wegen Verletzung einer Informationspflicht? Wie lang ist die Verjährungsfrist?*

Die Verjährung vertraglicher Schadensersatzansprüche unterliegt der regelmäßigen zivilrechtlichen Verjährungsfrist von 30 Jahren.

Die Verjährung deliktischer Ansprüche beträgt nach Art. 2270-1 Cciv 10 Jahre und für die Produkthaftung nach Art. 1386-16 Cciv ebenfalls 10 Jahre.

*e. Gibt es ein Recht auf Richtigstellung bzw. Veröffentlichung von Stellungnahmen*

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<sup>68</sup> Memento Pratique Francis Lefevre, Concurrence Consommation, 2009-2010, Rdn.75050

<sup>69</sup> „*démarchage* »

*zu von den Behörden herausgegebenen Informationen (Recht auf Gegendarstellung)?*

Ja, nach Art 13 des Gesetzes vom 29. Juli 1881 über die Pressefreiheit haben Unternehmen grundsätzlich das Recht auf Gegendarstellung in der Presse. Dieses Recht besteht ebenfalls im Radio und Fernsehen, wenn durch eine Darstellung eine Ehrverletzung oder Rufschädigung des Unternehmens eingetreten ist. Ein Recht auf Berichtigung von Internet Nachrichten besteht ebenfalls nach Art 6 des Gesetzes vom 21. Juni 2004<sup>70</sup>.

Außerdem muss nach Art. L 221-5 Abs. 4 Ccon der Minister, der im Falle einer schwerwiegenden oder gegenwärtigen Gefahr, Eilmaßnahmen durch Verfügung treffen kann, die betroffenen Unternehmen unverzüglich, spätestens 14 Tage nach einer Entscheidung über den Rückzug von Produkten, anhören.

*Und veröffentlicht es die Behörde (automatisch), wenn sich die Situation im betroffenen Unternehmer bessert?*

Nein

*Gibt es im Rahmen von staatlichen Qualitäts- und Sicherheitskontrollen im Falle schlechter Kontrollergebnisses einen Anspruch auf eine erneute (zeitnahe) Kontrolle?*

Bei Qualitätskontrollen gibt es eine regelmäßige Kontrolle durch die INAO. Ein Qualitätskennzeichen kann auch jederzeit entzogen werden, wenn sich bei der Kontrolle herausstellt, dass die erforderliche Qualität nicht mehr gegeben ist. Wenn ein neuer Antrag auf ein Qualitätskennzeichen abgelehnt wird, kann der Unternehmer einen erneuten Antrag einreichen, wenn er seine Qualität, Fabrikationsprozess etc. geändert und verbessert hat.

Bei Sicherheitsmaßnahmen kommen die Maßnahmen nur solange in Betracht, wie das Sicherheitsproblem besteht. Die Eilmaßnahmen, die nach Art L 221-5 Ccons durch den Verbraucherschutzminister oder den Präfekten getroffen werden können, sind in jedem Fall nach Abs. 1 der Vorschrift auf die Dauer eines Jahres begrenzt und innerhalb dieses Zeitraumes muss eine erneute Kontrolle erfolgen. Die Maß-

<sup>70</sup> Memento Pratique Francis Lefevre, Concurrence Consommation, 2009-2010, Rdn.77 360

nahmen können in jedem Fall erst dann aufgehoben werden, wenn sichergestellt ist, dass kein Risiko für die Verbraucher mehr besteht.

## **II. Informationsansprüchen gegen Behörden**

### **1. Informationsbeschaffung, -aufbereitung und -kontrolle durch die Behörden**

*a. Trifft die Behörde eine Pflicht, herauszugebende Informationen auf ihre inhaltliche Richtigkeit zu überprüfen?*

Ja, die mit dem Verbraucherschutz befassten Behörden haben auch Untersuchungsrechte- und Pflichten. Die Untersuchungen werden durch die Beamten der DGCCRF (Direction Générale de la Consommation, Concurrence et de la répression des fraudes) durchgeführt. Hierbei dürfen nur inhaltlich überprüfte und für richtig befundene Informationen weitergegeben werden.

Dagegen betrifft das verwaltungsrechtliche Akteneinsichtsrecht nur die Einsicht in die sich in den Akten befindlichen Unterlagen. Es soll gerade das sich in den Akten befindliche Dokument in der Originalform herausgegeben werden, ohne dass eine Veränderung oder Aufbereitung dieses Dokumentes durch die Verwaltung erfolgt.

*Trifft sie keine solche Pflicht: Ist sie zumindest verpflichtet, ihr bekannte Zweifel an der Richtigkeit weiterzugeben?*

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*b. Ist die Behörde verpflichtet, die Verständlichkeit der Information sicherzustellen (so z.B. bei der Einordnung technischer Messgrößen oder wissenschaftlicher Zweifel in der Risikobewertung)? Wenn ja, welchen Umfang hat die Aufbereitungspflicht?*

Es gibt hierzu keine ausdrückliche Regelung. Dies wird aber bei den privatrechtlichen Informationsrechten als selbstverständlich vorausgesetzt. Es gilt jedoch nicht bei dem verwaltungsrechtlichen Akteneinsichtsrecht (siehe oben).

*c. Gibt es einen Anspruch der Verbraucher auf schnellere Ermittlung von Informati-*

onen?

Es gibt teilweise Fristen für die Bearbeitung von Anträgen der Verbraucher auf Informationsbeschaffung, die aber nur Selbstverpflichtungen der Behörden sind und sich nicht aus den gesetzlichen Vorschriften ergeben. Ein Antrag bei der CSC muss z.B. innerhalb von 3 – 9 Monaten bearbeitet werden.

*d. d. Inwieweit wird ein Informationsfluss zwischen Behörden gewährleistet? Existiert eine gemeinsame Datenbank?*

Nein, es existiert keine gemeinsame Datenbank und der Datenfluss zwischen den verschiedenen Behörden ist nicht systematisch organisiert. Nur im Falle einer eiligen Warnung vor einem Sicherheitsproblem ist der Informationsfluss folgendermassen organisiert : Der Fabrikant hat eine Verpflichtung die Händler der Handelskette zu informieren, wenn er einen Sicherheitsmangel an einem Produkt feststellt. Er informiert gleichzeitig im Falle von Lebensmittelprodukten die *Direction départementale des services sanitaires et vétérinaires* und die *Direction régionale de la consommation, concurrence et répression des fraudes*. Der Händler, der die mangelhaften Produkte auf dem Markt angeboten hat, hat ebenfalls eine Verpflichtung nach Art L 221-1-3 Ccons. dieselben Behörden davon zu informieren. Diese örtlichen und regionalen Behörden informieren die Behörden auf nationaler Ebene (DGCCRF und DGAL) über die Warnung. Diese informieren die *Agence française de sécurité sanitaire des aliments* (AFSSA), die hierzu angehört wird.

*Sind Behörden verpflichtet, über bestimmte Informationen andere Behörden zu unterrichten?*

Z.B. in dem oben dargestellten Verfahren.

*Inwieweit sind Behörden an ein europäisches Informationsnetz angebunden bzw. inwieweit ist dies geplant?*

Die französischen Behörden sind an das europäische System des Informationsaustauschs RAPEX und Schnellwarnsystem RASFF angeschlossen. Kontaktpunkt für

die Annahme und Weiterleitung von Informationen nach dem RAPEX und dem RASSF System ist in Frankreich die *Direction générale de la consommation, de la concurrence et de la repression des fraudes* (DGCCRF).

*e. Wie wird die Informationsbeschaffung und –verbreitung in weniger dicht besiedelten Gebieten oder an besondere Personengruppen (Ältere, Behinderte, Migranten) gewährleistet?*

Die DGCCRF ist in allen 97 französischen Departements mit Außenstellen vertreten. Sie verfügt über 8 eigne überregionale Laboratorien für die Analyse der von Produkten entnommenen Proben.

Die Informationsverbreitung erfolgt heute weitgehend über Internet, aber auch Presse und Fernsehen, so dass die Informationen auch in entlegene Gebiete kommen.

*f. Werden in bestimmten Bereichen regelmäßige staatliche Qualitätskontrollen durchgeführt?*

In bestimmten Bereichen ist die Zertifizierung Pflicht. In diesen Bereichen ist die Zertifizierung nur für eine bestimmte Dauer gültig und muss danach erneuert werden. Dann erfolgt eine erneute Kontrolle.

Es gibt darüber hinaus keine regelmäßige staatliche Kontrolle der Qualität und Sicherheit. Wenn jedoch ausreichende Indizien dafür bestehen, dass ein Produkt oder eine Dienstleistung eine Gefahr darstellen, kann das Verbraucherschutzministerium den betreffenden Unternehmen auferlegen, eine Kontrolle innerhalb einer bestimmten Frist durch ein unabhängiges Kontrollorgan vornehmen zu lassen. Wenn die Kontrolle innerhalb der Frist nicht erfolgt ist, kann das Ministerium die Kontrolle selbst auf Kosten des Unternehmens vornehmen (Art L 221-7 Ccons). Das Unternehmen muss diese Kontrolle dulden.

Im Bereich der Qualitätskennzeichen erfolgt eine regelmäßige Kontrolle der betroffenen Produkte durch die Zertifizierungsinstitute auf die Einhaltung der Qualitäts- und Herstellungsvorgaben.

*Wenn ja, in welchen Bereichen?*

Z. B. bei den Dienstleistungen im Gesundheitsbereich besteht eine Zertifizierungspflicht in privaten Kliniken.

*Muss ein Unternehmen diese Kontrollen zulassen? Und sind rechtliche/tatsächliche Möglichkeiten bekannt, diese Kontrollen zu umgehen oder zu fälschen?*

Ja, das Unternehmen muss diese zwingenden Kontrollen zulassen und gegebenenfalls auch die Kosten für die Kontrollen tragen.

*Sind die Ergebnisse dieser Kontrollen auf Anfrage oder ohne zugänglich?*

Die Ergebnisse dieser Kontrollen sind in der Praxis nur auf Anfrage für Personen zugänglich, die ein besonderes Interesse hierfür nachweisen können. Eine Veröffentlichung für die Allgemeinheit findet nicht statt.

Im Prinzip kann nach dem Gesetz über den freien Zugang zu Verwaltungsunterlagen jeder Bürger auch Zugang zu den Akten bezüglich der Kontrollen beantragen. Wenn allerdings in den verlangten Dokumenten persönliche Daten enthalten sind, hat nur die betroffene Person einen Anspruch auf Einsicht. Ebenso ist die Einsicht ausgeschlossen, wenn die Veröffentlichung ein Betriebs- oder Geschäftsgeheimnis verletzen könnte.

Daher besteht wohl in der Praxis nur wenig Anwendungsbereich für Informationsersuchen der Verbraucher im Rahmen des Gesetzes über den freien Zugang zu Verwaltungsunterlagen bezüglich der Kontrollen der Produktsicherheit. Vorbereitende Untersuchungen und Dokumente der Verwaltung müssen nicht weitergegeben werden und soweit eine endgültige Entscheidung erfolgt (z.B. ein Rückruf, eine Warnung oder ein Verbot eines Produktes) wird diese veröffentlicht. Es könnte sich lediglich auf Fälle beziehen, in denen die Verwaltung entscheidet, dass keine ausreichende Gefahr für ein Einschreiten besteht. Wenn diesbezüglich eine endgültige Entscheidung erfolgt, kann Akteneinsicht für Verbraucher gewährt werden.

## 2. Behördenorganisation

*a. Ist eine zentrale (ggf. eigens dafür eingerichtete) Behörde für die Bearbeitung der Informationsgesuche zuständig oder die jeweilige Behörde, die über Informationen oder Untersuchungsmöglichkeiten verfügt?*

Es gibt eine zentrale Behörde für Verbraucherschutz : das ***Institut National de la Consommation***. Dieses Institut ist auch für Informationsgesuche zuständig aber nicht ausschließlich. Es handelt sich nicht um eine Behörde im eigentlichen Sinn, sondern um eine öffentlich-rechtliche Körperschaft, die mit Rechtspersönlichkeit und finanzieller Autonomie ausgestattet ist. Es hat eine Vermittlerrolle zwischen staatlichen Behörden und Verbraucherorganisationen. Es bearbeitet Informationsgesuche von Verbrauchern und Verbrauchervereinigungen, hat aber selbst keine Untersuchungsmöglichkeiten. Es soll mit seiner Arbeit auch die Verbrauchervereinigungen unterstützen und ist für die Information der Verbraucher zuständig.

Zentrale Untersuchungsbehörde ist dagegen die DGCCRF, die dem Wirtschaftsministerium untersteht und direkt von ihm weisungsabhängig ist. Das INC und die anderen im Verbraucherschutz tätigen Behörden können Tatsachenermittlungen durch die Beamten der DGCCRF verlangen.

Der einzelne Verbraucher kann sich auch an die DGCCRF wenden, wenn ihm Sicherheitsrisiken auffallen, die von Produkten oder Dienstleistungen ausgehen. Er kann damit ein Untersuchungsverfahren auslösen. Die DGCCRF ist somit häufig erster Ansprechpartner des Verbrauchers im Departement. Das Einschreiten steht jedoch im Ermessen der Behörde. Die DGCCRF ist dagegen nicht für die Information des Verbrauchers zuständig.

Nach dem Gesetz über freien Zugang zu Verwaltungsunterlagen muss der Antrag auf Akteneinsicht bei der jeweiligen Behörde gestellt werden, die im Besitz der verlangten Dokumente ist.

*Wie macht der Verbraucher die zuständige Stelle ausfindig? Gibt es (im Internet/in der Telefonzentrale) gemeinsame Anlaufstellen oder Auskunftspersonen?*

In den Internetseiten der verschiedenen Behörden werden auf die anderen Behörden und Institutionen hingewiesen. Z.B. in einer Rubrik :“Nützliche Adressen“ auf

der Internetseite des INC können die Verbraucher die Adressen der Stellen in ihrer Region abrufen, bei denen sie zu bestimmten Themen Informationen erhalten können.

*Was geschieht mit Anträgen, die bei der falschen Behörde eingereicht werden?*

Bei den speziellen verbraucherrechtlichen Informationsanträgen wird dem Verbraucher von der angerufenen Behörde die zuständige Behörde benannt oder die unzuständige Behörde leitet die Anfrage direkt an die zuständige Behörde weiter.

Wenn ein Antrag auf die Einsicht in ein bestimmtes Dokument nach dem Gesetz über freien Zugang zu Verwaltungsunterlagen bei einer Behörde gestellt wird, die nicht im Besitz dieser Unterlage ist, leitet diese den Antrag nach Art 2 Abs. 4 weiter, soweit ihr bekannt ist, wo sich die betreffende Akte befindet.

*b. Gibt es Fristen für die Bearbeitung von Anträgen? Wenn ja: Wie lang sind diese? Werden sie in der Regel eingehalten?*

Nein, in dem Gesetz über freien Zugang zu Verwaltungsunterlagen wird keine ausdrückliche Frist für die Vorlage der Unterlagen bestimmt. Es gibt jedoch eine allgemeine verwaltungsrechtliche Frist von einem Monat, nach deren Ablauf bei Unterlassen der Handlung (Antwort) der Verwaltung eine Ablehnung fingiert wird, so dass der betroffene Antragsteller bei der *Commission d'accès aux documents administratifs* einen Antrag auf Zugang stellen kann. Die Kommission verfügt dann wiederum um eine Frist von einem Monat, um der betroffenen Verwaltungsbehörde einen Entscheidungsvorschlag vorzulegen. In den meisten Fällen folgt die Verwaltung diesem Vorschlag. Sie ist jedoch nicht daran gebunden. Bei weiterer Ablehnung kann der Antragsteller die Verwaltungsgerichte anrufen.

Bei dem CSC gibt es eine Frist zwischen 3 und 9 Monaten für die Bearbeitung der Anfragen der Verbraucher.

*Wie wird verhindert, dass gleichartige Anfragen zu viel Verwaltungsaufwand produzieren?*

Anfragen die gleichartige Produkte oder Dienstleistungen betreffen, können zu-

sammengefasst und zusammenbehandelt werden.

### 3. Öffentliche Datenbanken

*a. Welche Informationen sind über Datenbanken (z.B. im Internet) abrufbar?*

Z. B. auf der Internetseite „[www.rappelsproduits.fr](http://www.rappelsproduits.fr)“ können alle Rückrufaktionen von Produkten abgerufen werden. (Siehe im übrigen Anlage II S.40 mit den Internetseiten der verschiedenen beteiligten Behörden und Institutionen).

Auch die verschiedenen allgemeinen Gutachten über die Sicherheit bestimmter Produktarten können im Internet abgerufen werden.

Alle Behörden und Institutionen, die mit der Verbraucherinformation befasst sind, geben auf ihren Internetseiten die Informationen, mit denen sie sich befassen, bekannt.

*Hängt die Nutzung dieser Daten von weiteren Kriterien ab (Alter des Verbrauchers, potentiell feststellungsinteresse an der Information) ab?*

Nein.

*b. Werden Ergebnisse von behördlichen Qualitäts- und Sicherheitskontrollen automatisch im Internet kostenfrei zugänglich gemacht?*

Ja, teilweise. Der CSC veröffentlicht seine Gutachten über die Produktsicherheit im Internet. Es handelt sich jedoch um Gutachten über bestimmte Produktgruppen, die nur als Gruppe genannt werden, ohne dass einzelne Hersteller dabei zitiert werden.

Die einzelnen Hersteller werden nur zitiert, wenn tatsächlich aufgrund konkreter Gefährlichkeit Rückrufaktionen der Produkte eingeleitet worden sind. Hierfür gibt es eine Internetseite, die sämtliche in den vergangenen Jahren zurückgerufenen Produkte auflistet<sup>71</sup>.

Bei konkreten Warnungen vor Risiken erfolgt auch eine Namensnennung. Diese Warnungen können aber nur als Eilmassnahme im Falle einer gegenwärtigen oder erheblichen Gefahr nach Art L 221-5 Ccons von dem Verbraucherschutzminister getroffen werden, wenn es sich um ein landesweit vertriebenes Produkt handelt. Wenn es sich um ein regional vertriebenes Produkt oder eine Dienstleistung handelt, ist der Präfekt zuständig. Die Warnungen können im Internet, in der Tages-

<sup>71</sup> [www.rappelproduits.fr](http://www.rappelproduits.fr)

presse oder im Fernsehen oder Radio erfolgen.

*Gibt der Staat Kontrollrankings heraus, in der Weise, dass er eine Liste der Unternehmen mit den besten und schlechtesten Ergebnissen (im Internet) veröffentlicht?*

Nein nicht im eigentlichen Sinne, aber der INC kann Vergleichstests unter Nennung der betreffenden Marken und Unternehmen veröffentlichen, bei denen insbesondere auch die Produktsicherheit getestet werden kann.

#### **4. Warnhinweise**

*Unter welchen Bedingungen sind Behörden ermächtigt oder verpflichtet Warnungen vor Produkten, Dienst- oder Werkleistungen herauszugeben? Wie sicher muss die Korrektheit der Information sein?*

Der Unternehmer hat nach Art. L 221-1-3 Ccons eine Verpflichtung, die zuständigen Behörden sofort davon zu unterrichten, wenn ein Produkt nicht den Sicherheitsanforderungen entspricht. Gleichzeitig muss er die Maßnahmen nennen, die er vorgenommen hat, um die Verbraucher vor Risiken zu schützen. Der Unternehmer, den diese Pflicht trifft, kann entweder der Hersteller, der Importeur oder auch der Verkäufer sein.

Zunächst trifft die Verpflichtung Warnungen zu veröffentlichen und alle erforderlichen Maßnahmen zu treffen, damit das Sicherheitsrisiko nicht eintritt, den Unternehmer selbst. Er hat auch die Wahl zwischen den verschiedenen zur Verfügung stehenden Kommunikationsmitteln.

Erst wenn er dieser Verpflichtung nicht nachkommt, hat der Minister für Verbraucherschutz nach Art. L 221-5 Abs.1 S.2 Ccons die Möglichkeit, Warn- oder Benutzungshinweise für bestimmte Produkte zu verbreiten, wenn eine gegenwärtige oder schwerwiegende Gefahr für die Verbraucher vorliegt.

In schwerwiegenden Fällen kann er auch den Rückruf des Produktes anordnen. Die betroffenen Produkte oder Dienstleistungen dürfen erst dann wieder auf dem Markt angeboten werden, wenn sie nach den entsprechenden Untersuchungen als den Sicherheitsanforderungen entsprechend anerkannt worden sind.

Bei Produkten, die nur regional vertrieben werden und bei allen Dienstleistungen,

die nicht der erforderlichen Sicherheit entsprechen, kann nach Art L 221-6 Ccons der Präfekt die erforderlichen Eilmaßnahmen treffen und gegebenenfalls das Angebot der Dienstleistung für eine Dauer bis zu zwei Monaten verbieten.

### **III. Gewährleistung von Unternehmens- und Datenschutz**

#### **1. Geschäfts- und Betriebsgeheimnisse**

*a. Gibt es Regelungen für Fälle in denen Verbraucherinformationsrechte mit Unternehmensrechten, namentlich im Hinblick auf Betriebs- oder Geschäftsgeheimnisse oder gewerbliche Schutzrechte, kollidieren? Wenn ja, welche?*

Nach Art L 216-10 Ccons stehen die strafrechtlichen Vorschriften betreffend den Schutz von Betriebs- oder Geschäftsgeheimnissen der Veröffentlichung und Verbreitung von Informationen an die Verbraucher nicht entgegen, sofern die Verbreitung erfolgt, um eine schwerwiegende oder gegenwärtige Gefahr für die Sicherheit oder Gesundheit der Verbraucher abzuwenden.

Weitere Vorschriften bezüglich der Betriebs- oder Geschäftsgeheimnisse betreffen die CSC. Nach Art L 221-4 Abs. 1 Ccons können die Unternehmen bei den Ermittlungen der Kommission die Auskunft oder Vorlage von Dokumenten nicht mit der Begründung verweigern, dass hiervon Geschäftsgeheimnisse betroffen sind. Wenn solche Geschäftsgeheimnisse betroffen sein sollten, ernennt die Kommission nach Art L 221-4 Abs. 4 Ccons einen Berichtersteller, der verpflichtet ist, die Informationen von denen er im Rahmen seiner Untersuchungstätigkeit Kenntnis bekommen hat, vertraulich zu behandeln.

Nach Art L 224-6 Ccons unterliegen außerdem alle Mitglieder der Kommission der Schweigepflicht bezüglich der Geschäftsgeheimnisse, die sie bei ihrer Tätigkeit erfahren. Die Verbreitung solcher Informationen ist unter Strafe gestellt.

Das allgemeine verwaltungsrechtliche Akteneinsichtsrecht ist dagegen nach Art. 6 Abs. 2 erster Spiegelstrich des Gesetzes über freien Zugang zu Verwaltungsunterlagen beschränkt, soweit sich in den verlangten Unterlagen Geschäfts- oder Betriebsgeheimnisse befinden. In diesem Fall darf keine Einsichtnahme von Dritten zugelassen werden oder die Unterlagen müssen vorher so aufbereitet werden, dass die Geheimnisse nicht mehr erkennbar sind.

*b. Sofern in Ihrem Land Betriebs- und Geschäftsgeheimnisse von der Informationsherausgabe ausgenommen sind:*

*Wie werden Betriebs- und Geschäftsgeheimnisse bei Ihnen definiert?*

Es gibt keine gesetzliche Definition der Betriebs- und Geschäftsgeheimnisse. Es gibt jedoch einen Hinweis in Art. 226-13 Code pénal, nach dem es sich nur um Informationen handeln kann, die Wettbewerbern nicht bekannt sind.

Rechtsprechung und Lehre definieren Geschäftsgeheimnisse als Tatsachen, praktischer und kommerzieller Art, an denen ein Geheimhaltungsinteresse besteht und die Wettbewerbern unbekannt sind.

*Wer bestimmt, ob es sich bei einer Information um ein Betriebs- oder Geschäftsgeheimnis handelt?*

Es wird nach den genannten objektiven Gesichtspunkten durch die Gerichte festgestellt.

*Sofern dies die Unternehmen selbst tun: Gibt es einen Negativkatalog mit Informationen, die keinesfalls als Betriebs- und Geschäftsgeheimnisse oder sonstige wettbewerbsrelevante Informationen schützenswert sind?*

Nein

*c. Darf oder muss die Behörde Unternehmen benachrichtigen, wenn sie Informationen über diese herausgibt? Geschieht diese Information vor, gleichzeitig oder nach der Informationsweitergabe? Kann der Unternehmer der Weitergabe widersprechen?*

Bei Eilmaßnahmen nach Art L 221-5 Ccons im Falle des Vorliegens einer schwerwiegenden oder gegenwärtigen Gefahr kann die Anhörung der Unternehmen auch erst nach Herausgabe der Warnungen an die Verbraucher erfolgen. In diesem Fall kann der Unternehmer nicht der Weitergabe der Information widersprechen.

Nach Art 26 Abs. 2 des Gesetzes über freien Zugang zu Verwaltungsunterlagen muss der Antragsteller durch die Behörde informiert werden, wenn an den verlangten Unterlagen, die der Antragsteller weiterbenutzen will, ein Dritter Inhaber von gewerblichen Schutzrechten oder Urheberrechten ist. Die Behörde muss den Antragsteller von dem Bestehen dieser Rechte informieren und ihm den Inhaber der Schutzrechte benennen. Der Inhaber der Schutzrechte selbst wird aber nicht von dem Antrag informiert.

*d. Gibt es in Ihrem Land Erfahrungen mit einem Selbsteintrittsrecht des Anspruchsgenegers in der Form, dass ein Auskunftsanspruch über Unternehmensinformationen gegenüber einer Behörde dann abzulehnen ist, wenn der Unternehmer sich bereit erklärt, die Information selbst zu erteilen?*

Nein

## **2. Datenschutz**

*a. Welche Aufgabe kommt dem Datenschutz im Rahmen der Informationserteilung zu und wie wird er gewährleistet?*

Der Datenschutz nach dem Datenschutzgesetz Nr. 78-17 vom 6. Januar 1978 betrifft nur persönliche Daten von natürlichen Personen. Unternehmens- und Produktbezogene Daten fallen nicht in den Schutzbereich und genießen keinen besonderen Schutz. Die Daten der Verbraucher dagegen, die Auskünfte über Unternehmen oder Produkte eingeholt haben, werden durch dieses Gesetz vor Weiterleitung an andere Behörden oder Unternehmen geschützt.

Bei einem Akteneinsichtsverlangen nach dem Gesetz über freien Zugang zu Verwaltungsunterlagen ist das Einsichtsrecht nach Art 6 Abs. 2 erster Spiegelstrich für Dritte ausgeschlossen, wenn in den verlangten Dokumenten persönliche Daten enthalten sind. In diesem Fall hat nur die von den Daten betroffene Person einen Anspruch auf Einsicht.

*b. Dürfen Behörden Unternehmern Namen und Anschrift von Antragstellern mitteilen, die Informationen über ihr Unternehmen eingeholt haben?*

Nein, z.B. bleibt die Anrufung der CSC nach Art L 224-3 Abs. 4 Ccons solange vertraulich, bis die Kommission über den Antrag entschieden hat oder den Antrag eingestellt hat.

c. Welche weiteren Grenzen der Auskunftserteilung kennt Ihr Rechtssystem?

Es gibt bei den verbraucherrechtlichen Informationsansprüchen des *Code de la consommation* keine Liste mit gesetzlichen Ausnahmen, bei denen unter den genannten Voraussetzungen Informationsersuche des Verbrauchers zurückgewiesen werden können. Da es aber auch keinen ausdrücklich gesetzlich geregelten Informationsanspruch des Verbrauchers gegen eine bestimmte Behörde gibt, liegt die Beantwortung von Informationsanfragen jedenfalls immer im Ermessen der Behörde, so dass die z.B. im deutschen Verbraucherinformationsgesetz genannten Ausnahmen in französischem Recht im Rahmen des Ermessensspielraums der Behörde berücksichtigt werden können. So wird z.B. die als besonders wichtig erscheinen Ausnahme der Bedürfnisse der nationalen Verteidigung ebenfalls in Frankreich immer zu einer Zurückweisung des Informationsverlangens eines Verbrauchers führen können.

Nach dem Gesetz über freien Zugang zu Verwaltungsunterlagen besteht in Art. 6 Abs. 1 eine Liste von öffentlich-rechtlichen Ausnahmen und nach Abs. 2 eine Liste von privatrechtlichen Ausnahmen, bei deren Vorliegen die Akteneinsicht ausgeschlossen ist. Danach sind nach Abs.1

- Entscheidungen des Staatsrats (*Conseil d'Etat*) und der Verwaltungsgerichte,
- Unterlagen der Rechnungshöfe oder der Finanzgerichte,
- Aktenstücke des Mediators der Republik,
- Berichte zur Akkreditierung und Audit von Kliniken und Personal im Gesundheitswesen, Gutachten über die Finanzierung der gesetzlichen Krankenkasse,
- Informationen die zum nationalen Verteidigungsgeheimnis oder zu der Führung des Außenpolitik Frankreichs gehören,
- Informationen, die die Staatssicherheit, öffentliche Sicherheit, Sicherheit von Personen oder die Währung betreffen,
- Informationen, die anhängige Gerichtsverfahren betreffen,
- Unterlagen der Zoll- oder Steuerfahndung,
- Informationen nach dem Umweltschutzgesetz

von dem Akteneinsichtsrecht ausgeschlossen.

Nach Abs. 2 sind folgende Informationen von dem Einsichtsrecht ausgeschlossen:

- die den Schutz der Privatsphäre, die Geheimhaltungspflicht der Ärzte oder Betriebs- und Geschäftsgeheimnisse betreffen,
- die Werturteile über eine natürliche Person enthalten, die identifizierbar ist,
- Unterlagen, die ein Verhalten einer Person erkennen lassen, dessen Bekanntwerden dieser Person schädlich sein könnte.

Wenn die Informationen, aufgrund derer das Akteneinsichtsrecht verweigert werden müsste, leicht von der Akteneinsicht ausgenommen (z.B. durch Schwärzen) oder so aufbereitet werden können, dass sie nicht mehr erkennbar sind, soll die Akteneinsicht in das aufbereitete Dokument gewährt werden.

#### **IV. Besonderheiten (vor-)vertraglicher Informationsansprüche**

##### **1. Mindestinformationen**

*Unterliegt der Unternehmer einer Pflicht oder Obliegenheit, den Verbraucher vor Vertragsabschluss über bestimmte Punkte zu informieren?*

Ja, nach Art 11-1 Ccons hat der Unternehmer eine Pflicht, den Verbraucher vor Abschluss des Vertrages in die Lage zu versetzen, die wesentlichen Eigenschaften des Produktes oder der Dienstleistung zu kennen. Er muss den Verbraucher ebenfalls über Lieferfristen und die Dauer der Bereitstellung von Ersatzteilen informieren. Bei bestimmten Vertragsarten wird diese Pflicht noch erweitert, indem eine gesetzlich bestimmte Mindestinformation über die Vertragsbedingungen verlangt wird.

*Wenn ja: Existieren Formerfordernisse für diese Informationen?*

Bei den erweiterten Informationspflichten bei besonderen Vertragsarten bestehen auch Formvorschriften für die Information.

- Bei Haustürgeschäften muss die Information nach Art L 121-23 Ccons schriftlich erfolgen und es muss nach Art 121-24 Abs1 ein abtrennbarer Coupon für die Ausübung des 7tägigen Rücktrittsrechts dem Vertrag anliegen;
- Bei Verträgen über Fernkommunikationsverträge müssen bestimmte Informationen nach Art L 121-83 Ccons schriftlich bereitgestellt werden;

- Bei Fernabsatzverträgen müssen die Informationen nach Art L 121-18, 121-19 Ccons ebenfalls schriftlich mit einem abtrennbaren Coupon für die Ausübung des Rücktrittsrechts verbunden sein.

## **2. Rechtsfolgen**

*Welche Rechte stehen dem Verbraucher im Falle unterlassener Information zu (Lösung vom Vertrag, Schadensersatz etc.)?*

Der Vertrag ist bei Nichteinhaltung der Informationspflicht schwebend unwirksam, d.h. er kann durch den Verbraucher, aber auch nur durch diesen angefochten werden. Außerdem verlängert sich das Rücktrittsrecht in bestimmten Fällen auf 3 Monate, wie z.B. nach Art L 121-20 Abs.3 Ccons bei Fernabsatzverträgen.

*Wenn ja: Ist dieses Recht zeitlich befristet und wie lang ist die Frist?*

Die Anfechtbarkeit des Vertrages unterliegt der regelmäßigen zivilrechtlichen Verjährungsfrist von 30 Jahren.

## **3. Andere funktional äquivalente Regelungen**

*Sieht das Rechtssystem Ihres Landes andere Regelungen vor, die den Zweck verfolgen, den Verbraucher vor einem Vertragsschluss ohne ausreichende Informationen zu schützen?*

Z.B. die Tatsache, dass Verkäufer keine Zahlungen von Verbrauchern annehmen dürfen, solange die Rücktrittsfrist nicht abgelaufen ist.

## **V. Praktische Wirksamkeit der Regelungen**

### **1. Welches sind die für die Verbraucherinformation wichtigsten Normen?**

Art L 111-2 Ccons. als allgemeines Verbraucherinformationsrecht und Art L221-1-2 Ccons. als spezielles Verbraucherinformationsrecht bezüglich der Produktsicherheit. Die beiden grundlegenden Informationsrechte richten sich gegen den Hersteller. Als Hersteller gilt dabei auch der Importeur von außerhalb der EU hergestellten Produkten und alle anderen in der Vertriebskette tätigen Unternehmer, die Sicherheits-

charakteristiken eines Produktes beeinflusst haben können.

Daneben gibt es nach den Art L 221-1-4 Ccons eine Pflicht der Verkäufer/Händler, die Informationen an die Verbraucher weiterzuleiten, die ihnen bezüglich Risiken von Produkten bekannt werden.

Weiterhin kann eine konkrete Informationspflicht bezüglich eines einzelnen Produktes oder einer Dienstleistung durch Verordnung nach Art L 221-3 Nr.3 Ccons. begründet werden, wenn ein Sicherheitsrisiko aufgedeckt wurde<sup>72</sup>.

**2. Sofern zu dieser Frage in Ihrem Land Daten vorhanden sind: Welche Anspruchsgrundlagen/Rechte werden am häufigsten von Verbrauchern, welche von Verbraucherverbänden genutzt?**

Es gibt hierzu keine Daten, da es auch nur zwei grundsätzliche Anspruchsgrundlagen gibt, die jede einen anderen Anwendungsbereich haben und damit nicht miteinander in Konkurrenz stehen.

**3. Warum werden gerade diese Anspruchsgrundlagen/Rechte am häufigsten genutzt?**

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**4. Wenn es Statistiken darüber gibt: Wie häufig werden Anträge auf welcher Grundlage und in welchem Sachbereich gestellt.**

Es gibt Statistiken über die Tätigkeiten der verschiedenen in dem Bereich der Verbraucherinformation über Produktsicherheit tätigen Behörden.

Z.B. die „**Commission de sécurité des consommateurs**“ hat in ihrem Jahresbericht zur Tätigkeit im Jahr 2008 folgende Angaben hierzu gemacht :

- von 260 Anträgen auf Einschreiten der Kommission wurde 100 Anträgen stattgegeben; davon stammen 82 Anträge von Verbrauchern, 6 von Verbrauchervereinigungen, 4 von dem *Conseil d'Etat* im Rahmen der Vorbereitung einer Verwaltungsverfügung, 5 von der Verwaltung, 2 von Ärzten und 1 von einem Unternehmer. Die eindeutige Mehrzahl der Anträge stammt also direkt von einzelnen

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<sup>72</sup> Z. B. das Décret n° 2009-890 vom 22 juillet 2009 relative à la prévention des risques résultant de l'usage des équipements de protection individuelle pour la pratique sportive ou de loisirs (bezüglich der Sicherheit von Sportgeräten).

Verbrauchern.

- diese Anträge verteilen sich wie folgt auf die verschiedenen Sachbereiche :

Dienstleistungen : 16

Säuglingspflegeprodukte : 15

Heimwerker und Garten : 9

Möbel : 9

Elektrohaushaltsgeräte : 8

Spielzeug : 8

Verschiedene technische Spielereien : 7

Heizung : 6

Sicherheitseinrichtungen : 5

Transporte : 5

Immobilien : 4

Sport und Freizeit : 3

Textilien : 3

Haushaltsreinigungsprodukte : 2

Der CSC hat aufgrund der Anträge 17 umfassende Gutachten in den folgenden Bereichen veröffentlicht, die vertiefte Ermittlungen erfordert haben :

Wassersport, Mobiltelefone, Vierradmotorräder, Rauchmelder, Fahrradträger, Heimwerker- und Gartenmaschinen, Kanu –und Kajak, Alarmanlagen, Brennalkohol und flüssige Feueranzünder, Gasherde, Kinderkleidung, Skipisten auf künstlichem Schnee, nicht in die Erde eingelassene Schwimmbäder, Ethanolfeuerstellen, Material in automatischen Waschsals, Fußballtore, berufliche Qualifikationen.

Darüber hinaus hat die Kommission 17 Pressecommuniqués veröffentlicht.

##### **5. Was sind die wesentlichen Ablehnungsgründe? Formfehler des Antragstellers, dass die Information nicht vorlag oder dass sie durch Geschäfts- und Betriebsgeheimnisse oder aus anderen Erwägungen geschützt ist?**

160 Anträge zum Einschreiten der Kommission wurden abgelehnt, entweder wegen fehlender Antwort des Antragstellers, wegen fehlender Gefahr durch das Produkt oder wenn über das betreffende Produkt bereits ein Gutachten abgegeben worden

ist.

**6. Haben einzelne (Verbraucher-) Informationsansprüche oder verschiedene Normen in ihrem Zusammenspiel der Praxis unerwünschte praktische Nebenwirkungen ausgelöst?**

**Wenn ja: Inwiefern und was war der Grund hierfür? Eine Verhaltensänderung der Normadressaten oder ein unbeabsichtigtes Zusammenspiel verschiedener, in diesem Sinne zunächst nicht gedachter rechtlicher Regelungen?**

Nein, hierzu sind jedenfalls keine konkreten Fälle bekannt.

**7. Haben einzelne Informationsregelungen unerwartete positive Entwicklungen verursacht, beispielsweise die Entwicklung neuer Produkte oder Qualitätskontrollmechanismen?**

Ja, insgesamt kann man feststellen, dass die Verbraucheraufklärung zu positiven Ergebnissen führt. Z.B. hat die AFSSA im Jahre 2005 Warnungen herausgegeben, wonach Jugendliche in Frankreich zu viele Trans-Fettsäuren mit industriell hergestellten Fertignahrungsmitteln aufnehmen. Vier Jahre später im Februar 2009 hat dieselbe Agence eine erhebliche Minderung der Trans- Fettsäuren in den Nahrungsmitteln festgestellt. Man kann also davon ausgehen, dass sich die Nahrungsmittelindustrie auf die Forderung der Verbraucher eingestellt hat<sup>73</sup>.

**8. Haben sich andere wirtschaftliche oder gesellschaftliche Auswirkungen gezeigt?**

Es hat sich gezeigt, dass vor allem in Großunternehmen spezielle Verbraucherabteilungen eingerichtet wurden, die als Anlaufstellen für Verbraucher dienen und die mit der Verbraucherinformation beschäftigt sind. Die in dieser Abteilung Beschäftigten sind eine Art Vertreter der Verbraucherinteressen im Unternehmen.

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<sup>73</sup> Le Figaro vom 11. Sept. 2009, S.14 « *Haro sur les mauvaises graisses alimentaires* »

**9. Wie lange dauert durchschnittlich die Bearbeitung einer Informationsanfrage? Existieren gesetzliche Maximalfristen und werden diese ggf. eingehalten?**

Hier können keine generellen Werte gegeben werden. Es kommt ganz auf die Art der Information, die Art des Produktes und darauf an, wie viele Erfahrungswerte schon mit der Benutzung des Produktes bestehen.

**10. Beispiel: Wenn in Ihrem Land festgestellt würde, dass bei einem bestimmten Produkt (etwa: Fleisch) wiederholt Verstöße gegen Produktstandards (konkret Nahrungsmittelvorschriften) vorliegen. Wer reagiert wie schnell auf welcher Grundlage auf diese Information? Woher erhält der Verbraucher die Information aus welchem Grund zuerst? Werden im Fall von öffentlichen Warnungen die Unternehmer oder das Produkt genannt (mit den zugehörigen Auswirkungen für die gesamte Branche oder einen Hersteller)?**

Im Falle Sicherheitsgefahr für Verbraucher hat das Parlament durch Gesetz die Regierung ermächtigt, durch Verordnungen einzuschreiten. Dieses Recht wird durch den Verbraucherschutzminister nach Art L221-3 Ccons wahrgenommen. Diese Verordnungen sind jedoch unpersönlich und nennen zwar das Produkt nicht aber das Unternehmen oder die Marke.

Nur bei Vorliegen einer gegenwärtigen und schwerwiegenden Gefahr für Verbraucher kann der Minister oder der Präfekt nach Art L 221-5 Abs.1 Ccons für ein Departement durch Einzelfallentscheidung eine Warnung für ein bestimmtes Produkt veröffentlichen, in der auch das betroffene Unternehmen genannt wird.

Bei Verletzung von Sicherheitsstandards bei Nahrungsmittel ist speziell die AFSSA zuständig. In diesem Fall können sowohl Verordnungen nach Art L 221-3 Ccons als auch Eilmaßnahmen nach Art 221-5 Ccons erst nach Anhörung der AFSSA ergehen (L 221-10 Ccons).

## VI. Produktkennzeichnung und Qualitätskontrollen

### 1. Existiert in ihrem Land ein obligatorisches System der Produktkennzeichnung, z.B. durch Kennzeichnungspflichten zur Gesundheitsschädlichkeit von Waren oder Dienstleistungen?

Ja , z.B. die *loi Evin* vom 12. Jan. 1991 für Tabakprodukte und Alkohol.

Für alkoholische Getränke ist die Werbung reglementiert. Sie ist im Fernsehen und in sämtlichen Sportstätten verboten, aber in geschriebener Presse und Radio erlaubt. Sowohl bei der Radio- als auch bei der Pressewerbung und auf den Etiketten der Produkte selbst muss nach Art L 3323-2 Code de la santé publique eine Gesundheitswarnung und eine Aufforderung zu gemäßigtem Konsum vermerkt sein<sup>74</sup>.

Für Tabakprodukte ist sämtliche Werbung verboten, so auch z.B. durch die kostenlose Verteilung von Warenproben. Auf dem Produkt selbst muss nach Art L 3511-2 ff. Code de santé publique eine Gesundheitswarnung und der Nikotingehalt vermerkt sein<sup>75</sup>

Werbung für verschreibungspflichtige Medikamente ist verboten. Für nicht verschreibungspflichtige Medikamente unterliegt die Werbung einem Genehmigungsverfahren und es muss nach Art L 5122-7 Code de santé publique sowohl in der Werbung als auch auf dem Belegzettel ein Warnhinweis erfolgen, dass bei Andauern der Krankheitssymptome das Aufsuchen eines Arztes unerlässlich ist.

Ansonsten umfasst die allgemeine Informationspflicht auch die Pflicht Sicherheits Hinweise auf Etiketten von Produkten anzubringen, die insbesondere nähere Angaben über Benutzungshinweise, Zusammensetzung der Produkte, eventuelle Warnzeichen (siehe zu VI 2.) und Risiken des Produkts enthalten.

Beispiele: *Ampelfarben auf Lebensmitteln, Smileys für Lebensmittelbetriebe, Verschluckgrößen für Babyartikel...*

Es gibt Kennzeichnungspflichten auf Etiketten bei denen die Risiken mit Zeichen dargestellt werden, wie z.B. leicht entflammbare Produkte, korrosive Produkte, explosive Produkte, giftige Produkte, irritierende Produkte, schädliche Produkte, umweltgefährdende Produkte, ...

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<sup>74</sup> « L'abus d'alcool nuit gravement à la santé. » « A consommer avec modération »

<sup>75</sup> « Nuit gravement à la santé »

Das Smiley-System wurde bisher in Frankreich nicht praktiziert und deren Einführung wurde auch bisher nicht diskutiert.

Ein ähnliches Kontroll- und Veröffentlichungssystem gibt es jedoch für Hotels bei denen Sterne vergeben und von den Hotels ausgehängt werden.

Die Sternvergabe an Hotels basiert im Prinzip auf einer freiwilligen Teilnahme der Hotels an dem Sternesystem. Dieses ist jedoch in der Praxis so weit verbreitet, dass fast alle Hotels daran teilnehmen.

Es handelt sich um eine Klassifizierung der Hotels mit 1 – 5 Sternen. Die Normen für die Erteilung der Sterne sind durch Gesetz<sup>76</sup> festgelegt. Die Hotels werden durch eine staatliche Kommission kontrolliert, die in jedem Departement gebildet wird. Vorsitzender der Kommission ist der Präfekt des Departements und Mitglieder sind Vertreter der Industrie- und Handelskammern, des Tourismusministerium und von Verbraucherschutzorganisationen.

Die Kontrolle der Hotels erfolgt in regelmäßigen Abständen. Das Hotel muss die Sterne draußen durch ein Schild mit weißen Sternen auf blauem Grund anschlagen auf dem auch das Jahr der letzten Kontrolle steht.

Die erteilten Sterne können dem Hotel auch jederzeit durch Entscheidung der Kommission wieder entzogen werden, wenn sich herausstellt, dass die an die betreffende Kategorie gestellten Anforderungen nicht mehr erfüllt werden.

Für Restaurants gibt es dagegen kein staatliches Kontrollsystem. Hier gibt es ausschließlich rein private Einstufungen und Klassifizierungen.

**2. Sofern eine Kennzeichnungspflicht bei Ihnen existiert, beschreiben Sie bitte das Kennzeichnungssystem. Von besonderem Interesse sind für uns u.a. folgende Fragen:**

Es gibt über die genannten Kennzeichnungspflichten für Warnungen der Verbraucher hinaus, ein freiwilliges Kennzeichnungssystem für Waren und Dienstleistungen mit Produktinformationen oder Qualitätskennzeichen.

Wenn der Unternehmer sich auf diese Qualitätskennzeichen beruft, ist er verpflichtet,

- den Namen und die Anschrift des Zertifizierungsunternehmens zu

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<sup>76</sup> Arrêtés du 14.2.1986 et du 7.4.1989 fixant les normes et la procédure de classement des hôtels et résidences de tourisme

nennen,

- die wesentlichen Eigenschaften, die entsprechend den Zertifizierungsvorgaben bestehen, zu bezeichnen (Art R 115-26 Ccons).

Wenn er diese Angaben unterlässt, kann er mit einem Ordnungsgeld nach Art L 115-26 Ccons belangt werden.

*a. Wo und wie werden die Ergebnisse bekannt gegeben?*

Sie werden nicht bekannt geben.

*b. Hat der Unternehmer einen Anspruch auf Gegendarstellung oder Stellungnahme?*

Der Unternehmer veröffentlicht die Informationen selbst auf dem Produkt oder in dem Unternehmen.

*c. Sofern der Unternehmer die Produktinformation oder Kontrollergebnisse selbst auf seinem Produkt oder in seinem Unternehmen veröffentlichen muss: in welcher Form, an welchem Ort und binnen welcher Frist muss diese Veröffentlichung geschehen?*

Die Qualitätszertifikate und Label müssen nicht zwingend genannt werden. Wenn der Unternehmer sich aber hierauf beruft, muss das Produkt die entsprechenden Charakteristiken aufweisen.

*d. Welche Sanktionen drohen einem Unternehmen im Falle fehlender oder veralteter Kennzeichnungen? Gibt es Strafen oder Ordnungsgelder, falls Unternehmer absichtlich wahrheitswidrig mit positiven Kontrollen oder Kennzeichen werben?*

Wenn der Unternehmer wahrheitswidrig mit Qualitätskennzeichen oder positiven Kontrollen wirbt, kann er nach Art L 115-30 Ccons wegen Irreführung und Betruges mit einem Ordnungsgeld belangt werden.

*e. Wie lange dürfen Unternehmen mit positiven Kontrollergebnissen oder Kennzeichnungen werben?*

Unternehmen, deren Produkte mit einem Qualitätskennzeichen ausgezeichnet sind, können solange mit diesem Zeichen werben, wie ihre Produkte die Vorgaben für die geforderte Qualität erfüllen. Das Qualitätszeichen kann jederzeit im Falle unzureichender Qualität entzogen werden. Produkte mit Qualitätskennzeichen müssen die Qualität in gleichem Masse weiterentwickeln wie Standardprodukte, denn sonst können sie in der Qualität eingeholt werden und die Qualitätsauszeichnung kann ihnen entzogen werden.

*f. Wie oft, nach welchen Kriterien und von wem werden die für die Produktkennzeichnung erforderlichen Qualitäts- und /oder Sicherheitskontrollen durchgeführt? Für welche Bereiche? Und haben Bürger oder die kontrollierten Unternehmer Einfluss auf die Kontrolldichte oder einzelne Kontrolltermine? Wer trägt bei beantragten Kontrollen die Kosten?*

Die Zertifizierungsinstitute können zu jedem Zeitpunkt und müssen regelmäßig Kontrollen der Produkte vornehmen, die von der Qualitätsauszeichnung betroffen sind und diese benutzen. Wenn die Kontrolle Abweichungen von den Qualitätsvorgaben erkennen lässt, kann die Zertifizierungsstelle die Qualitätsauszeichnung entziehen.

*g. Im Falle behördlicher Kontrollen: wie sind diese strukturiert? Existiert eine einheitliche Kontroll- oder Kennzeichnungsbehörde z.B. in einem (eigenen) Ministerium oder unterstehen die Kontrolleure den Kommunen?*

Man muss zwischen Qualität- und Sicherheitskontrollen unterscheiden. Nur Sicherheitskontrollen werden durch staatliche Behörden durchgeführt. Die Qualitätskontrollen erfolgen durch unabhängige private Zertifizierungsstellen.

Sicherheitskontrollen erfolgen größtenteils durch eine zentrale Untersuchungsbehörde, die DGCCRF, die dem Wirtschaftsministerium untersteht und weisungsabhängig ist. Nach Art L 215-1 Ccons haben die Untersuchungsbeamten der Behörde in Anwesenheit des Unternehmers Zugang zu den Geschäftsräumen des Unter-

nehmens und dürfen dort zu Untersuchungszwecken Warenproben entnehmen und sämtliche für die Untersuchungen erforderlichen Informationen und Auskünfte sammeln<sup>77</sup>.

*h. Entstehen durch das System erhöhte Kosten, insbesondere aufgrund Personalmehrbedarfs?*

Nein, da es sich um eine allgemeine Behörde des Wirtschaftsministeriums handelt, die vor allem auch Verstöße gegen das Recht des unerlaubten Wettbewerbs und des Kartellrechts kontrolliert.

**3. Falls in Ihrem Land kein Produktkennzeichnungssystem existiert: Gab es Überlegungen ein solches Kennzeichnungssystem einzuführen? Wenn ja, weshalb hat man davon Abstand genommen?**

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## **Teil C. Kostenlasten für die Beteiligten**

### **I. Aufwand der Informationsbeschaffung und -erteilung**

**1. 1. Welche tatsächlichen Handlungen sind zur Erfüllung der jeweiligen Informationsansprüche erforderlich?**

Der Hersteller und Importeur, aber auch die verschiedenen Zwischenhändler und der Verkäufer haben nach Art L 221-1-2 Ccons die Pflicht, sich ständig über die Risiken des Produkts zu informieren und alle Maßnahmen einzuleiten, die erforderlich sind, um die von dem Produkt ausgehenden Risiken zu beherrschen. Dazu müssen sie ein dauerndes Kontrollsystem der Produkte einrichten, vor allem solcher Produkte, die ihrer Natur nach Sicherheitsrisiken aufweisen.

**2. Wenn es in Ihrem Land Schätzungen oder Berechnungen der durch die Informationsbeschaffung und -erteilung verursachten Kosten gibt:**

*Wie hoch sind diese?*

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<sup>77</sup> Memento Pratique, Francis Lefevre, Concurrence-consommation 2009-2010, Rdn.73700

Es gibt keine Schätzungen oder Berechnungen der verursachten Kosten. Diese Kosten sind auch von einem Produkt zum anderen sehr verschieden, so dass es nicht möglich ist, diese Kosten generell zu schätzen.

*Welche Handlungsschritte sind besonders aufwändig (Informationsbeschaffung, Veröffentlichung/Bekanntmachung, Verwahrung der Information, Antragsbearbeitung, Untersuchungen in und Kommunikation mit Unternehmen, ggf. Aufbereitung und Prüfung der Informationen)?*

Am kostenaufwendigsten ist sicher die Informationsbeschaffung und Prüfung.

*Werden die Kosten der Informationsbeschaffung und –erteilung regelmäßig geschätzt oder ausgewiesen? Wenn ja, wie haben sie sich entwickelt?*

Nein

*Sofern bei Erlass des Informationsanspruchs eine Bürokratiekostenschätzung durchgeführt wurde: Welcher Betrag wurde veranschlagt? Inwieweit hat sich also diese Schätzung in der Realität bestätigt?*

Es wurde keine Schätzung durchgeführt. Da es in Frankreich keinen dem deutschen Verbraucherinformationsgesetz entsprechenden gesetzlichen Informationsanspruch des Verbrauchers gegenüber einer Behörde gibt, werden die Kosten der Behörde nicht veranschlagt.

*Und was sind Gründe für signifikantere Abweichungen?*

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### **3. Wurden infolge des Informationsanspruchs neue Anschaffungen getätigt oder Personal eingestellt?**

Das ist im Einzelnen schwierig zu beantworten, da das Personal in der Regel nicht nur der Informationsbeschaffung und Bearbeitung dient, sondern vielseitiger eingesetzt wird und es keinen gesetzlichen Informationsanspruch des Verbrauchers gegenüber der Behörde gibt.

## **II. Kostentragung**

### **1. Werden die Verbraucher an den Kosten für die Informationsbeschaffung und -erteilung beteiligt? Ist diese Beteiligung im Ergebnis kostendeckend?**

Nein, nicht direkt. Sie werden nur indirekt beteiligt, wenn sie z.B. auf den Internetseiten der Behörden Dokumentation oder juristische Gutachten abrufen oder Veröffentlichungen kaufen.

Die Akteneinsicht nach dem Gesetz über freien Zugang zu Verwaltungsunterlagen ist ebenfalls kostenfrei. Es können nach Art. 4 lit. b) nur Kosten für Fotokopien erhoben werden.

*In welcher Form werden die Verbraucher an den Kosten beteiligt: durch (aufwandsunabhängige) Gebühren, Entschädigungen für den tatsächlichen Aufwand?*

In Fällen der Informationserteilung werden Verbrauchern weder Gebühren noch Aufwandsentschädigungen in Rechnung gestellt.

*a. Gibt es eine Kostenpauschale oder findet eine individuelle Berechnung statt?*

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### **2. Gibt es Möglichkeiten für sozial Schwache kostenlos oder zu vergünstigten Konditionen Informationen einzuholen?**

Alle Informationen sind kostenlos.

### **3. Gibt es Anzeichen dafür, dass die Kostenbeteiligung eine stark abschreckende Wirkung entfaltet?**

Es gibt keine Kostenbeteiligung.

### **4. Werden Unternehmen nach dem Verursacherprinzip wegen der Risikoschaffung oder bei Verstoß gegen Verbraucherschutzvorschriften bei der Kostentragung mit herangezogen?**

Ja, nach Art L 221-3 Nr. 4 Ccons kann in Fällen, in denen ein Problem bei der Si-

cherheit eines Produktes besteht, in einer Verordnung festgelegt werden welche Kosten den Herstellern, Importeuren oder Händlern auferlegt werden.

### **III. Kosten-Nutzen-Betrachtung**

**1. Werden die Kosten für die Informationsbeschaffung und –erteilung bei der Frage ob ein Informationsanspruch besteht berücksichtigt? Werden also die Kosten für die Allgemeinheit mit dem Interesse des Einzelnen abgewogen?**

Nein.

**2. Wenn solch eine Interessenabwägung durchgeführt wird: hat die Beteiligung der Verbraucher an den Kosten daher Einfluss darauf, ob überhaupt ein Informationsanspruch besteht?**

Nein.

## **Teil D. Praktische Durchsetzbarkeit**

### **I. Durchsetzbarkeit der Informationsansprüche**

**1. Gibt es Streitschlichtungsmechanismen speziell für das Verbraucherinformationsrecht? Wenn nein, sind andere Streitbeilegungsmechanismen vorhanden? Werden diese Möglichkeiten genutzt?**

Es gibt in Frankreich zahlreiche Streitschlichtungsmechanismen im Verbraucherschutzrecht.

Nach Art D 512-1 Ccons wird in jedem Departement ein *Comité départemental de la consommation* eingerichtet. Dieses wird von dem Präfekten geleitet und besteht zur Hälfte aus Vertretern der Verbraucher und zur Hälfte aus Vertretern wirtschaftlicher Aktivitäten. Dieses Komitee hat unter anderem die Aufgabe bei der Schlichtung von Verbraucherrechtsstreitigkeiten mitzuwirken.

Außerdem können auf der Ebene des Departements oder der Region mit Unterstützung der Territorialregierung Kommissionen eingerichtet werden „*Commissions de règlement des litiges de la consommation*“, deren Aufgabe es ist, bei der Schlichtung von Streitigkeiten zwischen Verbrauchern und Unternehmen mitzuwirken<sup>78</sup>. Die Kommission setzt sich aus Verbraucher – und Unternehmervetretern zusammen.

Sie muss innerhalb von zwei Monaten ab Erhalt der Anfrage einen Regelungsvor-

<sup>78</sup> Guy Raymond, *Droit de la consommation*, 2008, S. 373

schlag unterbreiten. Wenn der Vorschlag von den Parteien angenommen wird, setzt sie ein Protokoll auf, andernfalls wird den Parteien das Scheitern des Verfahrens bescheinigt. Danach können sie den Rechtsweg bestreiten.

Daneben gibt es sogenannte Schlichter, die von den Verbrauchern angerufen werden können, soweit es um dispositives Recht geht. Wenn der Schlichter zwischen den Parteien eine Einigung herbeiführt, wird diese als außergerichtlicher Vergleich protokolliert. Der Schlichter kann auch noch im Rahmen eines bereits anhängigen gerichtlichen Verfahrens tätig werden. In diesem Fall wird der Vergleich gegebenenfalls aber gerichtlich protokolliert.

Auch die auch der französischen Zivilprozessordnung (Art 131-1 bis 131-14 CPC) vorgesehene Mediation ist im Bereich des Verbraucherschutzes anwendbar.

**2. Wenn bei Ihnen eine Pflicht zur Unterrichtung der Verbraucher durch Unternehmer besteht (wie z.B. in Art. 19 Abs. 1 der VO (EG) Nr. 178/2002): wie wird gewährleistet, dass Unternehmer dieser Pflicht auch nachkommen?**

Wenn der Unternehmer nicht freiwillig über Sicherheitsrisiken informiert, kann die Verwaltungsbehörde (DGCCFR) ihn zunächst nach Art L 221-7 Abs.1 Ccons dazu auffordern, diese Verpflichtung einzuhalten und sich innerhalb einer bestimmten Frist auf seine eigenen Kosten einer Kontrolle durch ein unabhängiges Kontrollorgan zu unterwerfen. Dieses ist einer aufgrund einer Ministerentscheidung festgesetzten Liste zu entnehmen.

Nach erfolglosem Ablauf der Frist kann die Verwaltungsbehörde selbst nach Art L 221-5 Abs.1 Ccons Warnungen bezüglich des Produktes veröffentlichen. Die Kommerzialisierung des Produktes ist dann nach Art 221-2 Ccons verboten, da das Produkt so behandelt wird als ob es nicht den Sicherheitsanforderungen entspricht.

Es bestehen nach den Art L 312-1 Ccons außerdem erhebliche bussgeldrechtliche und sogar strafrechtliche Sanktionen (Androhung von Gefängnisstrafe) für die Fälle, in denen der Unternehmer der Informationspflicht vor allem in der Form der zwingenden Etikettierungsvorschriften über Inhalte, Zusammensetzung, Gefahren, Benutzungshinweise, Warnungen etc. nicht nachkommt.

**3. Sieht das Rechtssystem Ihres Staates für Verbraucherschutzverbände o.ä. eine Möglichkeit vor, gegen Unternehmer vorzugehen, die sich nicht an die gesetzlichen Vorgaben zum Verbraucherinformationsrecht halten?**

Diese Klagearten sind zwar grundsätzlich zugunsten von Verbraucherschutzverbänden vorgesehen, aber nicht ausdrücklich für den Fall der Verletzung der Verbraucherinformationsrechte. Es gibt auch keine Beispiele aus der bisherigen Rechtsprechung, dass solche Klagen von Verbraucherschutzvereinen durchgeführt wurden. Sie könnten aber Unterlassungsklagen gegen wettbewerbswidriges Verhalten nach Art L 421-6 Ccons erheben.

**II. Prozessuale Besonderheiten**

**1. Existieren prozessuale Möglichkeiten an weitere Informationen zu gelangen (Beispiel: USA- pretrial discovery)? Welches sind gegebenenfalls ihre Voraussetzungen? Und inwieweit spielen Geschäfts- und Betriebsgeheimnisse in diesen Verfahren eine Rolle?**

Nein.

**2. Können andererseits prozessuale Begebenheiten (Ermittlungen o.ä.) zu einer Informationssperre bzw. einer Erschwerung des Informationserhalts führen? Wenn ja, unter welchen Voraussetzungen und mit welchen Folgen?**

Nein.

**Teil E. Abschließende Würdigung Wertungsfragen**

**1. 1. Für wie hoch halten Sie das Niveau der Verbraucherinformation und das Niveau des Verbraucherschutzes in Ihrem Land?**

Das Verbraucherschutzniveau halte ich insgesamt für sehr hoch in Frankreich. Es geht in den meisten Fällen in Frankreich auch über die Anforderungen der Richtlinien der europäischen Union hinaus. Dabei hat das französische Recht auch bestimmte Impulse für Entwicklungen im europäischen Verbraucherschutzrecht gegeben.

Das Informationsrecht erscheint allerdings eher als Selbstverständlichkeit und wird nicht besonders herausgestellt. Es wird mit Ausnahme der vorvertraglichen Informationsverpflichtungen bei bestimmten Vertriebsarten nur an zwei Stellen des Code de la consommation als ausdrückliche Anspruchsgrundlage zugunsten der Verbraucher ausgestaltet und in den Kommentaren und Lehrbüchern zum Verbraucherschutzrecht fast nicht als eigenständige Thematik behandelt. Es gibt daher auch kein eigenes Gesetz oder Verordnung wie in Deutschland zu speziellen Verbraucherinformationsrechten.

Die Informationsrechte müssen vielmehr im Gesamtzusammenhang aller anderen Maßnahmen zur Produkt- und Verbrauchersicherheit und dem verwaltungsrechtlichen Akteneinsichtsrecht gesehen werden.

**2. Halten Sie das System der Verbraucherinformation für erfolgreich oder was müsste im Sinne eines effektiven Verbraucherschutzes geändert werden?**

Ich halte das System für ausreichend. Wenn auch der Schwerpunkt nicht unbedingt auf dem Informationsrecht des Verbrauchers liegt, ist dieses Recht doch sehr stark ausgebildet. Es ist zwar nicht immer direkt als Anspruchsgrundlage für einen direkten Informationsanspruch des Verbrauchers (nur in dem Art L 111-1 und L 221-1-2 Ccons) angelegt, sondern häufig eher als Verpflichtung der Unternehmer in Bezug auf die Produktetikettierung oder Warnhinweise auf den Produkten oder Qualitätskontrollen.

**3. Welche negativen praktischen Auswirkungen oder Probleme mit der Norm sind bisher zu beobachten? Welche Auswirkungen erwarten Sie darüber hinaus?**

Da der Informationsanspruch der Verbraucher nach Art L 111-1 und L 221-1-2 Ccons nicht überbeansprucht wird, haben sich keine negativen praktischen Auswirkungen gezeigt.

**Nicht angesprochene Probleme**

**Gibt es im Bereich des Verbraucherinformationsrechts in Ihrem Land bedeutende Fragestellungen, die im vorliegenden Fragebogen nicht angesprochen worden sind?**

**Gibt es sonst irgendetwas, was Sie im Zusammenhang mit Verbraucherinformationsrechten in ihrem Land erwähnenswert finden?**

Der **Verbraucherbegriff** wird bei dem beschriebenen Informationsrecht im französischen Recht weit ausgelegt und ist nicht auf die natürliche Person, die zu privaten Zwecken handelt beschränkt, sondern versteht sich eher im Sinne des „Benutzers“ des Produktes. Dieser Benutzer muss auch nicht Vertragspartner sein, um die Rechte des Verbrauchers geltend zu machen.

In Frankreich scheint jedoch die Vielzahl der mit der Verbraucherinformation befassten **Behörden** ein Problem zu sein. Die Behördenstruktur ist für den Verbraucher zu kompliziert und unübersichtlich. Dies sollte vereinfacht werden, so dass der Verbraucher leichter den richtigen Ansprechpartner findet.

## **Anlage I:**

### **Originalwortlauf der Vorschriften, die ein Informationsrecht der Verbraucher begründen :**

#### **Code de la consommation**

#### **Partie législative**

#### **Livre Ier : Information des consommateurs et formation des con- trats.**

#### **Titre Ier : Information des consommateurs.**

#### **Chapitre Ier : Obligation générale d'information.**

#### **Article L111-1**

Tout professionnel vendeur de biens ou prestataire de services doit, avant la conclusion du contrat, mettre le consommateur en mesure de connaître les caractéristiques essentielles du bien ou du service. En cas de litige, il appartient au vendeur de prouver qu'il a exécuté cette obligation.

#### **Article L221-1-2**

I.-Le producteur fournit au consommateur les informations utiles qui lui permettent d'évaluer les risques inhérents à un produit pendant sa durée d'utilisation normale ou raisonnablement prévisible et de s'en prémunir, lorsque ces risques ne sont pas immédiatement perceptibles par le consommateur sans un avertissement adéquat. Ces dispositions s'appliquent sans préjudice des autres obligations mentionnées au présent article et aux articles L. 221-1 et L. 221-1-3. II.-Le producteur adopte les mesures qui, compte tenu des caractéristiques des pro-

duits qu'il fournit, lui permettent :

- a) De se tenir informé des risques que les produits qu'il commercialise peuvent présenter ;
- b) D'engager les actions nécessaires pour maîtriser ces risques, y compris le retrait du marché, la mise en garde adéquate et efficace des consommateurs ainsi que le rappel auprès des consommateurs des produits mis sur le marché. Ces mesures peuvent notamment consister en la réalisation d'essais par sondage ou en l'indication sur le produit ou son emballage d'un mode d'emploi, de l'identité et de l'adresse du producteur, de la référence du produit ou du lot de produits auquel il appartient. Ces indications peuvent être rendues obligatoires par arrêté du ministre chargé de la consommation et du ou des ministres intéressés.

#### **Article L221-1-4**

Les distributeurs s'interdisent de fournir des produits dont ils savent, sur la base des informations en leur possession et en leur qualité de professionnel, qu'ils ne satisfont pas aux obligations de sécurité définies au présent chapitre.

En outre, dans les limites de leurs activités respectives, les distributeurs participent au suivi de la sécurité des produits mis sur le marché par la transmission des informations concernant les risques liés à ces produits, par la tenue et la fourniture des documents nécessaires pour assurer leur traçabilité, ainsi que par la collaboration aux actions engagées par les producteurs et les autorités administratives compétentes, pour éviter les risques.

(Dernière modification du texte le 20 juin 2009 - Document généré le 13 août 2009 - Copyright (C) 2007-2008 Legifrance)

#### **Article L221-3**

Des décrets en Conseil d'Etat, pris après avis de la commission prévue à l'article L. 224-1 :

- 1° Fixent, en tant que de besoin, par produits ou catégories de produits, les conditions dans lesquelles la fabrication, l'importation, l'exportation, l'offre, la vente, la distribution à titre gratuit, la détention, l'étiquetage, le conditionnement, la circulation des produits ou le mode d'utilisation de ces produits sont interdits ou réglementés ;
- 2° Déterminent les conditions d'hygiène et de salubrité que doivent observer les personnes qui participent à la fabrication, à la transformation, au transport, à l'entreposage, à la vente des produits ou qui assurent des prestations de services ;
- 3° Peuvent ordonner que ces produits soient retirés du marché ou rappelés en vue de leur

modification, de leur remboursement total ou partiel ou de leur échange, et prévoir des obligations relatives à l'information des consommateurs. Ils peuvent également ordonner la destruction de ces produits lorsque celle-ci constitue le seul moyen de faire cesser le danger ;

4° Précisent les conditions selon lesquelles seront mis à la charge des fabricants, importateurs, distributeurs ou prestataires de services, les frais afférents aux dispositions de sécurité à prendre en vertu de la réglementation ainsi édictée.

## Anlage II:

Institution/ Behörde	AbK.	Gesetzliche Regelung	Internetseite
Agence française de sécurité sanitaire des produits de santé et des aliments	AFSSAPS	Art L 1323-1 Code de la santé publique	<a href="http://www.afssps.fr">www.afssps.fr</a>
Commission de la sécurité des consommateurs	CSC	Art L 224-1 f. und R 224-1 Code de la consommation	<a href="http://www.securiteconso.org">www.securiteconso.org</a>
Conseil national de la consommation	CNC	Art D 511-1 bis D 511-17 Code de la consommation	<a href="http://www.minefi.gouv.fr/conseilnationalconsommation/">www.minefi.gouv.fr/conseilnationalconsommation/</a>
Conseil national d'alimentation	CNA	Verordnung Nr.85-1282 vom 27. Nov. 1985t	<a href="http://www.cna-alimentation.fr">www.cna-alimentation.fr</a>
Direction Générale de la concurrence, de la consommation et de la répression des fraudes	DGCCRF	Z.B. Verordnung 2005-1086 vom 2. Sept. 2005	<a href="http://www.dgccrf.bercy.gouv.fr">www.dgccrf.bercy.gouv.fr</a>
Institut national de la consommation	INC	Art R 531-1 bis R531-8 Code de la consommation	<a href="http://www.conso.net">www.conso.net</a>
Institut national d'origine et de la qualité	INAO	Art L 115-19 Ccons	<a href="http://www.inao.gouv.fr">www.inao.gouv.fr</a>

### A III

## FORMULAR FÜR DIE MITTEILUNG EINES SICHERHEITSPROBLEMS AN DIE VERBRAUCHERSICHERHEITSKOMMISSION

(AUS DER INTERNETSEITE DER CSC)

### SIGNALEZ UN PROBLEME DE SECURITE A LA CSC

Les champs comportant une étoile (\*) sont obligatoires.

#### VOS COORDONNÉES

Nom\* :

Prénom\* :

Adresse\* :

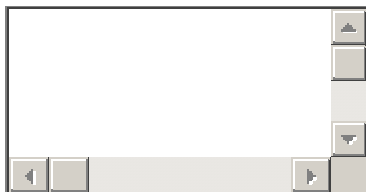
Code postal /

Ville\* :

Téléphone :

E-mail\* :

#### DESCRIPTION DU RISQUE OU DE L'ACCIDENT



#### IDENTITÉ DE LA PERSONNE BLESSÉE

Nom :

Prénom :

Age :

(au moment de l'accident)

Sexe :  Masculin  Féminin

Date de l'accident :  /  /

### PRODUIT EN CAUSE

Objet :

Marque  ou   
distributeur :

Modèle :

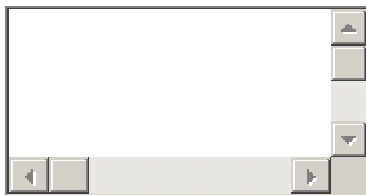
Référence :

Numéro de lot, série   
ou emballage :

Lieu d'achat :    
(magasin + ville)

Date d'achat :  /  /

### CONSÉQUENCES DE L'ACCIDENT (lésions, soins, séquelles)



Dans la mesure du possible, conservez toutes les pièces importantes (produits, emballages et notices) pour nous les transmettre ultérieurement.

## Anhang 5: Länderbericht Großbritannien

### CONSUMER INFORMATION RIGHTS IN THE UK<sup>79</sup>

The research initiative invites responses initially to a series of general questions. The following Commentary sets out a narrative of information rights as they affect consumers in the UK. The second part then responds to the questions raised.

#### Commentary

##### I. Introduction – Freedom of Information

The most important law in relation to access to information rights for individuals in the UK is the **Freedom of Information Act 2000 (FOIA)**.<sup>80</sup> This covers England and Wales and Northern Ireland. Scotland has its own law, the Freedom of Information (Scotland) Act 2002 which covers Scottish public authorities although the UK Act covers UK bodies operating in Scotland. The Scottish Act is largely modelled on the UK Act but there are some important differences. There is no Information Tribunal in Scotland as there is in the UK Act. Both Acts came into operation on 1 January 2005 in relation to individual rights of access. A pro-active form of publication of information held by authorities by way of Publication Schemes came into effect under the FOIA prior to that date and was introduced on a staggered basis on a sector by sector basis.

The UK Act covers well over 100,000 public bodies – from the Cabinet Office and Cabinet to local medical practices. Every university and school is covered, every police force and every local authority as well as the whole of central government including executive agencies and non departmental public bodies. It is the most comprehensive FOI legislation with which I am familiar. Furthermore, there is a very effective central authority which acts as the enforcer of the legislation, as a champion of the legislation, as a promoter of the information and as an information point for the information. This is the Office of the Information Commissioner (OIC).

<sup>79</sup> By Patrick Birkinshaw, Institute of European Public Law, University of Hull, UK; P.J.Birkinshaw@hull.ac.uk.

<sup>80</sup> P.Birkinshaw *Freedom of Information: the Law, the Practice and the Ideal* 4<sup>th</sup> ed 2010 Cambridge University Press; 3<sup>rd</sup> ed 2001; P.Birkinshaw *Government and Information: the Law Relating to Access, Disclosure and their Regulation* (2005, 3<sup>rd</sup> ed, Tottel Publishing). [http://www.opsi.gov.uk/acts/acts2000/ukpga\\_20000036\\_en\\_1](http://www.opsi.gov.uk/acts/acts2000/ukpga_20000036_en_1)

<http://www.ico.gov.uk/> Scotland has its own Commissioner (OSIC).  
<http://www.itspublicknowledge.info/home/ScottishInformationCommissioner.asp>  
Some bodies are excluded from the legislation. The most significant are the Queen and Royal Family and the security and intelligence bodies: MI5, MI6 and General Communications HQ at Cheltenham. Nationalised industries (most recently failed banks) are excluded. Some bodies are included for some information but are excluded for other purposes eg the BBC and Channel 4 are excluded for information concerning art, journalism and literature. This has been a highly contentious area with decisions going all the way to the House of Lords.<sup>81</sup> The Bank of England is also included but its functions in relation to monetary policy, financial operations to maintain stability and private banking are excluded. Schedule 1 sets out those bodies that are included in the Act. Furthermore, the Secretary of State may designate a private body as a public authority for the purposes of the Act by a statutory order. This specifically includes situations where a private body is performing public functions or is providing public services under a contract. The government launched a recent consultation on designation but to date no bodies have been designated.<sup>82</sup>

The Acts give a presumptive right of access to information held by a PA. PAs are under a duty to inform requesters whether they hold information of the type requested. This is known as the 'duty to confirm or deny' (DTCD). Where the effect of confirming or denying that the PA holds information may lead to the release of exempt information the DTCD may be overridden by the operation of the 'neither confirm nor deny' provision (NCND). If they do hold that information and the NCND does not apply they have to disclose it subject to exemptions. In the vast majority of cases the NCND provision does not apply.

There are at first blush 24 exemptions but some of these contain several exemptions so the number is larger than that. Exemptions may be of two types: absolute or ordinary. There are eight absolute exemptions. All the others are ordinary.

#### EXEMPT INFORMATION with Section Numbers

21. Information accessible to applicant by other means.

22. Information intended for future publication.

<sup>81</sup> *Sugar v BBC* [2009] UKHL 9.

<sup>82</sup> See *Hansard* HC Vol 496 col 64WS (July 16, 2009).

23. Information supplied by, or relating to, bodies dealing with security matters.
24. National security.
25. Certificates under ss. 23 and 24: supplementary provisions.
26. Defence.
27. International relations.
28. Relations within the United Kingdom.
29. The economy.
30. Investigations and proceedings conducted by public authorities.
31. Law enforcement.
32. Court records, etc.
33. Audit functions.
34. Parliamentary privilege.
35. Formulation of government policy, etc.
36. Prejudice to effective conduct of public affairs – a very broad exemption.
37. Communications with Her Majesty, etc. and honours.
38. Health and safety.
39. Environmental information.
40. Personal information.
41. Information provided in confidence.
42. Legal professional privilege.
43. Commercial interests.
44. Prohibitions on disclosure.

Ordinary exemptions are subject to a public interest test. Even though an exemption is properly claimed is there nonetheless a greater public interest in disclosure? Where the balance is even, the decision has to be in favour of publication. The public interest also operates in relation to the NCND. If the PA decides neither to con-

firm nor deny whether it holds the information as explained above, in relation to an ordinary exemption it has to decide whether a public interest overrides the operation of NCND.

Absolute exemptions do not allow for the exercise of the public interest test. If an exemption is properly claimed and it is absolute there is no discretion to disclose. There are eight of these. In most cases they are absolute for simple and non controversial reasons. The information may be otherwise available eg under another statutory provision such as those relating to consumer rights. The information must be available whether for charge or not. Information may be exempt because there is something preventing the disclosure of the information such as an actionable duty of confidence or the information relates to personal data which has its own legislation, the Data Protection Act 1998, under which applications for access may be made or which governs disclosures under FOIA (below). There may be a legal prohibition stopping disclosure – and these are common in legislation regulating markets such as financial services or enterprise – and whether the prohibition is in domestic or EU law. Information held by courts is subject to an absolute exemption because there are provisions allowing applications to be made to the courts under both civil and criminal jurisdictions. Disclosure undermining Parliamentary Privilege is subject to an absolute exemption – though this would not protect disclosure of information about an MP's expenses. The one controversial absolute exemption relates to information about the security and intelligence services held by PAs covered by the FOIA. The services themselves are excluded but information from them or about them held by eg the Ministry of Justice or Home Office is absolutely exempt.

In relation to ordinary exemptions, where the public interest is determined by the Information Commissioner to be in favour of disclosure s.53 FOIA allows the Secretary of State to issue a veto effectively overriding the decision by the IC. In almost five years there has been one veto, and that was in relation to the decision to disclose the minutes of the 2003 Cabinet meeting discussing the initiation of war in Iraq. This occurred in the Spring of 2009. Under the Act the decision is that of the Justice Secretary (Lord Chancellor) but he 'consults' Cabinet colleagues.

The mechanics of the Act is that a requester, anyone, applies to a PA for information as specified. Requests have to be in writing. The PA may ask for additional information to clarify the request. The requester has to supply a name and an address

for correspondence. Email application if acceptable and probably the majority of requests are made by email. After any clarification, the PA is given twenty working days to respond. Fees up to £450 are not charged (£600 in the case of central government departments) although disbursements such as photocopying and postage may be charged. Decisions on the public interest may take longer. Determining the public interest is not included in the calculation of fees. If the PA refuses to disclose the information the requester may ask for a second opinion from a higher ranking official. If this confirms refusal, the requester may apply to the Information Commissioner (IC). The IC does not charge for his services. He has full powers of investigation and has access to any papers he requires although in practice there may be limitations on *where* he examines these. The IC may issue a decision notice, an enforcement notice, or an information notice requiring information. His decisions and investigations are backed up by the contempt of court powers of the High Court. From his decision there are appeals to the Information Tribunal by either party. The IT may award costs against a party but this is extremely rare. Parties pay their own costs. Tribunals are meant to operate informally so parties should be able to conduct their own case but legal representation is becoming more common for PAs and eg newspapers. Scotland does not have an IT but a requester or PA would have to challenge the SIC's decision by a judicial review. From the IT under the UK legislation, there is an appeal on a point of law to the High Court, Court of Appeal and from September 2009 the new Supreme Court.

The Information Tribunal has described the FOIA as creating a 'fundamental right to information'. In the first four and a half years of operation the IC has stated that until May 2009 there had been a half million FOI requests, 11,500 complaints to the IC, 1,225 Decision Notices, and 415 appeals to the Information Tribunal.<sup>83</sup> For the vast majority of these requests, requesters now have a largely free and effective information service where before there was grace and favour. Sometimes, perhaps a very benevolent grace and favour but one dependent on discretion and length of foot! With the increase in numbers there comes an attendant delay in IC investigations, a matter on which the press have complained because of the damage to 'hot news items'.<sup>84</sup>

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<sup>83</sup> *Private Data, Open Government: Questions of Information* QEII Centre 13 May 2009.

<sup>84</sup> J.Hayes *A Shock to the System: Journalism, Government and the Freedom of Information Act 2000* (2009) Reuters Institute.

The FOIA gives a right to 'information' not specifically to documents but where access to information is most easily achieved by giving a document that should be given. A specific request may be made for documents which may be inspected *in situ*.

In addition to the FOI legislation there is the Data Protection Act 1998 implementing EC Directive 45/1995. The legislation covers the UK and the IC has a regional officer in Scotland for the application of the Act in Scotland. The DPA covers all data controllers whether private or public. The IC also has responsibility for this legislation but he is not a general ombudsman figure for the DPA as in the case of FOIA. He can conduct 'audits' of compliance with the DPA upon request of the data subject. The basic thrust of the DPA is that data subjects should enforce their rights in the courts. The IT deals with appeals from the IC's decision in relation to enforcement notices against controllers.

There is additionally the Environmental Information Regulations 2004 SI SI 2004/3391 (EIRs) implementing the Council Directive 2003/4 EC, itself following the Aarhus Convention. Separate regulations implement this Directive in Scotland. The EIRs use the pre-existing framework established under the FOIA so the mechanisms are more or less identical. These involve the IC and IT as explained above. The onus is on the PA (not requester) to identify in a request whether the subject is environmental information or other information and to determine which regime applies: FOIA or EIR. PAs frequently make mistakes.

Information constituting personal data will be governed by the DPA. Basically, requests about one's own data are made under the DPA. Requests about another's personal data are dealt with under FOIA or EIR subject to the Data Protection Principles.

The Ministry of Justice has responsibility for FOIA and DPA and the Department for the Environment, Food and Rural Affairs for the EIRs. All three regimes fall under the OIC and OSIC as explained.

The Office of Public Sector Information deals with re-use of information and government information technology concerns.

The Public Records Acts 1958 and 1967 set out the duties to publish official documents after they are 30 years old. The legislation is dovetailed with FOIA to be consistent with FOIA. No timescales apply to FOIA but exemptions may apply. In July

2009 the Government announced proposals to reduce the 30 year period to 20 years.

This is the public sector side of access to information although DP covers both sectors. FOIA amended DPA to give a greater right of access to unstructured and 'loose' files held by PAs. There are difficulties in some of these regimes – DPA is nothing less than tortuous but the underlying framework is reasonably clear and in the hands of one centralised office, OIC. The role and performance of the IC have been impressive and has assisted consumers, citizens and others. It is a robust regime at the forefront of FOI practice. It has an easy, accessible and cheap enforcement mechanism. It stands in complete contrast to specific regimes established to assist consumers in relation to information rights. Rarely do these give rights to individuals. Enforcement is by way of the criminal law and a prosecution.

It is important to realise however that the FOIA or EIRs may be used directly by consumers to get information held by PAs on eg decisions to prosecute restaurants, food outlets or producers for breaches of regulations, warnings and so on where the information is not otherwise available. Access will be subject to any exemptions and the public interest test. Third parties should be consulted where requests are made for information concerning them. Such consultation is not set out in the law but is provided in a code of guidance.

<http://www.foi.gov.uk/reference/impref/codepafunc.htm#partIV>

Apart from designating bodies who are engaged in the provision of public services such as major utilities, or bodies engaged on a widespread basis in charitable and voluntary work in areas of social welfare there would be widespread opposition from the private sector to an extension of FOI laws to that sector. The opposition would be based on familiar arguments of unjustified state intervention, damage to profitability, undermining competitive capability and producing an uneven playing field. In the absence of EU wide initiatives, why should the UK business sector be hampered by legal requirements affecting only British industry? that sector would maintain. By that as it may, an extension of FOI into the private realm is a topic of growing importance and legal models allowing for this already exist in eg South Africa.

### **'Scores on the Doors'**

An example of provision of information to consumers in the UK under the Freedom of Information Act 2000 occurs in relation to the 'Scores on the Doors' database (see below under **16 Public Databases**).<sup>85</sup> Apart from exemptions relating to public security, privacy of the individual, etc, the general principle is to give citizens the right to access information held by public authorities unless this can be shown not to be in the public interest. Scores on the doors is a national public information service where you can find the official local authority hygiene ratings for food businesses. The success of Scores on the Doors for food hygiene ratings is now being expanded to cover more public interest information such as licensing and trading standards, with others to follow. Individuals can find out how hygienic and well-managed the food preparation at any of the premises listed in the database are and include 'your favourite take-aways, clubs, pubs and restaurants'. There have been 176372 requests to the data bank involving 200 participating councils. The number of participating councils will grow in number.

<http://www.food.gov.uk/safereating/hyg/scoresonthedoors/>

There is no doubt that schemes such as this are very popular with the public in the UK and not just in England; the scheme covers England, Wales and Northern Ireland. Scotland will make its own arrangements. This can be seen from the large number of requests for information. People and the press want this information. There is a public interest in knowing. On the other hand it could be very damaging for a business. England, Wales and Northern Ireland operate a six tier rating system. Scotland has a two tier system. However, there is a degree of local variation which the Food Standards Agency is attempting to improve by encouraging greater uniformity.

At the moment the scheme is only voluntary. Businesses may publish the information on their premises. They are only likely to want to do this where the information is good for them. Participating authorities may also display the information on a web site. But the information held by authorities that are not participating in the scheme may be requested by requesters under FOIA. It may be subject to an exemption but the public interest would apply and would probably overcome the exemption. If lapses in the conditions of food sales were not serious there would probably be an effort to get improvement informally in standards with subsequent visits from the

<sup>85</sup> <http://www.scoresonthedoors.org.uk/home.php>

local authority before publicity. However, this is discretionary and would not cover more serious breaches in standards. Any information published *voluntarily* as under the scheme would have to be fair and accurate – otherwise an action may be brought for defamation. Difficult points of law on ‘qualified privilege would be raised. There is no such possibility arising from disclosure under FOIA unless the publication was made with ‘malice’.

### **‘Oneplace’**

Below is a website that opened today (9 December 2009) for the first time. It is a new site giving details of performances by local authorities and health bodies in local services, children’s services, care for the elderly, policing and health. It cost £22 million to put together and is politically contentious. The Conservatives have promised to do away with it if they come to power next year. It should be added under <16 Public Databases> of my paper. Below is a brief section of the official description. The site uses green flags for exceptional services and red flags for service areas of significant concern

<http://oneplace.direct.gov.uk/Pages/default.aspx>

‘The site above is the Oneplace website. Here you can see how local public services are performing in England, if they provide value for money and where they could improve. The Audit Commission, Care Quality Commission, HM Inspectorates of Constabulary, Prisons and Probation and Ofsted are working together to provide an independent overview of the quality of life in your area. You can also discover how well local public organisations, such as councils and police forces work together to meet local needs.’

## **II. Consumer rights to Information<sup>86</sup>**

The questionnaire seems to anticipate a coherence in national systems that may not exist in fact. We shall see there are many legal provisions in English and UK law on consumer information but nothing as coherent as under FOIA. While the object of the regulations is to protect consumers in terms of security, position, safety and so on, different laws adopt different styles and methods. Rarely is the consumer given

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<sup>86</sup> Howells, G, ‘The Potential and Limits of Consumer Empowerment by Information’ (2005) *Journal of Law and Society*, 349-370.

specific legal rights to information which s/he can enforce individually. The approach is a collective regulatory one – not an individual rights approach.

Specific information rights usually seek to protect the position of the consumer in a number of ways. The usual characteristics of the regimes are to give information to consumers but there is no means of enforcing these provisions under civil law. In other words, rarely is an individual or group right of action provided for. If the regulations or statutes contain their own means of enforcement, eg criminal fines, then under long standing principles of English law (and I dare say Scottish) it is presumed that the statute or regulations do not confer individual rights of action in the civil courts. As the consumer is not afforded rights as such, the consumer has nothing to waive.

A comprehensive regime does exist under the law of consumer credit agreements.

### **1. Consumer Credit Agreements**

Section 60 of the Consumer Credit Act 1974 enables the Secretary of State to make regulations as to the form and content of consumer credit act agreements. The Consumer Credit (Agreements) Regulations SI 1983/1553 and 2004 SI 1482/2004 contain such requirements. The consumer must be informed of: the rights and duties conferred or imposed on him by the agreement; the amount and rate of interest and charges; and the protection available to him under the Consumer Credit Act.<sup>87</sup> Under the Regulations other information must be contained in the agreement. For example, amongst other things, it must contain the following information: the name and address of the creditor and the debtor; price and details as to any purchase of land, goods or services for which the loan is being used; details of any advance cash payments; the amount of credit or the credit limit; the interest rate any other charges; timing of repayments; repayment sums; an APR (and any necessary statement as to variation of interest rates); description of any security; an indication of the penalty for failure to comply with agreement obligations. These information requirements are only indicative; some of them apply only in relation to particular types of agreement.<sup>88</sup>

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<sup>87</sup> More information is available in Halsbury's Laws of England (HLE) 9(1) 161 – 162.

<sup>88</sup> More information is available in HLE 9(1) 163.

Failure to comply with these information requirements means that the agreement is only enforceable on an order of the court. Such an order can specify that the agreement is to take effect but with terms modified in the agreement. There are also some circumstances in which the court cannot make an order.<sup>89</sup> Local authority trading standards services or the OFT can take enforcement action against the lender, using powers in Part 8 of the Enterprise Act 2002.

Under Section 77 of the Consumer Credit Act, the creditor is under a duty to provide information to the debtor upon the debtor's request and payment of £1 (see HLE 9(1) 236 – 237). Creditors have a duty to automatically give periodic information to the debtor under a running-account credit agreement at intervals of not more than 12 months; such information should detail the state of the account (see HLE 9(1) 238 – 239). Similarly there are some duties to give information to any sureties under the Consumer Credit Act. More information is available in HLE 9(1) 202, 203 and 206.

The creditor is also under a duty to provide notice as to unilateral variations of the agreement (Consumer Credit (Notice of Variation of Agreements) Regulations 1977 and see the Consumer Credit (Agreements) (Amendment) Regulations SI 1482/2004). More information is available in HLE 9(1) 244. Under the Consumer Credit Act 2006 which amends the 1974 Act, there are some provisions as to giving notice of arrears (Sections 86B and 86C of the 1974 Act). Noncompliance with this provision means that the creditor cannot enforce the agreement or charge interest for the period of noncompliance (Section 86D of the 1974 Act).

An offence is committed if any person gives false information to the Director General of Fair Trading (Section 7 of the Consumer Credit Act). More information is available in HLE 9(1) 312. No information obtained by virtue of the Consumer Credit Act about an individual can be disclosed without his consent (Section 174 of the Consumer Credit Act). Personal information rights under the Consumer Credit Act were subsumed within the Data Protection Act 1998. More information is available in HLE 9(1) 313.

The Consumer Credit (Disclosure of Information) Regulations 2004  
(S.I. 2004/1481)

The Consumer Credit (Agreements) (Amendments) Regulations 2004  
(S.I. 2004/1482)

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<sup>89</sup> More information is available in HLE 9(1) 169.

## **2. Consumer Hire Agreements**

Consumer hire agreement documents must contain the information as set out in Regulation 3 of the Consumer Credit (Agreements) Regulations 1983 and SI 1482/2004 above: the nature of the agreement; the parties to the agreement; key financial information; key information (the wider descriptions can be found in Schedule 3 of the Regulations – the requisite information is very similar to that for consumer credit agreements). More information is available in HLE 9(1) 164 – 165. As with consumer credit agreements there is a duty upon the owner to give information to a surety or hirer upon request (respectively Sections 109 and 79 of the Consumer Credit Act 1974). More information is available in HLE 9(1) 204 – 206 and 240.

## **3. European Measures**

Whilst the project is not interested in European measures per se, it might be useful to know the English transpositions:

- Consumer Protection (Distance Selling) Regulations SI 2000/2344 and SI 2005/689
- Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations SI 1987/2117
- Timeshare Act 1992
- Timeshare Regulations SI 1997/1081 reg 3.

Some specified kinds of contract require the seller to provide certain pre-contractual information. There are different remedies for failure to provide the information. However, the Institute should already be aware of these provisions because they are based on European Directives.

## **4. Consumer Contracts**

### ***Unfair Contract Terms***

The Office of Fair Trading has a duty, in the field of unfair contract terms, to investigate complaints made to it by a consumer (Regulation 10 of the Unfair Terms in Consumer Contracts Regulations SI 1999/2083). It can then decide whether to apply for an injunction preventing practices or requiring action. It is empowered to prevent the use of unfair contract terms via court orders. In order to further its investigation, the OFT has the power to obtain certain documents and information (Regulation 13) – presumably this is information which the consumer would not be able to obtain in the absence of an independent subsisting right of action. Therefore,

in some respects, the OFT operates on the consumer complainant's behalf.<sup>90</sup> The OFT must arrange for publication of: details of any undertaking (presumably by a business) or order notified to it; details of any undertaking given to it by or on behalf of any person as to the continued use of a term which the OFT considers to be unfair; details of any application made by the OFT for an injunction to prevent continued use of unfair terms; details of any application made by the OFT to enforce a previous order of the court (Regulation 15). The OFT must also inform any person on request whether a particular term has been: the subject of an undertaking given to the OFT; or the subject of an order of the court (Regulation 15).<sup>91</sup>

### ***Pre-Contractual Information***

There are currently no pre-contractual information provisions which relate to all consumer contracts. There are some provisions in specific areas such as package holidays (SI 1992/3288) and distance selling. However if the proposed consumer rights directive (COM (2008) 614 final) is adopted, we will see the introduction of some general pre-contractual information requirements into UK law. It would perhaps be possible to identify some pre-contractual information rights in general contract law principles. For example, certainty of contract, intentions of the parties, terms implied for business efficacy and perhaps even the parole evidence rule.

The Office of Fair Trading has produced guidance on what should be contained in codes in relation to pre-contractual items (OFT/390 (2008) 3d) (see below on OFT).

## **5. Consumer Protection**

### ***Product Safety***

Under Regulation 7 of the General Product Safety Regulations 2005 SI 1803/2005 (implementing Directive 2001/95 EC) a producer must provide the consumer with relevant information: to assess the risks inherent in a product throughout the normal or reasonably foreseeable period of its use, where such risks are not immediately obvious without adequate warnings; to take precautions against those risks. The producer should also attach its name and address to the product and a product ref-

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<sup>90</sup> More information is available in HLE 41 458 – 461.

<sup>91</sup> More information is available in HLE 41 463. See *OFT v Foxtons Ltd* [2009] EWCA Civ 288: the powers of the OFT relate to *existing* as well as future contracts.

erence or batch number. I set out the regulations in some detail to give an example of how the UK transposes Directives.

These Regulations impose requirements concerning the safety of products intended for consumers or which are likely to be used by consumers. The products covered are defined in regulation 2 and extend to second-hand products, ones intended for professional use which it can be foreseen may be used by consumers, and products supplied in the course of a service. Regulation 2 defines other key terms such as enforcement authority, distributor and producer. Regulation 3 provides that the Regulations apply except where there are no other specific provisions in rules of Community law other than the Directive. Where there are, those other rules apply. Regulation 4 excludes second-hand products which are expressly supplied for repair or reconditioning.

Regulation 5 requires producers only to place safe products on the market. Regulation 6 provides that a product which complies with certain safety standards is presumed to be safe unless there is evidence to the contrary. Regulation 7 requires producers to inform customers about the risks of products and to monitor the risks their products pose. Regulation 8 requires distributors to act with due care so as not to supply unsafe products and to co-operate in monitoring the safety of products. Regulation 9 requires producers and distributors to notify an enforcement authority if a product placed on the market poses risks that are incompatible with the general product safety requirement. This does not apply to antiques or products supplied for repair or reconditioning.

Regulation 10 imposes a duty on certain enforcement authorities to enforce the Regulations. It requires all enforcement authorities to act in a proportionate manner, to take account of the precautionary principle and to encourage voluntary compliance with the Regulations except in cases of serious risk.

Regulations 11-15 contain the enforcement powers which enforcement authorities may exercise in appropriated cases by issuing safety notices of various kinds. These are *suspension notices* to suspend the supply of a product (regulation 11); *requirements to mark* which require warnings to be marked on a product (regulation

12); *requirements to warn* those who have already been supplied with a product (regulation 14); *withdrawal notices* requiring products not to be placed on the market or supplied (regulation 13); and *recall notices* requiring the recall from consumers of products that have been supplied to them (regulation 14). Regulations 16 to 20 contain ancillary provisions providing for appeals against safety notices, compensation, forfeiture of dangerous products and offences.

Regulations 21-23 confer on enforcement authorities powers of test purchase, entry and search and seizure and detention of products. Regulations 24 to 27 contain ancillary provisions in respect of the offence of obstructing an officer of an enforcement authority, appeals against seizure and detention of products, compensation and the recovery of an enforcement authority's costs. Regulation 28 confers on the Secretary of State powers to require information and samples of products in order to decide whether to serve, vary or revoke a safety notice. Regulations 29-30 provide defences of due diligence and a defence in respect of the supply of antiques.

Regulations 32-34 sets out the system whereby enforcement authorities are to notify the Secretary of State of notifications they have received under regulation 9 and of enforcement action they have taken. The Secretary of State in turn is required to notify the European Commission and competent authorities in those other Member States where the product has been placed on the market. Regulation 35 provides for the implementation of Commission decisions in respect of products that pose serious risks. Regulations 36-38 provide for market surveillance by enforcement authorities, handling of safety complaints and co-operation between authorities.

Regulation 39 requires enforcement authorities to publish safety information with some restrictions in respect of professionally secret information. It also makes information obtained under the regulations subject to Part 9 of the Enterprise Act (restrictions on disclosure of information) and enables information subject to Part 9 to be disclosed for the purposes of enforcing these Regulations.

Regulations 40 provides for service of documents. Regulation 41 extends the time for bringing summary proceedings for an offence under the Regulations. Regulation

42 provides that the Regulations do not confer a right of civil action for their breach. Regulation 43 provides for legal professional privilege and privilege against self incrimination or incrimination of a spouse or civil partner. Regulation 44 provides that a notification under regulation 9(1) is in general inadmissible in criminal proceedings under the Regulations. Section 11 of the 1987 Act enables the SS to make regulations for the compulsory provision of information in relation to goods. For example under the Energy Information (Tumble Driers) Regulations 1996 implementing EC Directive 95/13/EC – there are numerous regulations - too many in fact to list.

Where the SS considers that goods which have been, or are being, supplied by a person are unsafe, he may issue a notice to warn potential users (Section 13 of the Consumer Protection Act 1987). A person who contravenes such a notice is guilty of a criminal offence. The workings of such a notice are that the retailer should warn consumers as to any goods which it supplies or has supplied which are unsafe.

Under Section 18(1) of the 1987 Act, if the SS considers that another person has information which is likely to assist his decision in making a regulation or issuing a notice to warn, he may serve them with a notice to furnish the information. Noncompliance is a criminal offence.

Under Section 37 of the Consumer Protection Act, Revenue and Customs must disclose information relating to consumer safety which it has collected by way of its functions in relations to imported goods.

### ***Misleading Information***

Misleading information is covered by the unfair commercial practices directive (Directive 2005/29/EC) which has been transposed into English law via the Consumer Protection from Unfair Trading Regulations SI 2008/1277. Under these regulations misleading actions or omissions are considered a criminal offence. Schedule 1 contains a list of commercial practices which in all circumstances are considered unfair including:

1. Claiming to be a signatory to a [OFT – see below] code of conduct when the trader is not.
2. Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation.

3. Claiming that a code of conduct has an endorsement from a public or other body which it does not have.

4. Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when the trader, the commercial practices or the product have not or making such a claim without complying with the terms of the approval, endorsement or authorisation.

## **6. Product and Process Information**

### ***Medicinal Products***

The main legislation for the labelling of medicines is the Medicines (Labelling) Regulations SI 1976/1726 as amended and SI 1992/3273 (made by the relevant SS under the Medicines Act 1968) and SI 1994/104. Under the regulations there are strict standard labelling requirements for all medicines (contained in Schedule 1) and requirements for medicines for human use (contained in Schedule 7). Information must be legible, indelible, comprehensible and in English. If there is more than one possible strength of medicine, the strength must be clearly labelled. Homeopathic medicines must be labelled as such (Schedule 9) and there are some specific provisions for dispensed medicines (Regulation 9).

### ***Pharmaceutical Testing***

This subject is subject to regulation at the EU and national level. The pharmaceutical industry is a very powerful industry in the UK which has entered into voluntary codes with government in relation to disclosure of information. It also engages in special arrangements for the pricing of its products most of which are paid for or prescribed by NHS bodies.

Details of the revised and updated ABPI Code of Practice that governs the UK-based pharmaceutical industry's relations with healthcare professionals and other stakeholders came into effect on January 1, 2006. The following from ABPI's publications <see <http://www.pharmadisclose.org/idp/>> offers an insight into the way in which the UK government and large industries enter into non legal and non-legally

enforceable concordats for the disclosure of information. The code has non legal status.

A major review of the code and its operation has taken place, and among key changes to the code are:

Patient safety is being further promoted by a requirement for all printed, promotional material to include prominent information about reporting adverse drug reactions.

Further definition and restrictions are being applied on what can be provided to health professionals in the way of promotional aids, hospitality, subsistence, travel, and accommodation.

Relationships with patient groups and the provision of information to the public are covered in greater depth.

A reduction in the permitted number of pages of medicines advertising and an outright ban on all promotional competitions are introduced.

Moves to speed up the process of determining complaints so that decisions can be made more quickly and sanctions imposed faster.

Materials or activities ruled in serious breach of the code may, under certain circumstances, be suspended, even if an appeal is intended, which will reduce the time such material remains in use.

Results of some, more serious cases will be advertised in the medical and pharmaceutical press, thus strengthening the sanctions available.

"This has been a fundamental review of the code and follows a far-reaching public consultation exercise. We have listened to all these comments and taken action accordingly," said Vincent Lawton, President of the ABPI.

"As well as the changes to the code itself, we want to ensure that more people and organisations know about it, its provisions and understand how it works. With this in mind, we are planning to create a new communications post within the Prescription Medicines Code of Practice Authority (PMCPA), which administers the code, and there will be a major campaign in the new year to ensure that the code has as high a profile as possible."

The Senior Policy Manager at the Government regulator, the Medicines and Health-

care products Regulatory Agency (MHRA) which is subject to the FOIA said: "The control of medicines advertising in the UK is based on a long-established system of self-regulation supported by the statutory role of the MHRA.

"The MHRA warmly welcomes the new code, which includes positive changes to enhance patient safety to ensure that the code remains robust and rigorous." The MHRA's backing for the new code coincides with the publication of a joint memorandum of understanding between the ABPI, PMCPA and the MHRA. The memorandum sets out the arrangements for the regulation of the promotion of medicines for prescribing in the UK, and is available on both the MHRA website ([www.mhra.gov.uk](http://www.mhra.gov.uk)) and that of the PMCPA ([www.pmcpa.org.uk](http://www.pmcpa.org.uk)).

The changes to the code have been agreed following a major consultation exercise with a wide variety of stakeholders, including professional bodies representing doctors, pharmacists and nurses; patient advocacy groups; and the MHRA. The process of considering complaints will be more transparent.

"The ABPI Code of Practice has been the gold standard for pharmaceutical industry regulation throughout the world for many years, and our aim was to ensure that it continued to be strong and effective as well as fully meeting all the changes and requirements that have occurred since the last review," said Andrew Hotchkiss, ABPI Board member and Managing Director of Lilly UK, who was in charge of the project.

"Self-regulation is by far the most effective means of ensuring that the industry's relationship with the NHS and others is conducted in a responsible and ethical manner. Given that branded medicines can make the difference between life and death, it is incumbent on all of us who work in the pharmaceutical industry to ensure the highest standards when dealing with healthcare professionals and other stakeholders. The revised code is a strong message of intent but, ultimately, society will judge us on our actions and behaviour."

i) Key changes to the ABPI Code of Practice Safety

To emphasise the pharmaceutical industry's commitment to safety, the new code requires companies to include prominent information about adverse event reporting mechanisms on all promotional material. This comes at a time when the Government is extending the 'Yellow Card' scheme so that patients across the country can report adverse effects, and will mean that all promotional material produced by companies will have to be changed.

#### ii) Relationships with health professionals

Existing rules that cover the provision of promotional aids, hospitality, travel and accommodation have been further defined. For example, it is now specifically stated that items must not be offered for the personal benefit of health professionals or administrative staff. It remains the case that items must be inexpensive - the limit is £6, excluding VAT - and relevant to the recipients' profession.

The new code makes it clear that promotional aids are more likely to be acceptable under the code if they benefit patient care, and gives more guidance on the types of items that are both acceptable and unacceptable. It also bans the use of promotional competitions and quizzes. As far as meetings and seminars are concerned, subsistence must be strictly limited to the main purpose of the event and be secondary to the purpose of the meeting. Companies must only offer economy air travel to delegates sponsored to attend meetings. Lavish venues must not be used and companies should avoid using venues renowned for entertainment facilities. Further clarification is also given on the circumstances under which meetings may be appropriately held outside the UK.

#### iii) Relationships with the public and patient groups

Definitions of what information can be supplied to the public have been improved to give more guidance and to clarify how companies may respond to patients' needs for reference information on medicines. Promotion of prescription-only medicines to the public remains strictly prohibited.

There is also an important new clause concerning relationships with patient advocacy groups. While companies are permitted to work with such groups, their involvement must be made clear, and rules on arrangements for meetings are the same as those for health professionals.

Companies must make public, by means of information on their website or annual report, a list of all patient organisations to which they provide financial support, and a written agreement must be in place with every organisation spelling out exactly the terms of the relationship and funding of every significant activity or ongoing co-operation.

#### iv) Complaints and sanctions

Complaints of breach of the code are received by the ABPI's Prescription Medicines Code of Practice Authority which reports to the ABPI and may be dealt with by a Code of Practice Panel and Code of Practice Appeal Board. The panel is internal to ABPI. It may allow expert advisers to join its meetings but they have no voting rights. The Appeal Board and its Chair are appointed by the board of management of ABPI. Appointment is made after consultations with the Medicines and Healthcare products Regulatory Agency (an executive agency of the Department of Health) and positions (not the Chair) are advertised in appropriate journals and the national press. The chair is independent and legally qualified and there are three independent registered medically qualified practitioners appointed following consultation with the British Medical Association (the representative medical association).

Various moves have been put in place to speed up the process of deciding a complaint and imposing sanctions. For example, a company accepting a ruling of the Code of Practice Panel has just five working days - instead of the current ten - to stop use of the material. In addition, if the material or activity found in breach is likely to prejudice public health or safety, or is a serious breach of the code, the company will be required suspend use of it even if an appeal is planned.

Several different sanctions are already applied to companies found in breach, but

the new code gives additional sanctions to the Appeal Board and also allows for details of certain cases, considered serious, to be advertised in pharmaceutical or medical press.

Brief details of ongoing cases will in future be available on the PMCPA's website. In the past, such details have only been provided when the case is completed.

The new ABPI Code of Practice can be accessed at [www.pmcpa.org.uk](http://www.pmcpa.org.uk) or by clicking on the link [http://www.abpi.org.uk/links/assoc/PMCPA/pmpca\\_code2006.pdf](http://www.abpi.org.uk/links/assoc/PMCPA/pmpca_code2006.pdf)

Freedom of Information has affected this area. SI 2004/3363 Freedom of Information etc Regulations removes several provisions making it a criminal offence to release information without authorisation. Article 4 of the regulation inserts a new subsection (1A) after subsection (1) of section 118 of the Medicines Act 1968. Section 118 of the 1968 Act provides that where a person discloses to any other person certain information he shall be guilty of an offence, unless the disclosure was made in the performance of his duty. This included safety data, advice of government expert committees and reasons behind licensing decisions. Section 118 relates to information about any manufacturing process or trade secret obtained by entry to premises by virtue of section 111 of the 1968 Act, or to any information obtained by or furnished to that person in pursuance of the 1968 Act. By section 118(1A), the offence provision in section 118(1) does not apply if the person making the disclosure is, or is acting on behalf of a person who is, a public authority for the purposes of the FOIA. This opens up requests for information to the appropriate authorities in the UK (Scotland repeated this provision) under FOIA. It will be subject to relevant exemptions such as trade secrets and commercial interests but these are not absolute exemptions.

There has been litigation which could have analogical potential for consumer information in this area. In *Eisai Ltd v NICE*<sup>92</sup> there was a question of information accompanying consultation. This is a complex issue and some description is necessary. The National Institute for Health and Clinical Excellence ("NICE") is responsible for appraising the clinical benefits and cost effectiveness of health care interventions notified to it by the Secretary of State and for making recommenda-

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<sup>92</sup> [2008] EWCA Civ 438.

tions as to their use in the NHS. The interventions relevant in this case are certain drugs for the treatment of Alzheimer's Disease (AD). The drugs, known as acetylcholinesterase inhibitors had previously been recommended for use in the treatment of NHS patients with mild to moderately severe AD. In 2006, however, NICE issued fresh guidance recommending their use only for patients with moderately severe AD. The claimant ("Eisai") is a pharmaceutical company holding the UK marketing authorisation for one of the drugs concerned. Eisai brought judicial review proceedings challenging the fresh guidance on a number of grounds. The company complained that the failure to provide the fully executable version of data (which would allow it to be re-run with alternative assumptions and inputs by E) was unfair. Refusal was based on the grounds of confidentiality. Basically, E claimed it was unable itself to test the reliability of the model by sufficient testing. This prevented it from making informed representations on a central element in the appraisal process. NICE's refusal to disclose the fully executable version of its model contrasted with NICE's requirement that, where manufacturers submit models of their own as part of their consultation responses to NICE, they must provide the fully executable versions of those models.

The view I have come to is that, notwithstanding NICE's considered position to the contrary (to which in itself I am prepared to give some weight), procedural fairness does require release of the fully executable version of the model. It is true that there is already a remarkable degree of disclosure and of transparency in the consultation process; but that cuts both ways, because it also serves to underline the nature and importance of the exercise being carried out. The refusal to release the fully executable version of the model stands out as the one exception to the principle of openness and transparency that NICE has acknowledged as appropriate in this context. It does place consultees (or at least a sub-set of them, since it is mainly the pharmaceutical companies which are likely to be affected by this in practice) at a significant disadvantage in challenging the reliability of the model. In that respect it limits their ability to make an intelligent response on something that is central to the appraisal process. The reasons put forward for refusal to release the fully executable version are in part unsound and are in any event of insufficient weight to justify NICE's position (para 66).

The case is a good example of the greater degree of transparency influencing judicial decisions.

## **7. Labelling and Leaflets**

### ***Animal Feed***

The relevant rules are contained in the Feeding Stuffs (England) Regulations SI 2005/3281 as amended and see SI 2009/28. Under Regulation 9 a statutory statement must be attached to the container or package containing the feed or can be given in the form of a notice in writing if it is less than 10kg and for the final user. The statutory statement must be separate from any other information, must be in English (subject to exceptions) and must be legible and indelible. Under Schedule 3, the statement should contain the name and description of the feed, its moisture content, the level of ash soluble in hydrochloric acid (subject to exception) and the quantity (this list is not exhaustive). It should also contain details of certain additive and ingredients and a warning statement if it contains mammal proteins (within the specified circumstances). Other information must be kept separate, must relate to objective or quantitative factors which can be substantiated and must not mislead. There are some specific provisions for compound feed and for pet food.

### ***Explosives***

Under the Classification and Labelling of Explosives Regulations SI 1983/1140 an explosive substance may not be conveyed, kept or supplied unless it has been classified for the time being according to composition and in the form or packaging in which it is to be conveyed, kept or supplied and any such packaging complies with the labelling requirements. Under Section 32 of the Explosives Act 1875, all gunpowder exceeding 500g must be marked "gunpowder". When conveying explosives, the packaging and marking must comply with the specific provisions of the 1983 Regulations. More information is available in HLE 17(2) 904, 975 and 989. There are also regulations on the manufacture and storage of explosives SI 2005/1082

### ***Farm and Garden Chemicals***

Under the Farm and Garden Chemical Act 1967 the relevant Minister may make regulations concerning the labelling and marking of farm and garden chemicals which are intended for sale. Such provisions can stipulate the name to be attached to the product, a warning mark which indicates the hazard to human beings or other

forms of life or that the container should bear other words or explanation (Section 1). The kinds of substances to which the Act applies are listed in Section 2. Transactions in unlabelled products are unlawful and the participants can be found criminally liable. See also the Farm and Garden Chemical Regulations 1971.<sup>93</sup> The Health and Safety Executive engaged in a consultation to remove these requirements because they were now enshrined in EC laws.

Relevant Directives on plant protection are now implemented in UK law by the Plant Protection Products Regulations SI 2005/1435. The wording added little to the Directive the Court of Appeal believed. I set out relevant provisions as an illustration.

**Reg 14.** - (1) The holder of any approval of a plant protection product granted under these Regulations or the holder of any extension of use of a plant protection product granted under regulation 10 shall immediately notify the Secretary of State, the relevant competent authorities and the Commission of all new information on the potentially dangerous effects of that plant protection product, or of residues of an active substance contained in that plant protection product, on human or animal health, ground water or the environment.

(2) Any person who contravenes or causes or permits any person to contravene paragraph (1) above shall be guilty of an offence.

#### **Data protection**

**15.** - (1) Subject to paragraph (2) below, the Secretary of State shall not make use of any information provided in accordance with Annex II by an applicant for approval of a plant protection product under regulation 5 or 7 for the benefit of any other applicant for approval of a plant protection product under regulation 5 or 7.

(2) The Secretary of State may make use of such information in the circumstances provided for in Article 13(3) [renewal be-

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<sup>93</sup> More information is available in HLE 1 1051 – 1052.

cause of new circumstances].

(3) Subject to paragraph (4) below, the Secretary of State shall not make use of any information provided in accordance with Annex III by an applicant for approval of a plant protection product under regulation 5 or 7 for the benefit of any other applicant for approval of a plant protection product under regulation 5 or 7.

(4) The Secretary of State may make use of such information in the circumstances provided for in Article 13(4) [provision of further information on renewal].

(5) The Secretary of State, following examination of an application for approval of a plant protection product under regulation 5 or 7, shall inform the Commission of instances where she considers that an active substance as included in Annex I has been produced by a person or manufacturing process other than those specified in the dossier on the basis of which that active substance was first included in Annex I and shall transmit to the Commission all relevant information regarding the identity and impurities of that active substance.

### **Confidentiality**

17. - (1) Subject to paragraph (2) and (4) below, where an applicant for the inclusion of an active substance in Annex I or an applicant for approval of a plant protection product so requests, the Secretary of State shall treat any information submitted by that applicant as confidential to the extent that in the opinion of the Secretary of State that information contains industrial or commercial secrets.

(2) The Secretary of State shall not treat as confidential the information specified in Schedule 2 and, once the application has been granted, the Secretary of State may make that information available to any person for inspection.

(3) If subsequent to the request mentioned in paragraph (1) above the applicant discloses any information which is confidential by virtue of this regulation, he shall inform the Secretary of State accordingly.

(4) This regulation -

(a) is without prejudice to the provisions of the Environmental Information Regulations 2004[10], and

(b) does not prohibit the provision, to any authority responsible for exercising any function under any equivalent provision, of in-

formation which the Secretary of State considers will assist the authority in exercising it.

### **Packaging**

**18.** - (1) No person shall place on the market a plant protection product unless the packaging of that product satisfies the following requirements -

(a) the packaging must be so designed and constructed that its contents cannot escape (unless special safety devices are required);

(b) the materials constituting the packaging and fastenings must not be susceptible to attack by the contents, or liable to form harmful or dangerous compounds with the contents;

(c) the packaging and fastenings must be strong and solid throughout so as to ensure that they will not come apart and will safely withstand normal handling;

(d) containers with fastening devices must be so designed that the container can be repeatedly refastened so that the contents cannot escape.

(2) Any person who contravenes or causes or permits any person to contravene paragraph (1) above shall be guilty of an offence.

### **Labelling**

**19.** - (1) No person shall place on the market a plant protection product unless -

(a) the labelling of the packaging in which the product is contained satisfies the requirements of paragraphs 1 to 6 of Schedule 3; and

(b) he has complied with any requirement imposed by the Secretary of State under paragraph 7 of that Schedule.

(2) Any person who contravenes or causes or permits any person to contravene paragraph (1) above shall be guilty of an offence.

### ***Information on Testing of Pesticides***

The subject of spraying of pesticides and their affect on neighbouring land and occupiers was examined in *Secretary of State for the Environment etc v G.Downs*

[2009] EWCA Civ 664 which heard argument that the safety precautions for the use of pesticides breached EC Directive 91/414/EEC. The case concerns environmental information but it has useful discussion on the principles involved. The plaintiff, whose land was affected by spraying and who was also a pesticides campaigner was successful in her initial action against the government but this was reversed on appeal. Her basis challenge was to the appropriateness of the tests adopted by the Government to satisfy the EC requirements. The lead on judicial review adopted by the Court of Appeal was that laid down by Community courts in *Commission of the European Communities v Cambridge Healthcare Supplies Ltd.*, Case C-471/OOP(R), in which the ECJ said, in the context of directives dealing with the authorisation of medicinal products:

"96. In principle, such assessments are subject to limited judicial review. According to the Court's case-law, where a Community authority is called upon, in the performance of its duties, to make complex assessments, it enjoys a wide measure of discretion, the exercise of which is subject to a limited judicial review in the course of which the Community judicature may not substitute its assessment of the facts for the assessment made by the authority concerned. Thus, in such cases, the Community judicature must restrict itself to examining the accuracy of the findings of fact and law made by the authority concerned and to verifying, in particular, that the action taken by that authority is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion."

The CA found that causality between spraying of pesticides and adverse health effects had not been established and there was no 'manifest error' by the government in its appraisal. I set out extracts from the judgment in detail which deal with the information requirements. A recommendation (in bold) had come from the Royal Commission on Environmental Pollution as follows (para 6.51):

**6.51 We recommend that records of which pesticides, and when and where they have been used, should be directly available from the persons responsible for crop spraying upon request to any resident and bystander and to researchers investigating the health effects of resident and bystander exposure.** (5.84)

The judgment continued by describing the Government's response to the recommendations:

"110. In 2004, Alun Michael the then Minister for Rural Affairs and Local Environment Quality, made a commitment to introduce new legal measures to require farmers and growers to keep records of pesticides used on crops and to make those records available to the public via a third party. Since that time this commitment has been superseded by new European legislation (EC Regulation 852/2004 on the Hygiene of Foodstuffs, EC Regulation 183/2005 on the Hygiene of Feed for Livestock). Under this legislation farm-

ers and spray operators are now legally required to keep a record of their spraying activity and these records can be made available through a suitable mechanism.

111. In the case of acute exposure where a resident or bystander has come into immediate contact with a pesticide as it is being sprayed, the Government believes it is highly unlikely that a spray operator would not be prepared to immediately inform the affected person or a doctor of what was being sprayed. The Government does not feel that a statutory requirement of disclosure is necessary for this situation as it is already covered in the PPP Code. The PPP Code states that "*If a [spray operator] or people they are working with or near feel unwell as result of being exposed to pesticides, they should think about getting medical attention (depending on the nature and severity of the symptoms)*" it further recommends that "*information on the pesticide involved, labels, data sheets and possible cause of contamination should be sent with the patient*". Government will review the wording of the PPP Code to determine whether this advice needs further clarification for the specific context of acute exposure of a resident or bystander.

112. More generally the Government agrees that residents and bystanders concerned about both acute and longer term chronic exposure should have access to information relating to pesticide use. The Government believes that most farmers would be willing to engage in a dialogue with residents, to address their concerns and provide them with appropriate information if requested, and that a statutory requirement is not necessary or appropriate. The Government is not aware of an existing scheme where one individual can demand this type of information directly from another and they are required by law to supply it.

113. The Government does recognise that there may be circumstances where such a dialogue is not appropriate or possible and that in these cases the use of a third party is most appropriate. Such a mechanism would allow records to be requested, on a case-by-case basis, and supplied in an appropriate format and timescale to meet the requirements of both the farmer and the requester. The availability of a third party will also help prevent vexatious requests for information.

114. The Government will consider a pilot approach using a central bureau, to accept inquiries and gather data from farmers. Information would be requested on a case-by-case basis in order to minimise the overall burden. The level of demand for such information and, therefore, the burden which would potentially be placed upon farmers and spray operators is not known. A pilot approach would allow an accurate assessment of the level of demand and the potential administrative burden as well as the opportunity to explore some of the practical issues before any decision is made on a long-term approach."

The court quoted from a further recommendation of the Royal Commission:

**"115. 6.52 We recommend that the residents living next to fields that are to be sprayed be given prior notification of what substances are to be sprayed, where and when. The results of the pilot study in this area announced by the government should be treated as an exercise to determine how best to provide information, not as an opportunity to re-examine the principle of doing so, which should be accepted (5.79).**

116. The Government recognises that notification can assist residents to make informed decisions regarding their behaviour in relation to pesticide spraying, should they wish to do so.

117. The Government considers that where a resident expresses concern about a farmer's use of pesticides it is good practice to give information about the pesticide and the reason for using it. It is also good practice to tell people who occupy land, premises or houses close to the area being sprayed. This is reflected in the guidance within the PPP Code.

118. A pilot study on prior notification was announced in 2004 by Alun Michael the then Minister for Rural Affairs and Local Environment Quality. The results of this study indicated that when residents' awareness had been raised through an introductory letter 75% expressed an interest in notification of spraying and that this dropped to 8% when some action was required on their part, for example a phone call, to obtain such information. Based on these findings there is no economic justification for requiring all adjacent residents to be notified in advance of all spraying events relative to a more targeted local approach. Provision of information does not guarantee any precautionary action will be taken by the recipient, Government would need to take other measures to ensure any health risks were addressed and therefore, the need for full notification can not be justified as a protective measure.

119. Application of pesticides in accordance with best practice and greatest efficacy requires quite specific weather conditions which can change rapidly on a day-to-day or even an hour by hour basis meaning that planned spraying is often cancelled or the decision to spray is made at the last minute. If a resident is notified in advance of spraying there is a risk that they may decide to take action as a result of this notification but that the spraying itself may be cancelled. This could lead to residents taking action on many more occasions than necessary. Similarly having made the effort to notify residents there is a risk that a farmer may feel constrained to spray in less than optimum conditions reducing the efficacy of the pesticide and potentially needing to increase the overall amount of pesticides used.

120. The Government believes that the above situations are best addressed through dialogue between the farmer and a resident so that both parties can understand the implications of notification, can consider alternative approaches which may satisfy the resident's concerns and if the resident would still like to be notified identify the most suitable means and timing of doing this.

121. The Government believes that making prior notification to all residents of every spraying event a statutory requirement would be highly bureaucratic and potentially reduce the ability of farmers to engage in such local best practice. The Government is committed to working with the various organisations representing the full range of stakeholders to identify how greater dialogue between farmers and residents can be encouraged and to develop ways in which farmers can be supported in providing information to residents. We will also examine the language in the PPP Code to determine if this can be amended to further encourage such local best practice."

The judgment then continued with the legal analysis:

102. 'I have set out the Government's response to these recommendations in full because it is clear that the Appellant gave a very full and detailed explanation as to why the three recommendations were not accepted. The Respondent's submission that the reasons given by the Appellant are not "clear and compelling" is, in reality, no more than an expression of her disagreement with those reasons. In each case, the Green Code, access to information, and

prior notification, the key question was whether the issue was better dealt with by way of "good practice" as set out in the Code of Practice or by the imposition of statutory obligations.

103. Statutory Codes of Practice are found in many administrative contexts: Social Services, Mental Health, Homelessness etc. Whether a particular provision or provisions should be included in primary or delegated legislation, in a Statutory Code of Practice, or in non-statutory policy guidance, is pre-eminently a matter of political judgment. The more usual criticism of Governments is that they seek to persuade Parliament to enact too much, not too little, primary legislation, and that they make far too many, rather than too few, regulations under delegated legislation. The Respondent vigorously disagrees with the Government's view that the imposition of statutory duties in these three respects would not be appropriate, but that is a very far cry from establishing Wednesday unreasonableness, however intensive the process of judicial review.

The Court did not accept that the Government had acted unlawfully in not making the code statutory or that inadequate information had been given. There was no breach of the Directive. The Court also found that there was no breach of Art 8 ECHR

104. Article 8

Collins J. dealt briefly with this aspect of the Respondent's case because he considered that it added nothing to her claim: either the Appellant's approach was in compliance with the Directive, in which case any interference with the Respondent's Article 8 rights would be in accordance with the law; or if the Appellant's approach was not in compliance with Article 8, reliance on the Article was not needed because the Respondent had a domestic remedy in respect of the Appellant's failure to comply with the Directive: (see paragraph 67 of the judgment). Given Collins J.'s view that there was a failure to comply with the Directive his conclusion that Article 8 added nothing to the claim is readily understandable.

105. If the Appellant's approach does comply with the Directive, is the Respondent nevertheless entitled to succeed on her Article 8 claim?

It is common ground that:

i. "severe environmental pollution may affect individuals' well being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health." *Lopez Ostra v Spain* 20 EHRR 277, paragraph 51.

b. However, in that case, as in *Fadeyeva v Russia* (2007) 45 EHRR 10 it had been established that (a) the environmental pollution had had a severe impact on the complainant's quality of life; and (b) the responsible authorities had failed to take appropriate legal steps to deal with the pollution. In *Guerra v Italy* 26 EHRR 357:

i. "it was not disputed that the inhabitants of Macedonia were at risk from the factory in question and that the state authorities had in their possession information which would have enabled the inhabitants to assess this risk and take steps to avert it": see *McGinley and Egan v United Kingdom* 27 EHRR 1, paragraph 99.

c. The complainants in *McGinley*, who had been stationed on or near Christmas Island at the time of nuclear tests there in 1958, sought access to documents in the Government's possession relating to the tests. The ECtHR held that in these circumstances there was a positive obligation under Article 8 to disclose the documents:

i. "Where a Government engages in hazardous activities, such as those in issue in the present case, which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information." (101)

106. Mr Fordham relied upon the *Guerra* and *McGinley* decisions in support of his submission that there was a failure to comply with Article 8 because, in the absence of a statutory entitlement to access to spraying records and to prior notice of spraying the Respondent was unable to assess the risks and to take steps to avert them. However, *McGinley* is clearly distinguishable because (a) the activity in question, the spraying of pesticides, is undertaken by third parties, not the Government; (b) there is a dispute as to whether that activity, if it is carried out in accordance with the uniform principles in the Directive, is hazardous; and (c) the records are held by, and prior notice would have to be given by, third parties, not the Government. In *Guerra*, while the factory was not operated by the State, there was no dispute: (a) that it was hazardous (in that it placed certain inhabitants of Macedonia at risk); and (b) that the state authorities had the relevant information in their possession.

107. Even though the state authorities in *Lopez Ostra* and *Fadeyeva* had not complied with, or had failed to enforce, the relevant legal provisions dealing with the pollution in those cases, I would accept Mr Fordham's submission that the mere fact of the Appellant's compliance with the Directive would not necessarily be a sufficient answer to the Respondent's Article 8 claim. It is possible to envisage circumstances in which severe environmental pollution might infringe on individual complainants' Article 8 rights even though the state authorities had complied with all relevant legal requirements. If the pollution was not caused directly by the state, it would have to be demonstrated that there was a failure properly to regulate the third party responsible for the pollution. Whoever is responsible for the activity that is complained of, the mere possibility of harm to the complainant is not sufficient for the purposes of Article 8. In *Asselbourg v Luxembourg* (2912/95) (Dec) June 29, 1999, the applicants complained of a violation of their Article 8 rights as a result of the environmental impact of a steelworks. The ECtHR considered:

i. "that the mere mention of the pollution risks inherent in the production of steel from scrap iron is not enough to justify the applicants' assertion that they are the victims of a violation of the Convention. They must be able to assert, arguably and in a detailed manner, that for lack of adequate precautions taken by the authorities the degree of probability of the occurrence of damage is such that it can be considered to constitute a violation, on condition that the consequences of the act complained of are not too remote."

b. The Court rejected the application as inadmissible.

108. The Respondent genuinely believes that her own, and her family's health problems have been caused by their exposure to pesticide spraying. However, that is not enough for the purposes of her Article 8 claim. In the absence of evidence to support an argument that there is a sufficient degree of probability of a causal link between the pesticide spraying and

her health problems the Respondent is not able to establish that there has been a breach of Article 8 (see "Solid Evidence" above).

109. I realise that, for the purpose of deciding whether or not there was compliance with the Directive, the question was not whether this Court considered that there was "solid evidence", but whether the Appellant was in manifest error in concluding that there was not such evidence. On the premise that in an Article 8 case the Court is entitled to form its own view as to whether, by reason of severe environmental pollution, there has been an interference with the individual's right to respect for his private and family life, home and correspondence, under Article 8.1, I can see no evidential basis for going further than the RCEP's conclusions on causality in respect of both chronic illnesses and local effects. While the possibility that some or all of the Respondent's medical conditions may be due to pesticide spraying cannot be ruled out, that possibility is not a sufficient foundation for an Article 8 claim. Moreover, even if the probability of a causal link had been established in respect of certain local effects, such as skin or eye irritation, it must be questionable whether they would fall within the description of "severe environmental pollution" in the Lopez Ostra and Guerra decisions.
110. I realise that the Respondent's concerns for the purposes of Article 8 are not limited to the health problems of herself and her family. She complains of the effect of pesticide spraying on the quality of her home life generally. The spray drifting over her garden, the noxious fumes of some of the sprays, the need to keep windows shut in the summer, etc. These general effects are described in great detail, principally in her first witness statement and the first dvd.
111. However, if causality is not sufficiently established in respect of the medical effects of spraying, I do not consider that these general effects on the Respondent's family fall within the ECtHR's description of "severe environmental pollution". In saying this, I do not intend to minimise the problems experienced by the Respondent, but she has made her claim as an individual, not in a representative capacity. In Lopez Ostra and Guerra and Fadeyera the pollution came from a particular source and affected a wide area containing a considerable number of people. It was therefore entirely reasonable to expect the state authorities to have taken action to prevent, or at least minimise, the widespread pollution from that particular source.
112. There is no doubt that some, the Respondent would say very many, individuals are adversely affected by pesticide spraying: spray drifts across their gardens forcing them to close their windows etc. (see the dvds). The fact that a particular farmer or grower sprays pesticides on his fields or orchards in such a manner as to cause a nuisance to his neighbours does not mean that the state authority is in breach of its obligations under Article 8. Where spray drift does cause damage or nuisance, e.g. by harming plants or animals on adjoining land, or by reason of fumes etc., the legal system does afford a remedy to those individuals who are adversely affected. Just as the obligation under Article 2 of the Convention to protect life does not impose an obligation on Governments to guarantee the safety of their citizens, but merely requires them to put in place an effective criminal justice system; so Article 8 does not impose an obligation on the Government to guarantee that no individual's enjoyment of his private and family life, or his home will be disturbed by the activities of third parties. The Government's obligation in respect of pesticides is to put in place an effective regulatory framework. That it has done: the Directive is such a framework, and Defra's current regulatory process is in accordance with the Directive. However effective the framework, particular cases of nuisance or other harm may occur. If they do, the legal system provides redress for the individuals concerned.
113. The extent to which, and the means by which, potentially harmful effects in the environmental field should be regulated by the state was considered by the Grand Chamber of the ECJ in *Hatton v United Kingdom* (2003) 37 EHRR 28. The case was concerned with the night flying regime at Heathrow. Having stated that an issue may arise under Article 8 "where an individual is directly and seriously affected by noise or other pollution (paragraph 96), the Court said:

i. "97. At the same time, the Court reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy maker should be given special weight.

98. Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure properly to regulate private industry. Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under para.1 of Art.8 or in terms of an interference by a public authority to be justified in accordance with para.2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Art.8, in striking the required balance the aims mentioned in the second paragraph may be of a certain relevance.

99. The Court considers that in a case such as the present, involving State decisions affecting environmental issues, there are two aspects to the inquiry which may be carried out by the Court. First, the Court may assess the substantive merits of the Government's decision, to ensure that it is compatible with Art.8. Secondly, it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual.

100. In relation to the substantive aspect, the Court has held that the State must be allowed a wide margin of appreciation. In *Powell and Rayner*, for example, it asserted that it was "certainly not for the Commission or the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere", namely the regulation of excessive aircraft noise and the means of redress to be provided to the individual within the domestic legal system. The Court continued that "this is an area where the Contracting States are to be recognised as enjoying a wide margin of appreciation".

114. The regulatory framework for pesticides undoubtedly falls within a "difficult social and technical sphere" in which a balance must be struck between "the competing interests of the individual and of the community as a whole". The Appellant was entitled to conclude that that balance was struck by compliance with the terms of the Directive which ensures, through the application by all Member States of the uniform principles in Annex VI, that priority is given to the protection of human health. For these reasons the Respondent's Article 8 claim must fail.

## Food Products

### **General – Food Labelling Regulations SI 1996/1499**

Food which is ready for delivery to the ultimate consumer or a catering establishment must be labelled with the following information: the name of the food; a list of ingredients; the appropriate durability indication; any special storage conditions or conditions of use; the name or business name and an address or registered office of either or both of the manufacturer or packer, or a seller established within the European Community; particulars of the place of origin or provenance of the food if failure to give such particulars might mislead a purchaser to a material degree as to the true origin or provenance of the food; and instructions for use if it would be difficult to make appropriate use of the food in the absence of such instructions. If a name is prescribed by law or custom, that must be used, otherwise the name used must be sufficiently precise to inform a purchaser of the true nature of the food and to enable the food to be distinguished from products with which it could be confused and, if necessary, must include a description of its use. There are further regulations about the order of the ingredients, ingredients that do not need to be listed, or situations in which an ingredient list is not necessary. There are regulations as to the durability indication. Some food which is not pre-packed etc need not be labelled.

### *Meat* – Meat Products (England) Regulations 2003/2075

Under the Regulations, there are restrictions on the use of certain names if the meat content is below the prescribed level. In relation to some meat products, the name must include an indication of any added ingredients. Noncompliance is a criminal offence.

### *Margarine* – Spreadable Fats (Marketing Standards) Regulations 1995/3116 and SI 2008/1287.

A spreadable fat cannot be labelled/sold as margarine unless it contains the minimum vitamin content as stipulated in Regulation 4.

## **9. Utilities**

### ***Water***

There are comprehensive provisions relating to consumer information covering water utilities in the following areas under the Water Resources Act 1991 and Water

Industry Act 1991 (as amended by the Water Industry Act 1999, Water Act 2003 (and SI 1996/2971, SI 1988/1048 Water (Meters) Regulations):

1. Pollution control register
2. Information and assistance required in connection with the control of pollution
3. Exchange of information with respect to pollution incidents
4. Information to be provided with bills
5. Billing disputes and provision of information by water undertaker
6. Public access to information
7. Register maintained by Water Services Regulation Authority
8. Maps of waterworks (location of pipes etc)
9. Publication of information and advice
10. Publication of reasons for decisions
11. Duties to furnish authorities with information
12. General restrictions on disclosure of information
13. Provision of false information is an offence
14. Reports of the Water Services Regulation Authority
15. Power of the Authorities to acquire information for enforcement purposes

The following bodies have functions in relation to the provision of information

i) Drinking Water Inspectorate

The main responsibility of the DWI is to keep a check on the quality of the water supplied by water companies; it collects, processes and publicises information on water quality. The Water Industry (Suppliers' Information) Direction 2009 <http://www.dwi.gov.uk/regs/infolett/2009/info0609.pdf> requires suppliers to provide information about various aspects of its operation to the DWI (some monthly and some annually). The reports are available on its website.

ii) OFWAT

OFWAT (the Water Services Regulation Authority) produces information for the public, publications and leaflets regarding water services. This information is fairly general advice about how consumers deal with problems etc. OFWAT is particularly interested in the quality and price of water services.

iii) Consumer Council for Water

This body represents consumers of water and sewerage in England and Wales. It produces some information and publications and provides advice to consumers – however the information does not appear to be particularly specific.

iv) The Water Companies

The water companies have a duty to provide information to the DWI, which then makes the information available in the public domain. However, it appears that most or all of the water companies provide a substantial amount of information about their services on their websites.

Water undertakers (which it would seem are much the same thing as water companies) have a duty to prepare and maintain a record of certain information, which must be open for inspection by the public (Regulations 34 and 35 of the Water Supply (Water Quality) Regulations SI 2000/3184). Under Regulation 36, water undertakers are required to publish a report annually containing a substantial amount of information as to its service.

### ***Electricity and Gas***

There are comprehensive information provisions relating to Electricity and Gas providers and regulators. Copies of the relevant sections are available to the project (the highlighted relevant parts of Halsbury's (Vol. 19(1) and 19(2)) – some of the points relate to both electricity and gas whereby they are treated together and some points relate to the utilities separately. The duties exist under the Utilities Act 2000. The Gas and Electricity Consumer Council (now a part of Consumer Direct below) has duties to publish information under the 2000 Act and is specifically mandated to have regard to those who are disabled or chronically sick, pensioners, those on low income and those living in rural areas. Specific points which are relevant include:

1. Reports of the Gas and Electricity Markets Authority (GEMA) – the statutory regulator.
2. Duty to carry out impact assessment and publication of such
3. Acquisition and review of information by the Gas and Electricity Consumer Council – GECC – Energy Watch – Consumer Direct (below)
4. Provisions of advice and information by GECC
5. Provisions of information to consumers by GECC
6. Power of GECC to publish advice and information on consumer issues
7. Provisions of information to the GECC at its direction
8. Provision of information by the GECC to the GEMA
9. Information which need not be supplied
10. General restrictions on the disclosure of information
11. Consumer complaints and related reports
12. Publication of advice and information on consumer issues by GEMA
13. GEMA register and public access
14. Power of GEMA to require information

15. Duty to give reasons and publication of such
16. Suppliers' duty to notify consumers of rights
17. GEMA must collect and publish information as to standards of performance
18. Service standards and remuneration of directors must be published
19. Notice of interruption to supply – compensation for failure to notify
20. Declaration of phases, frequency and voltage at supply terminals upon request
21. Power to require information of an electricity licence holder

From September 2009, Ofgem has introduced new rules under its statutory powers and changes in licence conditions requiring:

suppliers to provide:

a standard annual statement covering, among other things, the tariff name, the customer's consumption and a reminder of the customer's right to switch;

simplified information on tariffs to make comparison easier including an at-a-glance price score card to help consumers in switching;

written quotations following doorstep sales and, for prepayment meter customers, proof that the offer made on the doorstep is better than the customer's existing deal;

new protections for small businesses including clear and transparent contract terms and conditions, and an end to automatic roll-over when fixed-term contracts expire; and

greater financial transparency to give consumers confidence that the market is competitive and fair.

Relevant bodies:

- i) OFGEM
- ii) Gas and Electricity Consumer Council (EnergyWatch now part of Consumer Direct below)

***The Consumers, Estate Agents and Redress Act 2007, ss.45 and 46***

Consumer Direct (below) possesses relevant powers under this Act in relation to regulators in gas and electricity, water services and the post. I quote from these sections.

s.45 Information with respect to compliance with complaints handling standards

(1) This section applies in relation to standards prescribed by a regulator by regulations under section 43 in relation to its regulated providers (or some of them).

(2) The Council must publish such statistical information as it considers appropriate relating to the levels of compliance with the standards which those regulated providers have achieved.

(3) That information must be published in such form and manner, and with such frequency, as the Council thinks appropriate.

(4) Schedule 5 makes further provision with respect to information about compliance with complaints handling standards.

#### 46 Supply of information to consumers

(1) A regulator may make regulations requiring each of its regulated providers in relation to which standards are prescribed under section 43 to give to the provider's relevant consumers such information as may be specified or described in the regulations about—

(a) the standards, and

(b) the levels of compliance with those standards achieved by the provider.

(2) Regulations under this section may include provision specifying the form and manner in which, and the frequency with which, information is to be given.

### **Telecommunications**

The consumer's right to information is not afforded as powerful presence in respect of telecommunications. Information has to be published on complaints procedures. Relevant parts of Halsbury's (Vol. 45(1)) are photocopied are although they are not that helpful. It appears that OFCOM have a duty to conduct consumer research and publish its findings. It must also carry out consumer consultation.

There are general restrictions on the disclosure of information in relation to telecommunications; however there is an exemption for OFCOM. OFCOM must keep a publicly accessible register which details designations and notifications in relation to telecommunications companies. OFCOM has the power to require certain companies and organisations to provide information to it, but there are some limits. Also, in some situations, OFCOM has some information provision responsibilities.<sup>94</sup> Public sector broadcasters are subject to FOIA.

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<sup>94</sup> P Xavier, 'Consumer Information Requirements and Telecommunications Regulation' (2008) 24(5) *The Information Society: An International Journal* 342 – 354.

## 10. Financial Services<sup>95</sup>

As one would imagine this is a vast area and is regulated under the Financial Services and Markets Act 2000 which established the Financial Services Authority. The Conservative Party has indicated that this regulator would be abolished if they win the 2010 election. The Act sets out the regulatory objectives as: market confidence (s.3), public awareness including provision of 'appropriate information and advice', the protection of consumers including 'the general principle that consumers may have advice and accurate information' (s.4(2)(b)) together with the general principle that consumers should take responsibility for their decisions (s.5(2) (c) and (d)). The FSA has to follow principles of good governance (s.7) is under a general duty to consult (s.8) and must establish Practitioner and Consumer Panels to represent those respective interests (ss.9 and 10). Reviews and inquiries into the performance of the FSA may be undertaken on behalf of the Treasury into its use of resources (s.12) or into events posing a 'grave risk to the financial system' or which 'caused or risked causing significant damage to the interests of consumers' (s.14). Those conducting reviews and inquiries are given full powers to obtain information.

The FSA is the market regulator and only authorised (approved) bodies may conduct 'regulated activity'. This involves provision of detailed information to the FSA. Securities have to be 'listed' which involves provision of information as set out in ss.79-83, prospectuses have to be approved before listing and s.90 provides a right to compensation for false or misleading particulars causing damage or omitting information as set out above. The regulator is exempted from liability except where acting in 'bad faith' (s.102) a provision repeated in relation to others such as the compensation scheme manager (s.222).

The regulator is responsible for enforcing the provisions of the Act and the Act sets out penalties, disciplinary hearings and appeals, the FSA's rule making powers, information gathering and investigation by the regulator, disciplinary measures, a financial services compensation scheme and an ombudsman scheme which operates on a compulsory (authorised and regulated activities) and voluntary basis depending upon details. There are powers to obtain information backed up by the contempt powers of the High Court (as under the compensation scheme).

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<sup>95</sup> A new set of regulations, the Banking Conduct of Business Rules under the Payment Services Directive came into effect in the Autumn of 2009.

See the Financial Services (Distance Marketing) Regulations SI 2004/2095 implementing Directive 2002/65 EC

Art 7 Information required prior to concluding contract

(2) The supplier shall provide the information specified in Schedule 1 in a clear and comprehensible manner appropriate to the means of distance communication used, with due regard in particular to the principles of good faith in commercial transactions and the principles governing the protection of those who are unable to give their consent such as minors.

Art 8 Written and Additional Information (in Sched 1)

Regulation 16 is designed to prevent the Regulations being undermined. It renders void any contractual term which is inconsistent with any provision of these Regulations or purports to impose on a consumer additional or greater duties or liabilities than those provided for in the Regulations; and it overrides any contractual term which aims to apply the law of a non-EEA State so as to prevent a contract or supply closely connected with an EEA State from being governed by the provisions of the Directive.

Regulations 17 to 21 and 26 to 28 contain or provide for enforcement mechanisms in relation to the substantive provisions of the Regulations. Enforcement of duties by injunction and criminal penalties for breaches of Arts 7 and 8 where specified.

### ***The FSA Handbook***

The FSA Handbook sets out the rules (instruments) of the FSA. This is accompanied by a Guide <http://fsahandbook.info/FSA/pdf/rguide.pdf> The rules set out Overarching Standards for regulated firms, including principles for business, senior management arrangements, threshold conditions, statements of principle and the code of practice, and Prudential Standards, Conduct of Business Sourcebook, Regulatory Processes and Decisions and Complaints Processes involving internal complaints procedures within the specific firm and then the ombudsman and Listing Transparency and Disclosure Rules. Tailored Handbooks are produced for smaller firms which are about 90 pc shorter than the main Handbook and cover about 70 pc of regulated firms. <http://fsahandbook.info/FSA/pdf/rguide.pdf>

Most of the rules in the Handbook create **binding legal obligations** on firms. If a firm contravenes such a rule, it may be subject to enforcement action (see DEPP

and EG) and, in certain circumstances, to an action for damages. S.150 FS&M Act allows a right of action under the statute for a private party injured by a breach of the rules who suffers loss as a result of a breach of the rules. Chapter 6 of the Guidance sets out the status of the different forms of rules, directions, guidance etc.

General principles and Principle 7 *Communications with Clients* states:  
<http://fsahandbook.info/FSA/html/handbook/PRIN/2/1>

A *firm* must pay due regard to the information needs of its *clients*, and communicate information to them in a way which is clear, fair and not misleading. An independent complaints scheme (involving the FSA and then ombudsman) will exist to deal with complaints which may also be a disciplinary matter. The ombudsman hears complaints against the FSA. He is not an employee of the FSA. The provision of information includes information about the compensation scheme.

The FSA's *Treating customers fairly* (TCF - 2008) is central to the delivery of FSA's retail regulatory agenda as well as being a key part of its move to more principles-based regulation. As from January 2009, delivery of TCF will be tested as part of firms' usual supervision and the FSA promises tough penalties where its 'consumer outcomes' are breached. As well as fair treatment and appropriate marketing, these include

**Outcome 3:** Consumers are provided with clear information and are kept appropriately informed before, during and after the point of sale.

**Outcome 4:** Where consumers receive advice, the advice is suitable and takes account of their circumstances.

**Outcome 6:** Consumers do not face unreasonable post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint.

The **Conduct of Business Sourcebook** sets out Guidance on

<http://fsahandbook.info/FSA/html/handbook/COBS>

*Communicating with Clients including financial promotions*

<http://fsahandbook.info/FSA/html/handbook/COBS/4>

*Information about the firm its services and remuneration*

<http://fsahandbook.info/FSA/html/handbook/COBS/6>

*Preparing Product Information*

<http://fsahandbook.info/FSA/html/handbook/COBS/13>

*Providing Product Information to Clients*

<http://fsahandbook.info/FSA/html/handbook/COBS/14>

*Reporting Information to Clients*

<http://fsahandbook.info/FSA/html/handbook/COBS/16>

*There is an insurance Handbook produced by the FSA setting out standards including disclosure of information*

<http://fsahandbook.info/FSA/html/handbook/ICOB>

*One also for mortgages and home finance*

<http://fsahandbook.info/FSA/html/handbook/MCOB>

*A banking Conduct of Business sourcebook*

<http://fsahandbook.info/FSA/html/handbook/BCOBS>

And there is also a voluntary Banking Code of Practice setting out in broad terms what information and terms will be provided on savings etc. It advises on protection of confidentiality and data protection of customers and on complaints. Complaints routes are identified as the bank or building society which has to have a clear procedure and then the ombudsman under the FS&M Act (above).

[http://www.bankingcode.org.uk/pdfdocs/PERSONAL\\_CODE\\_2008.PDF](http://www.bankingcode.org.uk/pdfdocs/PERSONAL_CODE_2008.PDF)

The FSA has been criticised by consumer groups for 'watering down' proposals to 'name and shame' companies with the worst customer service records just as the government set out new proposals to empower consumers <Cm 7669 2009 July Dept B.I.Skills>. The FSA proposed to publish data it collects on companies with the highest number of complaints. But some of these have been adapted and dropped.<sup>96</sup> Original plans included details of all complaints with an 8 week period and amounts paid in compensation. Industry representations led to amendment. Consumer groups said companies were not being forced to supply data on a product basis as in payment protection insurance. The FSA denied the substance of the criticism. Companies above a disputes requirement threshold criteria will need to publish certain data every six months. This will be compiled by the FSA and published on its web site. Record numbers of consumers are taking complaints to the ombudsman which will publish its own data in September.

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<sup>96</sup> FT 18 July 2009.

## **11. Estate Agents**

### ***Home Information Packs – Part 5 of the Housing Act 2004***

It is the duty of the person responsible for marketing the home (either the estate agent or the home seller – Sections 151 – 153) to have a home information pack and provide a copy of it upon request (Sections 155 – 156). Home information packs should contain information as to: the interest for sale, the title to the property, anything about the property that must be kept in a register or records (presumably easements – rights of way - and restrictive covenants), the physical condition of the property, the energy efficiency of the property, any warranties or guarantees in relation to the property and any taxes/charges which are payable (Section 163 – although expanded upon by regulations of the SS – various Home Information Pack Regulations and Amendment Regulations).

Estate Agents Information – Estate Agents Act 1979 (amended by Part 3 Consumer, Estate Agents and Redress Act 2007).

The Estate Agent Public Register – Contains the details of all disbarred estate agents and those who have received warnings under the Estate Agents Act 1979: [http://www.offt.gov.uk/advice\\_and\\_resources/resource\\_base/register/?Order=Date](http://www.offt.gov.uk/advice_and_resources/resource_base/register/?Order=Date)

## **12. Companies Generally**

Under the Companies Act 2006 (mostly in force) companies are required to register certain information with the registrar of companies. Part 9 (ss.145 – 153) deals with information rights. Under Chapter 10 they must file certain accounts and reports with the registrar (Section 441); failure to do so can incur a criminal penalty (Section 451) or civil penalty (Section 453). Under Section 1080 the registrar must keep a register of certain information (including accounts and reports). This register can be inspected by any person (Section 1085 – 1086). The register is easily accessible via the Companies House website – [www.companieshouse.gov.uk](http://www.companieshouse.gov.uk). Some of the information has to be paid for. However, it is a useful resource for consumers to check details of a company they may be dealing with. It could, for example, be used to check the solvency of a company against which a consumer has a claim.

Quoted companies must put annual accounts and reports on their website (Section 430). It is the right of a member of a company to demand copies of accounts and reports (Sections 431 – 432). Information about share ownership is contained in Part 22 ss. 791 – 828 and Transparency Obligations in Part 43 ss. 1265 - 1273.

### **13. Nuclear Power**

There is very little by way of 'consumer information' in the area of nuclear generation, nuclear decommissioning or nuclear new build. The EIRs and FOI will cover the relevant bodies including, arguably the private sector site companies responsible for decommissioning under contracts with the Nuclear Decommissioning Authority. There are various environmental groups operating in this area who are highly effective and who won an important victory when the government failed to carry out adequate consultation on its policy of nuclear new build after a change in policy where there were serious deficiencies in the information provided by government: *R (Greenpeace) v Secretary of State* [2007] EWHC 311. Apart from 'exempt disclosures' to official bodies such as the Secretary of State, inspectorates, Health and Safety Executive (HSE), the Environment Agency and EU and international bodies, and for patents, the emphasis is on security and secrecy. Public access may be had to certain information under the Radioactive Substances Act 1993 and applications are made to the Environment Agency or the local authority. Information about ionising radiation may be made available but there are enormous exclusions. Decommissioning site licensees are under a duty to send environmental statements to the HSE and must publish in local newspapers various details of their proposed decommissioning work including the statements and decisions for consent which must also be accompanied by publication of relevant information. Stakeholder groups from the locality will be established to assist consultation.

### 14. Environmental Information

I have attached a publicly available Register of Environmental Registers all of which are publicly: see 'Databases' below.

### **15. Information under the Civil Procedure Rules**

#### ***Pre-Action Disclosure***

The Civil Procedure Rules govern the detail of civil litigation before courts in England and Wales. These contain the rules relating pre-commencement of proceedings disclosure as well as disclosure after commencement of proceedings. Pre-commencement disclosure is governed by the terms of rule 31.16 (see s.33 Supreme Court Act 1981).

Apart from disclosure, some information as to the claim will have been disclosed in the particulars of claim, defence and counterclaim. It is open to a party to make a request for further information under Rule 18; upon such a request the court may make an order for the provision of further information.

Disclosure is invasive. The general disclosure rules are set out at Rule 31. Disclosure is a statement that a document exists (Rule 31.2). Parties have a right of inspection of documents which have been disclosed (Rule 31.2); this is subject to some exceptions. The main form of disclosure is “standard disclosure” under Rules 31.5 and 31.6. This includes any documents which a litigant relies on, documents which he is required to disclose by law and documents which adversely affect his own case, adversely affect another party’s case or support another party’s case. The duty of disclosure continues throughout the proceedings (Rule 31.11). The party is under a duty to make a reasonable search for documents when compiling a list of disclosable documents (Rule 31.7), but is only under a duty to disclose documents which are or have been under his control (Rule 31.8). There is a procedure for standard disclosure contained in Rule 31.10. Specific disclosure is also possible under Rule 31.12 whereby the court can make an order for disclosure of a specific document or class of documents or can order a search to the extent stated in the order and order disclosure of any document found in that search. Under Rule 17 it is possible to apply to the court to make an order for disclosure against a person who is not a party to the proceedings; there are certain criteria to fulfil before the court can make such an order.

### ***Search Orders***

It is also possible to obtain information under the CPR by applying to the court for an interim remedy; namely a search order (Anton Piller order). The relevant rule is Rule 25.1(h). Rules 25.1(i) and 25.1(j) are also relevant in seeking information before a claim has been made or against a non-party (respectively) the latter of whom, although not culpable, has vital information about a tortfeasor’s identity or address etc.

## **16. Public Databases**

### ***Environmental Databases***

The DEFRA website contains a list, and links to, of all the environmental registers which are available for public inspection: <http://www.defra.gov.uk/corporate/opengov/eir/pdf/register.pdf> (I have also printed out the list – it can be found with the other paper materials).

### ***'Scores on the Doors'***

All councils have the power to conduct food hygiene inspections under Part 3 of the Food Safety Act 1990. Councils are permitted to disclose the results of their inspections and some do so via the scores on the doors system ([www.scoresonthedoors.org.uk](http://www.scoresonthedoors.org.uk)). Some councils opt to publish the results independently, otherwise the results are obtainable by way of the Freedom of Information Act.

### ***Consumer Direct***

The duties of Consumer Direct under the Consumer, Estate Agents and Redress Act 2007 were outlined above.

## **17. Consumer Champions**

### ***Office of Fair Trading***

#### ***Voluntary Codes of Practice***

The OFT, effectively an agency of central government, operates a voluntary code of practice. It was established on its present basis under the Enterprise Act 2002 Part 1. It has various informational and regulatory functions under the 2002 Act and other statutes. Its basic concerns are consumer protection and competition regulation.

On the consumer side, industry organisations (otherwise known as sponsors) can sign up to the scheme and produce a code of practice to which its members must adhere. Such members are then permitted to display the OFT logo on the premises and advertising etc. The codes of practice stipulate (among other things) customer service and information requirements. I have printed off some of the relevant criteria for a code (entitled – core criteria and guidance). Members and sponsors are required to conduct research into the operation of and compliance with the code. This information is then relayed to the OFT.

More information is available at the following website:

[http://www.offt.gov.uk/advice\\_and\\_resources/publications/approved\\_codes/](http://www.offt.gov.uk/advice_and_resources/publications/approved_codes/)

According to the OFT: 'If a firm displays the OFT Approved code logo it operates to higher standards of customer protection than the law requires. You can have confidence that OFT-Approved code businesses:

- are committed to treat you fairly if problems arise
- will guarantee good customer service
- give you clear-cut information about the goods or services they're selling
- have user-friendly, straightforward and quick procedures for dealing with customer complaints
- will use clear and fair contracts, and
- will offer free or low cost dispute resolution, such as arbitration or an ombudsman, if you can't agree how to sort out a problem.'

### ***Consumer Direct***

There are a number of consumer representative bodies representing the interests of consumers and which publish information for consumers. The foremost is **Consumer Direct** formerly the National Consumer Council – NCC. CD was formed in 2008 after the merger of Energy watch, Post watch and the National, Scottish and Welsh Consumer Councils. The Consumers etc Act 2007 now makes provision for CD and gives it various promotional, advisory, information and complaints handling functions including those for the vulnerable. The functions of the Water Consumer Council may be transferred by order to CD.

This body is independent of government but is government funded via the Office of Fair Trading. This published information on 'Your Rights', 'Goods and Services' and 'Consumer Issues'. It lists those bodies, public and private, that it deals with. It is a UK wide body. <http://www.consumerdirect.gov.uk/> It has regional offices and works in conjunction with Trading Standards bodies operating in local government. It cannot do the following things:

Consumer Direct cannot:

- Recommend a trader or organisation to you (but we may direct you to another organisation that has helpful information).
- Give you specific information about whether there has been a complaint about a trader.
- Complain to a trader on your behalf.
- Provide advice on specific products (except in relation to safety issues).

- Provide advice on mortgages, tenancy or housing/welfare benefits.
- Provide advice on personal debts or financial mis-selling.
- Provide advice on local government issues.

Consumer Direct is not a legal service. However, its advisers are trained in all aspects of consumer rights. CD state this enables them to offer legally correct advice and courses of action that consumers can rely on.

There are also Citizens Advice Bureaus assisting individuals with complaints and grievances and consumer specialist journals such as *Which?* which publishes independent advice on over 450 subject areas in its guides. <http://www.which.co.uk/>

## **18. Advertising**

Finally, there is the Advertising Standards Authority which is a self regulatory body administering the advertising standards which are separated out into codes for TV, radio and all other types of ads. There are also rules for Teletext ads, Interactive ads and the scheduling of television ads. [http://www.asa.org.uk/asa/about/short\\_guide/](http://www.asa.org.uk/asa/about/short_guide/)

The ASA investigates complaints made about ads, sales promotions or direct marketing. Anyone can complain to ASA. Most complaints are made through the complaints form on their website. ASA publishes its adjudications on complaints on this website every Wednesday.

The advertising industry takes responsibility for writing the advertising standards codes and enforcing ASA rulings through the Committee of Advertising Practice, which represents the main industry bodies representing advertisers, agencies and media owners. It may refer complaints to the OFT or, in relation to broadcasting, it may refer them to Ofcom. The ASA has been ruled by the courts as a body susceptible to judicial review ie a body which is subject to public law type review.<sup>97</sup> However, it is not under the FOIA. I now turn to the specific questions.

## **The Questionnaire**

### ***Introduction***

A word of warning. Many of the questions are phrased in a manner which may re-

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<sup>97</sup> *R v Advertising Standards Authority ex p Insurance Services* (1990) Admin. L.R.77.

flect German legal traditions in the form of terminology, expression or concepts. In many instances this is not familiar to a UK lawyer or UK law. Also, the detail in UK law is voluminous. It would take several months to research and gather all relevant laws and regulations.

As a preliminary, while there are many provisions on the disclosure of information to consumers, information has to be seen in the wider context of providing safe and reliable production processes and goods as well as fair terms. Safety is not an absolute concept and often has to be weighed in relation to hazard, risk and benefit. Safety systems adopt a variety of techniques: pre-market approval by either the producer or regulator; control of the process of design, manufacture, labelling and use of standard symbols; packaging, storage and distribution. The steps are usually based on the producer and distributors operating quality systems applying best standard practice recording all steps and decisions taken. The steps taken are regularly approved and monitored/audited by external independent bodies and are often subject to official guidance. Companies also operate post marketing vigilance procedures recording and reviewing complaints and safety information. PAs are invariably under duties to review and oversee these practices by operating market surveillance systems and product testing and reviewing reports. Enforcement action will be taken when regulations are broken. There are extensive powers in the authorities of investigation, testing, prohibiting further marketing or supply and prosecution. Since the 1990s there has been increasing emphasis on improving post marketing systems. Producers under codes approved by the OFT will undertake to provide compensation for breaches of the code. Policy is determined by central government but enforcement is often the responsibility of local trading standards authorities. Special bodies exist such as the Medicines and Healthcare Products Regulatory Agency and the Vehicle and Operator Services Agency.

Many businesses are also regulated by state bodies which often required licensing or approval to operate from a statutory regulator. Licensing, approval etc require provision of information to the regulator by the business to guarantee suitability. Much of this information is published. That which is not published will be requestable under FOIA from public authorities.

## **Part A. General Principles**

### **I. Structure of the consumer information law**

**1. What is the function of consumer information within the system of consumer protection in your country? Which role does it play with regard to consumer protection by means of preventive control or admission restrictions (e.g. health standards or import standards)?**

The basic rationale of giving consumers information in the UK (the position is a UK one) is to protect them from danger, weak market position, ignorance, to help them look after their interests, and more recently, to assist them make informed choices about service options. The latter was given official impetus by John Major's *Citizen's Charter* (1991) in relation to public services although it predates that initiative. I am not sure that preventive control via information is something that information for individuals could achieve. Rather it is information for authorities who take the necessary action to stop production, bring activities to cessation or stop imports to prevent harm.

**2. What are the bases of claim for consumers to obtain information about production processes or health hazards of products, services or work performances?**

These have been listed above in great detail. However, although detailed it is not exhaustive. The more important and representative examples have been chosen.

**3. Are these rules mandatory or is the consumer allowed to abandon information rights in general?**

Almost always mandatory – but enforceable in many different ways as shown above. The basic idea is to promote a stable and fair market in which the consumer may make informed and sensible choices. The primary emphasis is the imposition of a duty on the seller, producer, agent etc rather than a right in the individual consumer. In that case, most rights cannot be 'waived' although the consumer may choose not to exercise any advantages achievable through information rights eg not

to avoid a contractual undertaking. In most cases the consumer cannot sign away rights to information – Data Protection is a clear example. The ‘control’ is in the hands of the regulators/enforcers ie invariably state bodies.

**4. Are information rights in general or in particular developed by case law? If so, have they been codified in the meantime?**

Most are statutory and case law has been interstitial. I have shown some examples of how fair procedure may assist in information rights. Case law (from the High Court, Court of Appeal and House of Lords) is beginning to make an impression in FOIA. In relation to consumer law, the common law adopted a robust and individualistic approach and in some respects placed heavy information duties upon consumers in eg insurance where *uberrimae fidei* prevailed. The law’s primary focus was upon a remedy for injury or loss suffered as a consequence of an alleged breach of duty and at the stage of litigation discovery (disclosure) would be used to obtain relevant and necessary information as explained above. This is an invasive process and trial lawyers spend much of their time developing expertise in procedural niceties seeking further information from the adversary.

**5. Is the relation of the claims to information mentioned in questions A.I.2. and A.I.4. subsidiary or is there a concurrence between the different bases of claim? Are they (currently) in any way coordinated, maybe even integrated in a single code?**

Apart from the FOI, DPA and EIR (FOI etc) legislation most claims for information are subsidiary, as explained. The ‘rights’ appear in many separate statutes and regulations. FOI etc are free-standing codes, two of which (DPA and EIRs) are the result of EU obligations.

**6. If there are legal regulations on consumer information in your country: Can they primarily be assigned to private law, public law or criminal law? Why has this option of regulation been chosen?**

Do not forget that we do not have the public/civil law distinction common to the continental traditions – although there are variations in that tradition. In the UK, certainly in England, Public Law involves much civil law – all the law of liability is common law ie private law. Public Law also involves administrative law including judicial review, constitutional law and regulatory law. The latter is a sort of hybrid involving the regulation of quintessentially private relationships in the public interest. There is a state presence actively coordinating or directing or shaping ‘private’ activity. The specific answer is that some information rights come under ‘public law’ – FOIA etc. Much of the field is regulatory and would be subsumed within public law (administrative law). Some, where criminal penalties are involved, seems to be criminal but deals with what would be regarded as *mala prohibita* and is now seen as subsumed within regulatory law. Some would appear to be purely tortious or contractual and would appear to be private law. This may seem inelegant to our continental colleagues but common law philosophy is flexible and pragmatic. Is there a problem and how is it best dealt with?

**7. In case the provisions can be assigned to private law, are they primarily contract law or tort law provisions?**

Where private law forms are in existence they are usually contractual in nature. Under DPA they are tortious in form (compensation for injury) as well as statutory: blocking correction, removal and so on. As explained, many statutes provide their own remedy so this prevents the creation of a right in private law owed to the individual.

**8. What possibilities, besides the rights to information mentioned in questions A.I.2 and A.I.4 do consumers have in order to obtain information on the quality of products, work performances and services as well as on infringements, production processes or health hazards from authorities or private persons?**

These are referred to in the main commentary.

**9. Do the authorities or persons mentioned in question A.I.8 receive general funding by the state or a remuneration/reimbursement from the state for specific actions relating to informing consumers?**

In most cases, the burden falls on the producer/seller etc. It is a long convention of Parliament that where a statute imposes a financial burden on the state (tax payer) that has to be stated and assessed in the statute. In FOIA the government stated that no financial obligation would be imposed on state bodies! If private regulators or representative interest groups are involved the provision of information would be part of an understanding that statutory regulation will not be imposed and self regulation will invariably be allowed to continue so long as the private activity maintains appropriate standards. See the case of pharmaceuticals and pesticides above and advertising.

**10. Are the authorities mentioned in question A.I.8 or the issued information controlled by the state (through random samples)?**

Depends what is meant by 'state'. If statutory the answer is 'yes'. If 'independent' of government, they are state funded, answerable to state audit and Parliamentary oversight and subject to judicial review. They will usually be dismissible at pleasure – subject to statutory provision. If 'private' and self regulatory they will be subject to state influence and negotiation rather than 'control'. It is often known as an element of the corporatist embrace.

## II. Historical development

### 1. When, in what context and for what reasons were the rights to information and the consumer information institutions mentioned in A.I.2. to A.I.10. established?

Information gathering and promotional bodies go back into antiquity in England – usually associated with civil liberties, social and economic rights and reform. The consumer movement gathered momentum in the 1960s and 1970s, very much influenced by English academic lawyers and the National Consumer Council was established in 1975. The Thalidomide episode and litigation has a considerable consciousness raising effect in the late 1960s and 1970s. The consumer bodies in the utilities emerged with privatisation from the 1980s – the record of the utilities vis a vis the consumer in all respects was pretty deplorable when in state ownership which was one of the reasons why there was little opposition to privatisation in the 1980s. The reason for consumer rights was the growing and obvious realisation of the inadequacies of laissez faire individualism post Second World War. The consumer movement in the USA was influential as well as the influence of trade unionism and collectivism throughout 19<sup>th</sup> and 20<sup>th</sup> century Britain. The latter began to wain in the 1980s under the Thatcher onslaught but ‘consumers’ and their rights became a popular and reasonably containable interest group. What political party could not support consumers?

In terms of the FOI movement, this was influenced by the USA law of 1966 and successors and the English movement had notable consumer advocates in its vanguard. Particularly important was the highly effective Campaign for FOI. The FOI movement gathered momentum largely because of the obsessive secrecy of British government and attempts at ‘reform’ in 1979 that would have led to greater secrecy.<sup>98</sup> After introducing Data Protection laws (1984 and 1998) and information laws for local government (1985), Prime Minister Major introduced a *Code on Open Government* in 1994 (revised 1997) as part of the Citizen’s Charter reforms. This was a non binding administrative code policed by the ombudsman. This was in effect until December 31 2004. After that, the FOIA came into effect. The White Paper for the FOIA was published in December 1997 and was a major plank in the fundamental constitutional reforms of Blair’s first government.

<sup>98</sup> See P.Birkinshaw *Freedom of Information: the Law, the Practice and the Ideal* 1<sup>st</sup> ed 1988.

**2. Can certain waves in the establishment of information rights be distinguished in your country? Were they released within a mutual context (in terms of time and subject matter)?**

The answer above provides the general development. There was, in the typical British fashion, no master plan, simply pressure, campaign and adventitious development.

**3. Have there been phases of counteracting or correction? Has the extent of the rights to information or the involved group of people at some point been highly extended, restricted, modified or defined?**

The general trend has been development and extension. I expect consumer rights to increase. In relation to FOIA, I have no doubt that the 'gut feel' of both main parties would be for its considerable reduction in effect and scope. Attempts to make it more government (and Parliament) friendly have failed so far. The press and media are very much in favour of the FOI and removal would be politically unpopular with the public. It is here to stay. But some movement has been suggested on Cabinet minutes and papers concerning the Royal family held by bodies covered by the Act. DPA and EIRs are EU obligations.

**4. What were the reasons for a legislative action?**

See above.

**III. Private sources of information**

**1. What is the role of voluntary product information given by businesses within the consumer information system in your country? What percentages of businesses provide this kind of product information or participate in voluntary control systems? What are (possible) reasons for low participation?**

**Are there voluntary agreements of businesses to provide certain information?**

This as explained above is considerable. The OFT has produced guidance (*Give your business the edge* (2008); *Consumer Codes Approval Scheme Evaluation* (2007), *Consumer Codes Approval Scheme – Core Criteria and Guidance* (2008)) and actively encourages voluntary schemes. These were spelt out above. The OFT has carried out a large amount of research on self regulation under OFT approved schemes. The schemes are in very wide use. Membership is taken up by those who are in a trading association. Those who are not members of such associations are not likely to be a part of an approved code. Precise figures are not available but a search on the OFT site will reveal whether a business etc has agreed to a code. The problem is that those who should be members are not and therefore will not be under an approved code – they are known in the vernacular as ‘cowboys’.

**2. If there are voluntary agreements in your country to provide information, as mentioned in question A.III.2:**

**In what way are these information provided to the consumer?**

**Does the state review the accuracy of the information (with random samples)?**

The information will be provided directly to the consumer under the code and requests can be made for additional information. The codes contain dispute mechanisms and a complaint may be made to the OFT. The OFT has to approve the code so approval will involve some degree of checking but this is unlikely to be a ‘hard review’. Any shortcomings are likely to emerge in complaints which will then lead to the possibility of the accreditation being removed if practice does not improve.

**Part B. General view of the consumer information regulations**

**I. Questions going beyond individual bases of claims**

**1. General considerations**

*a. In case your country does possess consumer specific information provisions:*

*To what subject of matter do they apply? If Regulation (EC) 178/2002 applies in your country: Does the specific information law for consumers regard areas other than food law?*

This has been outlined above. Regulation 178/2002 only applies to food. The UK is strict in its implementation of EC obligations.

*b. Does a rule state an information duty in your country, in case a person is offered products, services or work performances, which do not fulfill the particular security requirements?*

Again this is outlined above in the commentary. There is no general law but subject specific laws.

*c. Is there a term for maturity of information (information must/should not be handed on regarding to the age of the data)? If so, what is the time limit after which information are regarded as too old?*

Regulations may state that the information has to be updated in accordance with the latest and relevant developments. It is a reasonable assumption that information has to be up to date and reliable and accurate. Details of specific regulations are given (see SI 2005/1435 on Food Protection below C.VI.2(d)). Obviously, where criminal prosecutions and penalties are involved, the law would have to be stricter. In the case of self regulatory codes, failing to keep information up to date will be a matter of complaint and could lead to adverse findings before the complaints procedure and non accreditation as explained above. Failure to advise on dangerous conditions could lead to tortious and/or contractual claims. DP law has strict conditions on the age of data in the DPP.

*d. Concerning the question, whether there is a right to information: is the interest of the consumer measured against the interests of the general public or other involved parties, e.g. regarding costs? For which bases for claim?*

I think the philosophy of the British approach is that in most cases the individual is not given a right to sue upon a right to information – failure to disclose does not in itself lead to a right of action. To that extent the remedies are often indirect. In FOIA a breach of the duty to provide the information is specifically not made actionable in

damages. One can enforce the provision of information by devices under the Act which are usually very effective. To repeat points made above, the approach is more collective in its objectives – by improving the *system* one improves the individual position. Obviously the law will protect trade secrets, commercial and personal confidentiality, personal data and so on.

## **2. Dealing with (supposedly) incorrect or incomplete information**

*a. What constitutes a breach of the duty to inform? How is a breach determined? Which problems occur in practice? Are there any proposals for solutions? Who bears the burden of proof that the information issued is incorrect?*

This question is incredibly broad. Each provision would have to be examined to see what is entailed. For historical reasons, English laws and regulations are drafted in a pretty detailed and complex manner. Under FOIA, a breach is constituted by not giving information as requested which is possessed by a public authority. It's as simple as that. Sometimes it may be specified that information which is known or which ought reasonably to have been known should be given. We have seen how in regulation of pesticides the courts give a pretty wide margin to regulators and the information they collect on pesticides. Many factors come into play and the courts recognise this. Opinions on significance and interpretation differ. The courts would look for a manifest and serious deficiency.

In English law the burden of proving a breach rests upon the person (state body or individual) making the accusation of breach. The authorities are well aware of the possibilities of Art 6 ECHR.

*b. If the breach of the duty to inform entitles to claim for damages: Is this claim dependent on negligence? Which other requirements and objections are decisive? (How) Can the authority/the company free itself from liability? How is the situation handled if information turns out to be wrong later on, but seemed correct according to the state of knowledge when the information was given?*

We have seen that duties to provide information rarely involve claims for damages. Negligence is a common law concept in our law and the courts are extremely reluc-

tant to find a breach of a duty of care in the exercise of statutory powers and duties, but a liability is possible and may lead to liability where information of a serious danger which causes substantial damage is not given or distorted. In the provision of state services, the courts have ruled that there is a duty to provide accurate information on services and the ombudsmen would certainly be likely to find maladministration leading to compensation where inaccurate information leads to injustice and injury.<sup>99</sup>

*c. How is the damage calculated?*

*Are moral damages compensated in case of violation of the duty to inform? If yes: Under which conditions?*

*Are punitive damages (or similar) granted in case of violation of the duty to inform?*

The usual basis of damages would apply: an assessment of the injury suffered and its quantification in financial terms (tort) or putting the plaintiff in the position he would have been in had the contract been performed. The law is complex.

*d. When exactly commences the limitation period for claims based on the breach of the duty to inform? What is the statutory limitation period?*

This is not really relevant. FOIA is fully retrospective. DPA has limitations built in. EIRs do place limits on claim. The limitation period for contract is six years and also for tort. In the case of personal injury it is three years but there are complications where there are hidden causes or effects.

Does the business have the possibility/right to correct or comment (incorrect) information issued by authorities in public (right to a counterstatement)? And is it published (automatically) by the authority, if the situation in the respective company improves?

In reality, providing the information meets the criteria set by the regulator/enforcer it will leave the precise detail to the producer etc. In scientific information there will be numerous advisory committees/bodies etc which can be official or non official who will take a part in the vetting/approval process. If it emerges that details differ from

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<sup>99</sup> *R (Anufrijeva) v Secretary of State for the Home Department* [2003] 3 All ER 827 (HL); *R (Salib) v Secretary of State for the Home Department* [2003] EWHC 2273 (QBD).

the industry view, the latter will of course be given the opportunity to make comment and influence outcome. If the statutory regime does not allow this, the common law of fairness will (see the NICE litigation above). Under FOIA the views of third parties whose information has been requested have to be sought before disclosure. They cannot prevent disclosure unless the information falls under an exemption. An increasingly important approach by industry is to assert that information cannot be disclosed because it is protected by IP rights such as copyright. My advice on this has been accepted by the Cabinet Office. There are careful procedures to follow before information is published which could have a serious impact on a business and this has (in another context) been the subject of recent litigation concerning those running residential homes for the elderly or working with vulnerable people. Human rights factors come into play. The way it works in the UK is that if an adverse report is to be made which could lead to serious consequences, the authority will avoid using its most drastic penalties (eg prohibition or closure orders) providing the situation improves to its satisfaction.

## **II. The right to receive information from authorities**

### **1. Provision, processing and control of information by authorities**

*a. Is the authority obliged to check whether information that is to be released is correct?*

*If there is no such obligation: Is it at least obliged to communicate doubts it is aware of with regard to the correctness of the information?*

Usually no. A specific duty would have to be placed upon a public authority. Under FOI for instance, the duty is to pass on information held – not to ensure its accuracy. Doubts may be expressed to the provider, who would be asked to verify, but not the consumer under consumer laws.

*b. Is the authority obliged to ensure that information is comprehensible (e.g. for assessing technical measurements, or scientific doubts in risk assessment)? If yes, what is the scope of its obligation to process information?*

See above. Where information is of a complex nature there will be advisory committees to advise government. We have seen how the general approach is for the courts to ask whether this constitutes a rational basis of decision. Serious mistakes could have serious political repercussions as in the 'Mad Cow' episode where government scientists were reluctant to share information with universities and independent bodies and which led to severe criticism by the Phillips Inquiry. In law, the approach is 'Has the information been through a robust process?' rather than is it objectively correct? The advice will be available under FOIA – from the government department or the advisory committee if covered by FOIA. However, it will be subject to any relevant exemptions.

*c. Is the consumer entitled to claim a more rapid collection of information (in cases of delay)?*

This depends upon the legal duties. Time scales are laid down in FOIA and periods are suggested in guidance on the EIRs. The usual fall back provision in the absence of specific requirements will be 'provision within a reasonable period' which means objectively reasonable in all the circumstances.

*d. In how far is the flux of information between authorities guaranteed? Is there a joint database?*

*Are authorities obliged to notify and/or hand on specific information to other authorities?*

*In how far are authorities connected to a European information network or in how far is this planned?*

In the case of personal data there would have to be statutory authorisation to pass on data to comply with the DPA. This is a considerable problem where authorisation is not present. There are plans to establish a wide ranging data transfer scheme although there has been considerable opposition from the Information Commissioner. Implied powers may exist but they are limited and uncertain in scope. In the case of transfer between authorities of non personal data, authorities have a wide discretion but probably adopt a 'need to know' approach.

*e. How is provision and dissemination of information ensured in less densely populated areas or for particular population groups (senior citizens, handicapped people, migrants)?*

Translation is increasingly common but some regulations specify that the language is English. Utilities legislation makes special provision for disadvantaged and senior citizens. Bodies are exhorted to ensure wide dissemination rather than making that the subject of a legal requirement. Poor dissemination could be a subject of complaint dealt with through internal channels as explained.

*f. Does the State carry out quality controls in certain areas regularly?*

*If yes, in which areas?*

*Is a business obliged to accept such controls? Are there any legal/actual possibilities known about how such controls can be circumvented or falsified?*

*Are the results of these control measures accessible, upon request or without making a request?*

Yes, in the areas of nuclear activity, scientific (in the widest sense) activity, food production, food outlets and so on. Much of the outlet inspection is carried out by local government but there are numerous government agencies such as the Food Agency, Environment Agency, Nuclear Inspectorate, Nuclear Decommissioning Authority, Health and Safety Executive [and] Commission and so on.

Inspections and regulation are rarely optional – I am not sure ‘control’ is the right concept. Evasion is not known to be widespread – very rare is most likely. There will always be those seeking to evade unwanted regulation – examples in foot and mouth and Mad Cow disease were investigated.

FOI or EIR is the obvious point of reference to obtain such information (above). In some cases numbers of specific items have to be kept and made publicly available without request as in utilities (above). The example from the Financial Services Authority was examined above.

## 2. Organisation of authorities

*a. Is a central authority (maybe especially designed for these purposes) responsible for handling the requests for information? Or is the respective authority responsible for the requests that possesses the information or is able to examine the matter?  
How can the consumer find the competent authority? Are there (on the internet/in a telephone exchange) joint contact points or contact persons?  
What happens with requests directed at the wrong authority?*

The Office of the Information Commissioner is the most obvious. The utility regulators (now commissions) collect and publish information as does the Office of Fair Trading. Otherwise requests are made to the regulator/enforcer/inspector if a public authority.

The OIC has information on bodies under its control. The regulators also have information on their sites and have to provide detailed information on their quarterly bills about complaints, assistance and other information.

Under a FOI request, an authority which receives a request for information has to pass it on to the appropriate authority and inform the requester of this.

*b. Are there any time limits for handling requests? If yes: What are the time limits? Are they usually abided by?  
How is ensured that similar or parallel requests do not cause too much administrative work?*

The obvious one is the 20 working day period for response under FOIA (above). The IC finds frequent breaches of this requirement and overly extensive periods to consider the public interest factors (this should be within a period of 20 further days where the public interest factors are 'exceptionally complex'). In the OIC's view in no case should the **total**

time exceed 40 working days. The IC's office has itself been subject to increasing complaints of delay – especially from the press and media.

FOIA has special provisions on repeat or collective requests – as well as vexatious requests. Basically, an authority is permitted not to respond to a request which is substantially similar to a previous request from that person or to a request which is

vexatious. Guidance exists on this. The concept is very broad. It is the request which is vexatious not the requester. It may be vexatious because it is very rude or invasive, or aggressive or impertinent. Also, where an appellant behaves vexatiously at the appeal before the Information Tribunal, the Tribunal may award costs against that person. Usually, parties pay their own costs.

See: <http://www.justice.gov.uk/guidance/foi-procedural-vexatious.htm>

### **3. Public Databases**

*a. Which kind of information is available via databases (e.g. on the internet)? Does the access to or use of these data depend on additional criteria (age of the consumer, potential interest in receiving the information required)?*

Under FOIA all PAs have to publish Publication Schemes of classes of information. This is proactive publication. Their schemes have to be approved by the IC who may produce model schemes. Government use of the web is very advanced in the UK – it was non-existent a little over a decade ago. The information is available to all without discrimination – this is a requirement of FOIA.

*b. Are results of official quality or safety controls automatically made accessible online free of charge? Does the state compile and publish on the internet rankings concerning the performance of businesses with regard to the results of the control?*

The utilities do produce information which is published. Business rankings are not published by state bodies but university performance in research, school rankings for examinations and health trust performances are published eg in the latter case fatalities after operations, time for treatment etc. Businesses publish a good deal of information but one has to be careful about self-promotional objectives.

### **4. Warning notices**

Apart from those mentioned in 3. above there are few obligations to publish such information. Authorities may have powers to do so. If the information is not accurate then a firm or operative may consider defamation proceedings.

### **III. Guaranteeing the protection of companies and data**

#### **1. Industrial and business secrets**

*a. Are there specific rules for cases in which consumer information rights collide with business law, especially provisions concerning competition rules or trade and business secrets? If so, please name these rules.*

There are long-standing provisions protecting trade secrets, commercial confidentiality and commercial interests. The EIRs contain different wording based on the EC law but the scope of the protection would be very similar. Information may also be protected by the restraint of trade principle but this would have to comply with competition law.

*b. If industrial and business secrets are exempt from the obligation to release information in your country:*

*What is the definition of industrial and business secrets in your country?*

*Who decides whether specific information constitutes an industrial or business secret or not?*

*If businesses are deciding the previous question: Is there a negative list indicating which kind of information needs in no way be protected as industrial or business secrets or as other privileged information?*

Trade secret' is something that has commercial, financial and independent value of itself. Confidential information is information which has the necessary quality of confidentiality about it so that a reasonable person would recognise its confidential nature. Confidential information does not have to be stated as such in a contract but it is good practice to give contractual protection to confidential information. The person who receives confidential information and who realises or ought to realise that it is confidential is bound by duties of confidentiality. The common law allows a defence of public interest disclosure. The onus is on the person claiming a public interest – the defendant. Trade marks, patents, copyright and IP law may be relevant. In the event of a dispute a court or arbitrator will determine the dispute. There is an enormous case law on this subject area.

There is a public interest defence as explained. There are examples of such lists. See SI 2005/1435 Plant Protection Products:

## SCHEDULE 2

Regulation

17

### NON-CONFIDENTIAL INFORMATION

1. The name and content of the active substance and the name of the plant protection product.

2. The name of other substances which are regarded as dangerous under -

(a) Council Directive 67/548/EEC on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances[64] as amended[65]; and

(b) Council Directive 1999/45/EC concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations[66] as amended[67].

3. Physico-chemical data concerning the active substance and plant protection product.

4. Any ways of rendering the active substance or plant protection product harmless.

5. A summary of the results of the tests to establish the efficacy and harmlessness to humans, animals, plants and the environment of the active substance or the plant protection product.

6. Recommended methods and precautions to reduce handling, storage, transport, fire or other hazards.

7. The methods of analysis referred to in regulation 6(4) and (5) and Article 5(1).

8. Methods of disposal of the product and of its packaging.

9. Decontamination procedures to be followed in the case of accidental spillage or leakage.

10. First aid and medical treatment to be given in the case of injury to persons.

*c. Can an authority inform a business if it releases information on the latter, or does it have to? If the company is informed, does this happen before, at the same time or after the release of the information? Can the business object to the release?*

If an authority holds information which is not exempt it must disclose the information. As explained already, third parties should be informed where a disclosure affects them under FOIA.

*d. Does your country have any experience with an opposing party's right to adopt a transaction for themselves in the way that the entitlement to receive information on a company from an authority must be denied if the business agrees to provide the information itself?*

Duties are placed on the authority and the private party and it would be difficult to avoid this. A distinction is sometimes drawn between information volunteered to an authority and that which is compulsorily obtained. Most of the information of interest to this study is compulsorily acquired and disclosable unless exempt or protected.

## **2. Data protection**

*a. What is the role of data protection in the framework of releasing information and how is data protection ensured?*

The same Ministry that deals with FOI has responsibility for DP – the Ministry of Justice. Both subjects are under the bailiwick of the OIC. DP will be dealt with seriously under the terms of the Data Protection Act 1998 although there have been notorious breaches of the safe handling and safe keeping of data by public and private bodies. The Act has recently been amended to address these concerns.

*b. May authorities pass on the name and address of persons having made a request to receive information on a company to its entrepreneurs?*

The name and address are personal data and disclosing them would have to be in compliance with the DPA.

*c. Which are the limits of providing information in your legal system?*

For personal data the data must be 'processed' in compliance with the Data Protection Principles in Schedule I (Parts 1 and 2) and subject to the conditions in Sched II or III.

#### **IV. Specific aspects of (pre-) contractual rights to information**

##### **1. Minimum information**

*Is it the entrepreneur's legal duty or is he obliged to inform the consumer about certain facts before the conclusion of a contract?*

*If yes: Is there a specific form requirement as to how the information has to be given?*

Generally the answer is 'No' but there are many exceptions. A recent example concerns purchasing of houses. Under the Housing Act 2004 the owner has to prepare a Home Information Pack which is a set of documents that provides the buyer with key information on the property and must be provided by the seller or the seller's agent. It is a legal requirement to have a HIP and a property cannot be placed on the market without one. The details are set out in the Home Information Pack No 2 Regulations 2007 SI 2007/1667 and SI 2008/1266.

The HIP allows buyers to see important information about the property at the start of the process, free of charge. This means there is less chance of buyers becoming aware of any surprises at the end of the process. The HIP can help reduce delays and extra expense to the buyer and seller.

[http://www.direct.gov.uk/en/HomeAndCommunity/BuyingAndSellingYourHome/Homeinformationpacks/DG\\_171807](http://www.direct.gov.uk/en/HomeAndCommunity/BuyingAndSellingYourHome/Homeinformationpacks/DG_171807)

## **2. Legal consequences**

*Do consumers have any rights in case they have not received the necessary information (cancellation of contract, compensation for damage)?*

*If yes: Is this right subject to a time limit and what is the time limit?*

In the case of HIPs above the property cannot go onto the market where the information is not disclosed.

## **3. Other functionally equivalent rules**

*Does your country's legal system provide other rules intended to protect consumers from concluding a contract without having all necessary information?*

The rules on safety have been mentioned. The primary enforcement is not via contract. See the Introduction to the Questionnaire.

## **V. Practical effects of the rules**

### **1. Which are the most important norms for consumer information?**

These have been referred to in the Commentary.

### **2. If your country possesses data on this question: Which bases for claims/causes of action are most often used by consumers, which by consumer associations?**

No data is available. Statistics are kept by the OIC and MoJ on FOI and DP but only in a general sense. See Commentary.

### **3. Why are these bases for claims/causes of actions the ones most frequently used?**

This is not known.

### **4. If there are any statistic data on this issue: How often are requests made, on which basis and on which subject matter?**

Not known.

**5. What were the main reasons for the information to be denied? Inability of the requester to meet formal requirements, or the fact that the information required was not available or that the information requested was protected as industrial or business secrets or for other considerations?**

Not known.

**6. Did individual (consumer) rights to information or different norms in their interaction lead to undesired side-effects in practice?**

Not known.

**7. If yes: In how far, and what was the reason? Change in the behaviour of the addressees of the norm, or unintended interaction of several provisions that were originally intended for other purposes?**

Not known.

**8. Did individual rules concerning information lead to unexpected positive developments, for example the development of new products or mechanisms for quality control?**

Not known.

**9. Were there other economic or social impacts?**

Not known.

**10. How long does it take, on average, to handle a request for information? Are there any maximum time limits by law and are they abided by?**

Information on the FOI is stated in the Commentary above. These are the only published statistics.

**11. If repeated offenses against product standards (precisely: food safety standards) in a specific product category (precisely: meat) occurred in your country: Who would react to this information, how quickly and on which basis? From whom does the consumer receive the information first, and for which reason? In case of public warnings: Are the entrepreneurs or the product mentioned (notwithstanding the impacts on the whole industry or a specific producer)?**

The UK has experienced two meat crises: Mad Cow Disease and Foot and Mouth disease. Primary responsibility was on a single Ministry – the Ministry for Agriculture, Fisheries and Food – which was heavily criticised for looking after the interests of consumers and producers and being too heavily under the influence of the latter. The usual method of informing the public would depend upon the information. If for safety, it would be via a government department or local authority making media/press/newspaper announcements. Infected or suspect animals would be slaughtered immediately. In fact, it was claimed the slaughter was too widespread. Where necessary, imports would be stopped but this would have to comply usually with EC law and proportionality. If it is to establish details, causes, lessons to be learned and such matters a public inquiry will be set up under a senior judge or senior figure which will investigate and report. The inquiry will invariably have access to all persons and papers and its report will be published. Naming producers would depend on the circumstances. Under FOIA for instance there are exemptions pending criminal or other inquiries. A balance has to be struck between protecting consumers and not irrevocably damaging an innocent producer.

## **VI. Product labelling and quality control**

### **1. Is there a mandatory system for product labelling in your country, e.g. obligation to label goods or services that are harmful to health?**

This has been examined in the Commentary.

### **2. If there is an obligation to label products/services in your country, please describe the labelling system. The following questions are of great interest to us:**

Tobacco and alcohol have to have health warnings. Pharmaceuticals, crop sprays and fertilizers are described above. Food has to contain details of ingredients. Seizure of contraband items is often allowed together with their destruction and imposition of criminal offences and fines.

#### *a. Where and how are the results published?*

Results are monitored by government and published either by government or the producer.

#### *b. Is the entrepreneur entitled to make a counterstatement or statement?*

It would not work like this. If the producer disagrees with a statutory test, the producer would challenge its accuracy in a judicial review application (see *G Downs* above). The industry and government will have detailed negotiations and possibly dispute resolution procedures before resort to courts is relied upon. Such negotiations may well be the subject of FOI requests from consumer groups or newspapers.

#### *c. If the entrepreneur is obliged to publish product information or results of control measures himself on the product or in the company: in which form, at which place and in which time limit does he have to publish this information?*

The goods will usually have to be labelled and packaged in a particular manner carrying the information. Contravention is a criminal offence.

*d. Which sanctions might a company face in case of lacking or outdated information? Are there fines/administrative fines for entrepreneurs who deliberately and falsely advertise their products/services with positive control outcomes or labels?*

The producer will be under duties to notify the government/regulator of new developments or testing will be subject to periodic review. Providing false or misleading data is a criminal offence. Defences are available such as under SI 2005/1435 on Food Protection

**General defence of due diligence**

**23.** - (1) In any proceedings for an offence under these Regulations it shall be a defence for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

(2) Without prejudice to the generality of paragraph (1) above, a person is to be taken to have established the defence provided by that paragraph if he proves -

(a) that he acted under instructions given to him by his employer; or

(b) that he acted in reliance on information supplied by another person without any reason to suppose that the information was false or misleading,

and in either case that he took all such steps as were reasonably open to him to ensure that no offence would be committed.

*e. For how long are entrepreneurs entitled to advertise their products/services with positive control outcomes or labels?*

See d above.

*f. Who carries out the quality and/or safety controls necessary for product labelling, how often and what are the criteria applied? For which areas? And do citizens or the entrepreneurs controlled have an influence on intervals between controls or individual dates for controls? Who bears the costs for controls that are conducted upon request by someone?*

It varies according to the regulatory regime. See Introduction above.

The intervals would be determined in the regulations after consultation with interested parties. These consultations would be subject to FOI requests. The use of expert consultants would be usual. The cost is borne by the industry. No private individual could insist on a 'control'.

*g. In case of controls carried out by authorities: in which way are the controls structured? Is there a standard authority for control and labelling, e.g. in a ministry (for these purposes) or are the inspectors subordinate to municipalities?*

See Introduction above.

*h. Does the system cause higher costs, most importantly due to the fact that more staff is required?*

Obviously the more staff the greater the cost. Cost is uppermost in the minds of the industry and could adversely affect the market, research and development, profitability, pensions, salaries and so on. The government is well aware of this and seeks to strike an appropriate balance.

**3. If there is no product labelling system in your country: Were there considerations to introduce such a labelling system? If yes, why wasn't it introduced?**

Not applicable.

## **Part C. Cost burdens for the parties involved**

### **I. Efforts for obtaining and issuing information**

**1. Which factual actions are necessary to fulfil the requirements of the respective rights to information?**

It depends upon the statute. Under FOI a request has to be in writing identifying the information and an address for correspondence and a name for reply have to be given. If a statute requires payment, this will have to accompany a request – as in

DP. In EIRs, the request does not have to be in writing but the information has to be described. Further details may be requested by the authority to assist in identifying information requested.

**2. If there are estimates or calculations for costs caused by the procurement and issuing of information in your country:**

***What are the total costs?***

***Which actions are most expensive and/or time-consuming (obtaining information, release/publication, storing information, handling requests, examinations in and communication with companies, if necessary: processing and verifying information)?***

***Are the costs for procuring and issuing information estimated or reported on a regular basis?***

***If yes, in which way have they developed?***

The review of the FOIA on central government conducted by Frontier Economics in 2006 found that the Act had cost in total £24.4 million for central government in its first year. £8.6 million was on officials' time, the rest on overheads, processing internal reviews, appeals to the IC and IT.<sup>100</sup> The report calculated that the hourly rate in central government was £34 and not the £25 allowed by the regulations and on average a request took 7.5 hours to deal with. The report found that requesters were of five key categories: journalists, MPs, campaign groups, researchers and private individuals. The report was used as a basis for reform of fee charges under FOIA which the government, after vociferous opposition, shelved in 2007.

Reports are made by the MoJ but these only cover central government. The OIC has published estimates (above). There has been a slight reduction in requests.

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<sup>100</sup> Note 1 above.

**3. If there was a cost estimate for bureaucracy costs when the right to information was enacted:**

**Which amount was estimated? In how far has this estimate proven true in practice?**

**In case of significant divergence – what are the reasons?**

See above.

**4. Were new purchases made or staff hired due to the right to information?**

Figures are not collated centrally but the answer is yes. Outside FOI, DP and EIRs the situation is unknown.

**II. Bearing the costs**

**1. Do consumers have to contribute to covering the costs for procuring and issuing information? Does this contribution cover the costs?**

**In which way are consumers involved in covering the costs: by fees (independent of time and effort), or by compensation for the actual efforts made?**

**Is there a fix lump sum or are the costs calculated on an individual basis?**

Under FOI 'No' providing requested information is within cost limits – see Commentary. They will pay for 'disbursements'. There is a standard fee under DPA - £25. IN EIRs the charge is a 'reasonable' one. In other cases it depends upon the statutory regime in question.

**2. Are there any opportunities for socially deprived people to obtain information for free or under more favourable conditions?**

Generally, there are no concessions. Under DPA there are different registration fees for large enterprises (defined by turnover and employees) recently introduced.

### **3. Is there any evidence that cost sharing has a deterring effect?**

The government decided to exempt FOI from fees (up to the limits) so as not to discourage requests.

### **4. Do entrepreneurs have to contribute to covering the costs according to the cost-by-cause principle for creating risks or for offense against consumer protection regulations?**

The business is saddled with the costs.

## **III. Cost-benefit analysis**

### **1. Are costs for procuring and issuing information taken into account when dealing with the question whether there is a right to information? Are the costs for the general public measured against the interest of the individual?**

III.1 The answer is yes. See Introduction. All UK regulation has to undergo stringent tests before it is brought into effect. This is not quite the technical and detailed practice in the USA but costs and benefits are calculated. It was estimated that FOI would result in no additional costs for PAs, or at best only marginal costs. This is not true. However, there are benefits and cost savings in enhancing efficiency and in producing better filing and information retrieval systems. However, this is not a factor in the private sector. There are in the latter imponderables such as reduction in litigation costs by providing safer products especially as individuals have become more litigation conscious.

### **2. If there is such a balance of interests: does involving the consumer in covering the costs therefore influence whether there is a right to information at all?**

I would say no.

## **Part D. Practical Enforceability**

### **I. Enforceability of the right to information**

**1. Are there any mechanisms to settle disputes especially for consumer information acts? If no, are there any other mechanisms for settling disputes? Are these mechanisms being used?**

In FOI the role of the OIC has been explained. So too has the role of codes. Industries and enterprises are required to have their own grievance mechanisms and the OFT, a regulator or ombudsman, usually exists to apply pressure.

**2. If, in your country, entrepreneurs are obliged to inform the consumer (as e.g. in Art. 19 section 1 of the Regulation (EC) Nr. 178/2002): how is made sure that entrepreneurs fulfil this duty?**

In food, and most other areas, duties are primarily enforceable by criminal penalties. These may involve custodial sentences in serious or repetitive cases. In FOI, enforcement is via notices of the IC which are backed up by contempt powers of the High Court – fines, or prison in very serious cases.

**3. Does the legal system of your country provide possibilities for consumer associations and similar institutions to sue businesses which did not comply with legal requirements concerning consumer information legislation?**

We have seen that rights to information are not usually the subject of a legal action by an individual. A group would therefore have no entitlement to commence proceedings. But representative groups may bring applications for judicial review, be joined as parties where appropriate or assist litigants in eg contract or tort cases.

## **II. Procedural particularities**

**1. Are there any procedural opportunities to obtain further information (example: USA- pre-trial discovery)? If there are, what are the conditions? An in how far do industrial and business secrets play a role in these procedures?**

Pre-trial disclosure is available as explained above. If documents are disclosed on disclosure, the party receiving them may be required not to use them for any purpose other than the immediate litigation. Proceedings may be conducted in camera. Confidentiality per se is not a ground for withholding documents required in the interests of justice, subject to safeguards, but commercial and trade secrets will not be disclosed. The judge may inspect documents to see if they are relevant without disclosing the protected information to the other party. Providing a false disclosure statement is punishable under CPR 31.23

**2. On the other hand, can procedural aspects (investigations etc.) lead to the blocking of information or complicate the receipt of information? If yes, under which conditions, and what are the consequences?**

Matters subject to investigation or judicial proceedings are exempt under FOI. See Commentary. In an investigation, the information is subject to a public interest test.

## **Part E. Final appreciation, assessment**

**1. What is, in your opinion, the level of consumer information and consumer protection in your country?**

My belief is it is of a high quality and has been enhanced by the FOI developments. I am not a consumer lawyer but generally consumer protection has improved dramatically in the last twenty years. I hope the above has helped explain why.

**2. Do you think the system for consumer information is successful, or what needs to be changed to make consumer protection more effective?**

I think there is a very strong case for extending FOI to the private sector to cover companies (over a certain size/turnover/employees) where they are interfering with the rights of an individual and the duty should cover relevant information. This would embrace consumers but would have a wider application.

**3. Which negative practical impacts or problems with the norm could be observed so far? Which other impacts do you expect?**

There is no evidence in the private sector of which I am aware. Under FOI, there is a frequent claim that the law has made more senior civil servants reluctant to be candid and comprehensive in their advice – they feel inhibited because of possible publication. The IC and IT have generally treated this with the scepticism it deserves – but a case a good case *may* be made out to exempt very recent advice. It would depend on the details. The approach of the IC and IT is fair and balanced.

One final point: as well as extending FOI to the private sector as explained, I believe FOI should be regarded as a fundamental human right. I have argued for this elsewhere.<sup>101</sup> In this connection, see the draft Council of Europe Convention on Access to Official Documents (CoE Treaty Series/205, 18/06/09). This does not, however, form a part of the ECHR.

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<sup>101</sup> P. Birkinshaw 58 Admin L.R. 177 (2006) 'Freedom of Information and Openness: Fundamental Human Rights?'

## Anhang 6: Länderbericht Irland

### Introduction: Overview of Consumer Information Rights in Ireland

Ireland does not have a particularly impressive history of legislative activity in the area of contract or consumer law. For example, in contrast to the UK, we have not legislated on the areas of third party contractual rights or unfair contract terms in commercial contracts.<sup>102</sup> Nor have we reformed laws which are currently detrimental to consumers, such as the rules on the passing of property and risk when buying goods. Most of the consumer protection measures which have been implemented have originated, unsurprisingly, from the EU, and not from Government initiatives. Exceptions to this in the area of consumer law include the Sale of Goods and Supply of Services Act 1980, which increased consumer protection in the area of the sale of goods and supply of services and is in some ways further reaching than the Consumer Sales Directive,<sup>103</sup> the Consumer Information Act 1978, which dealt with false or misleading advertising or trade descriptions, but which has since been repealed owing to the implementation of the Unfair Commercial Practices Directive,<sup>104</sup> and the establishment of the National Consumer Agency in 2007.

Moreover, although in the last decade there was a surge of interest in consumer rights, the political impetus to protect consumer rights appears to be weakening. In the last budget the Government effectively abolished the National Consumer Agency – a statutory body which was set up to protect and represent the consumer interest only in 2007! – by “amalgamating” it with the Competition Authority. Details on how this is to occur are not yet publicly available, although legislation is expected by the end of the year, but the decision signals the lack of prioritisation of consumer rights in Ireland. Given that one of the primary functions of the National Consumer Agency was to promote consumer information, education and awareness, this move was regrettable. Within the sphere of consumer policy, it demonstrates how particular consumer interests are valued more than others – the Government’s focus is on

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<sup>102</sup> There is some reference to this in the Sale of Goods Acts 1893 – 1980, but not to the same extent as is found in the United Kingdom.

<sup>103</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

<sup>104</sup> Directive of the European Parliament and Council concerning unfair business-to-consumer practices in the internal market and amending Directives 84/450/EEC, 98/27/EC.

the creation of a more competitive market for consumers and businesses,<sup>105</sup> rather than on furthering consumer education and awareness and promoting consumer information.

This is not to say that the Irish Government has not introduced measures to protect consumers. It has done so under different guises, for example to protect the health and safety of consumers, or to ensure high professional standards in particular fields, and, of course, it has implemented EU directives when necessary. However, the method of consumer protection in Ireland is largely regulatory rather than rights-based. Consumers depend to a large extent on regulatory bodies which carry out inspections, maintain and enforce standards, and ensure that, when necessary, relevant information enters the public domain via the television, radio, national and local newspapers and the internet. There is a veritable web of statutory regulatory bodies in Ireland, and their functions can frequently overlap.<sup>106</sup> Some of these functions – for example, the provision of information about the safety of household water supplies – are carried out by Local Authorities. Sometimes the same body is responsible for the provision of and regulation of a particular service, which can potentially cause a conflict of interest.<sup>107</sup>

The statutory provisions which provide for these regulatory bodies do not give consumers “rights” or a “cause of action” as such. However, many of the public bodies which regulate the provision of goods and/or services to consumers produce reports or data on those services. In the past it was “generally the norm that such inspectorates or regulatory bodies operated outside of the public domain; their reports and findings in individual instances tended not to be available to the public and there

<sup>105</sup> Government policy in Ireland has on occasion favoured the protection of small to medium sized independent businesses over an increase in competitiveness. For example the Restrictive Practices (Groceries) Order 1987, S.I. No.142 / 1987, prohibited supermarkets from selling many items below the invoiced price, in order to protect small independent stores which could not compete directly on cost. This was repealed in 2005 as it artificially inflated prices and was anti-consumer and anti-competitive. Planning legislation also directly favours small independent stores over larger supermarkets, and has been criticised as being inherently anti-competitive: The Competition Authority “*The Retail Planning System as Applied to the Grocery Sector: 2001 to 2007 – Grocery Monitor Report No.3*” (July 2008) Available at [www.tca.ie](http://www.tca.ie)

<sup>106</sup> See P.Clancy and G. Murphy “*Outsourcing Government: Public Bodies and Accountability*” (TASC, 2006), in which the authors identified in excess of 450 Public bodies (excluding local authorities), and criticised the degree of overlap and lack of coordination in their functions. See [www.tascnet.ie](http://www.tascnet.ie)

<sup>107</sup> See for example the Bar Council of Ireland and the Law Society, which until this year represented and regulated barristers and solicitors. The Legal Ombudsman Services Act 2009 has taken away some of the regulatory functions of the Council and Society. Another example of self-regulation can be seen in the Medical Council. A conflict of interest can also be seen in regard to the Department of Transport, in that it acts as both regulator and owner of most bus services and all rail services.

were few if any mechanisms for informing the public of their activities”.<sup>108</sup> Today the reports of these bodies are now open to the public either by way of automatic publication of reports on the internet or by way of release of information under the Freedom of Information Act 1997 - 2003.<sup>109</sup>

The impact of Freedom of Information Act on consumers can be seen in the case of inspections by Health Boards of private nursing homes and child care facilities. Until recently the reports of the Health Boards were not published, yet there was an obvious public interest in obtaining the information contained in such reports. The Freedom of Information Act allows consumers to gain access to these reports. In addition, the Act has acted as a form of “soft law” to increase the transparency of the activities of public bodies such as the Health Boards, so although access to such information was initially only by means of Freedom of Information (FOI) requests, it is now obtainable as a matter of course on the Health Boards’ websites. Without the Act, it is possible that consumers would have remained unaware of the lack of standards in particular facilities. Other records released under the Act which can be said to have an impact on consumers include requests made to hospitals for extensive records about microbiology, infection control, hygiene and related issues possibly connected to MRSA, records detailing on which streets in Dublin you are most likely to have your car clamped, “University Feeder School” tables, records relating to the policy of some hospitals regarding the transference of children's body parts to hospitals in the UK and records relating to the amount of the television (RTÉ) license fee, which all television owners in the country are legally obliged to pay. The reports of bodies such as the Food Safety Authority of Ireland are also subject to FOI requests, although not all information requested will be made available, for example because of exceptions relating to the commercial sensitivity of a report.

Ireland’s regulatory approach to consumer information rights needs to be put in context. Ireland is a relatively small country which in the last census in 2006 recorded a population of 4,239,848. From a practical viewpoint this means that information, including important consumer information, can be disseminated throughout the country quickly and without causing a disproportionate administrative or financial burden.

<sup>108</sup> Office of the Information Commissioner “*Freedom of Information, the First Decade*” (2008) p.26.

<sup>109</sup> Freedom of Information Act, 1997 (No.13 / 1997), as amended by the Freedom of Information (Amendment) Act 2003 (No.9/2003).

The mass media is particularly important in providing information to consumers, and a relatively high percentage of the population accesses the news on television, radio, or newspapers each week.<sup>110</sup> In addition, statistics from 2007 indicated that 57% of Irish households had access to the internet, and this number is rising. Hence, when there is a nationwide health and safety issue, or consumer protection concern, information is usually quickly and readily available, and products can be quickly recalled if necessary.<sup>111</sup> If all these methods of communication are not sufficient, it is possible for every household in the country to receive leaflets or pamphlets in the post within a relatively short space of time. The importance of the mass media as a source of consumer information is reflected by the current trend of translating important information into various languages so that it is accessible to all. In some ways, this system of communicating information has acted as a disincentive for a more rigid regime of consumer information rights, as the regulatory regime described above is generally perceived as adequate (or excessive) for such a small population, particularly given the costs of implementing a new consumer information rights regime. Regardless of whether or not this is an accurate reflection of the need for consumer information rights, it seems it has resulted in a certain amount of apathy regarding such rights.

In conclusion, to the extent that consumer information rights have been paid any attention in Ireland, it is with regard to issues such the prohibition on misleading or false information, labelling requirements on products or on information which must be provided when entering into online contracts or when obtaining financial products, rather than on any broader question of a general right to information regarding consumer products or services, with a correlating right to bring an action to enforce that right to information, or obtain redress for its breach. Instead, the focus has been on regulation, with the establishment of public bodies with an obligation to protect consumers by ensuring standards in products and food, and to (sometimes) provide consumers with information by means of the Freedom of Information Act. Five types of obligations as regards consumer information can thus be identified:

<sup>110</sup> A 2002 Eurobarometer survey indicated 91% of people in Ireland watch the news on television every day or several times a week; 82% listen to the news on the radio every day or several times a week; and 69% read the news in daily papers every day or several times a week. See S.O'Donnell "News Consumption in Ireland and the European Union: Traditional Media v the Internet" 9 *Irish Communications Review* (2003).

<sup>111</sup> Ireland has implemented Regulation (EC) 178 / 2002. See generally on food recalls: The Food Safety Authority "Guidance Note No.10 Product Recall and Traceability, Revision 1" (2008) Available at [www.fsai.ie](http://www.fsai.ie)

(a) Businesses are obliged to provide certain information to regulatory bodies such as the Irish Medicines Board, the National Consumer Agency or the Food Safety Authority before or if they can market their goods in Ireland. The information here is designed primarily for the regulatory body and not for consumer per se but it protects consumers as the regulatory regime ensures the product reaches certain standards before it can be sold on the market. Some of this information may be published by the public bodies, often at their discretion in cases of non-compliance or where there is a health and safety risk.

(b) Businesses are obliged to provide certain information directly to consumers. This can include information about the product itself, its contents, instructions for its use, or possible risks associated with the use or consumption of the product. This information may have to be provided on the product itself, on the packaging, or, where contracts are entered into online, on the website and in a confirmation email (or other durable medium).

(c) Businesses are obliged not to mislead consumers or falsely advertise their goods. In addition, they must not omit material information about a good where this would cause the consumer to enter into a transaction they would not otherwise have entered into, i.e. where an omission is essentially misleading. Instances of misleading advertising will be investigated by the National Consumer Agency.

(d) Consumers are entitled to request information from public bodies, including information about consumer products and services, under the Freedom of Information Act.

(e) Information may be available through the discovery process of litigation. However, this is information which is made available only after an injury or harm has occurred, and there may be practical and legal difficulties in obtaining such information.

Consumers do not have a legal right to request information directly from businesses.

The following two sections provide an overview of the public bodies with an obligation to provide or regulate consumer information, and the main provisions of the

Freedom of Information Act. The specific issues in the questionnaire are then discussed, where applicable in the Irish context.

## **Overview of the Public Bodies with an Obligation to Provide or Regulate Consumer Information**

### **1. The National Consumer Agency**

The National Consumer Agency (NCA) was established by the Consumer Protection Act 2007 in response to the publication of a 2005 Report by the Consumer Strategy Group entitled *Make Consumers Count: A New Direction for Consumers*. This Report highlighted considerable gaps in consumer protection in Ireland, including a lack of a uniform and co-ordinated approach to consumer education, information, and awareness, and a general lack of representation and promotion of the consumer voice in Government policy and decision-making.

The functions of the NCA, as set out in the 2007 Act,<sup>112</sup> are:

- (a) to promote and protect the interests and welfare of consumers,
- (b) to enforce the relevant statutory provisions, including by the prosecution of offences, by way of summary proceedings,
- (c) to encourage compliance with the relevant statutory provisions,
- (d) to investigate instances of suspected offences under any of the relevant statutory provisions,
- (e) at its discretion, to refer cases to the Director of Public Prosecutions where the Agency has reasonable grounds for believing that an indictable offence under any of the relevant statutory provisions has been committed.

The provision of information aimed at increasing awareness of consumer issues is a core activity of the NCA. The information services currently provided by the NCA include a consumer website<sup>113</sup> which provides consumers with a range of information in relation to basic rights and updates on topical consumer issues. It runs spe-

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<sup>112</sup> Section 8.

<sup>113</sup> [www.consumerconnect.ie](http://www.consumerconnect.ie) See also the corporate website: [www.nca.ie](http://www.nca.ie)

cific information campaigns on television, radio and across other media, and has a consumer helpline on a national “lo-call” number. The information made available through the NCA consists to a large extent of an explanation of consumer rights, and takes the form of “Guides” to consumers when buying goods or services. However, it does also include specific information such as safety warnings and information on product recalls. On August 17, 2009, for example, it published a notice that Electrolux PLC was taking the precautionary measure of requesting owners of certain brands of oven to contact it immediately, as there is a potential risk of fire while using the grill function on a limited number of these ovens.<sup>114</sup> Although in this case it published a notice issued by the company taking the precautionary measure, it also distributes details of safety alerts issued by other statutory bodies such as the Food Safety Authority.<sup>115</sup> It also issues information regarding which traders it has investigated regarding offences under consumer statutes. Section 86 of the Consumer Protection Act 2007 provides the basis for the National Consumer Agency (NCA) to maintain a “Consumer Protection List” which contains the names, addresses and details of the actions taken by the Agency. The Act grants discretionary powers to the NCA to publish the list as it considers appropriate. This is essentially a “name and shame” list, and it has been used, for example, to warn consumers about certain car dealers who were “clocking” cars (i.e. giving false mileage on the odometer), about publicans who were watering down alcohol, and about supermarkets which repeatedly displayed false prices. However, the difficulty with both the Consumer Protection List and the information on product warnings is accessibility – only consumers who actively seek the information will obtain it, and even the website can be difficult to navigate, particularly when looking for the Consumer Protection List. Moreover, there is no “right” to the information, and hence no course of action if information is not published and harm is suffered as a result.<sup>116</sup> There would not appear to be any specific recourse available to a trader who has had wrong information displayed about them, although they could possibly take an action in

<sup>114</sup> [http://www.consumerconnect.ie/eng/News+\\_Research/Product\\_Recalls/](http://www.consumerconnect.ie/eng/News+_Research/Product_Recalls/)

<sup>115</sup> See “Recall of Heinz Mum’s Own Spaghetti Bolognese” 23 July 2009, available at [http://www.consumerconnect.ie/eng/News+\\_Research/Product\\_Recalls/](http://www.consumerconnect.ie/eng/News+_Research/Product_Recalls/)

<sup>116</sup> An action in tort would be unlikely to succeed, particularly given the disclaimer of liability on the website of the Agency.

defamation<sup>117</sup> or negligence in a suitable case and they may have a right to have wrong information corrected under the Freedom of Information Act.

The National Consumer Agency takes a “risk-based” approach to its investigations. Certain sectors will come to its attention, either because of consumer complaints made to the Agency,<sup>118</sup> or because of issues highlighted in the media. The Agency also monitors advertising in the national media. There is a weekly enforcement meeting at which traders are discussed and placed on a “risk list” and inspectors are sent out to inspect the trader’s activities. However, the Agency would not carry out detailed scientific inspections, as this is the role of other agencies such as the Food Safety Authority. Rather, the focus is on compliance with general consumer protection law, such as ensuring the correct prices are posted, and that consumers are not misled, and this is done in conjunction with other agencies where necessary. The Agency will also cooperate with National authorities such as Customs to ensure consumers are aware of illegally imported (and potentially dangerous or defective) products.

As mentioned in the introduction, the National Consumer Agency has now been “amalgamated” with the Competition Authority, although it is not clear what the implications of this will be. Legislation on this issue is expected by the end of the year.

Website: [www.nca.ie](http://www.nca.ie) or [www.consumerconnect.ie](http://www.consumerconnect.ie)

## **2. The Competition Authority**

The Competition Authority was established by the Competition Act 2002 and its main function is to enforce competition law in Ireland. However, it can also be an important source of consumer information as it publishes information on prosecutions which it brings against traders suspected of anti-competitive behaviour, such as cartels or price fixing. This gives consumers information about traders in their area who may be involved in such behaviour. It also publishes information on investigations it carried out, or decisions it made as to whether certain practices were anti-competitive, where there was no need to initiate court proceedings. For exam-

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<sup>117</sup> However, the Agency could arguably have a defence based on, e.g. qualified privilege, although it is unclear whether it would apply where information is released to the public at large.

<sup>118</sup> The Agency receives approximately 70,000- 80,000 calls to its consumer complaints and information phone line per annum.

ple, in August 2009, it published information for consumers on their rights regarding exclusivity agreements for pay-TV services to apartments.<sup>119</sup> The basis of this is section 30(1) (g) of the Competition Act 2002, which gives the Authority the function of “carrying on such activities as it considers appropriate so as to inform the public about issues concerning competition”.

Website: [www.tca.ie](http://www.tca.ie)

### **3. The Food Safety Authority**

The Food Safety Authority of Ireland (FSAI), was established by the Food Safety Authority of Ireland Act, 1998. It is a public body responsible for protecting public health and consumer interests in the area of food safety and hygiene.

The Authority is authorised to carry out inspections of any place where food is handled or prepared, to ensure compliance with legislation and recognised codes of good practice. It also has an important role in communicating risks to consumers, public health professionals and those in the industry. As the FSAI is a public body, it is subject to the Freedom of Information Act and thus any person can request access to records held by it. However, the main way in which it acts as a source of consumer information is in the provision of information on risks, via its website and circulation lists, and through press releases and the media. For example, the FSAI publishes notices of closure orders, improvement orders,<sup>120</sup> and prohibition orders<sup>121</sup> served on food businesses. Their website contains an “Enforcement orders” database on which this information can be easily accessed. It also issues “Food Alerts” to official agencies and food businesses relating to an identified hazard in food with the potential to cause and adverse health effect. Sometimes a national food alert is issued, where necessary, to enforcement agencies, public health representatives, food business representatives and other interested groups and organisations who have requested to be on the circulation list. Such a food alert will appear on the

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<sup>119</sup> See [http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected\\_item=249](http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=249).

<sup>120</sup> Improvement “notices” are issued when there is a potential risk to public health. These are not published but if they are not complied with an improvement “order” may be issued, and this is published on the website until three months after the order is lifted.

<sup>121</sup> Prohibition notices are essentially orders to recall or withdraw food products from sale.

FSAI website, and could appear on the websites of other organisations such as the National Consumer Agency.<sup>122</sup>

Although it is independent, the FSAI acts in conjunction with other public bodies, such as the National Consumer Agency, the Health Service Executive and the Department of Agriculture. The Health Service Executive enforces food law via the environmental health officers in all retail food businesses (including some wholesale butchers), all food businesses processing foods of non-animal origin and some other food businesses not requiring approval. The Sea-Fisheries Protection Agency (SFPA) enforces food law in all food businesses handling and processing fish and fishery products, including shellfish. The Department of Agriculture, Fisheries and Food (DAFF) and the Local Authority Veterinary Service (LAVS) enforce food law in most food businesses engaged in the handling and processing of foods of land animal origin including meat, dairy products and eggs.

Website: [www.fsai.ie](http://www.fsai.ie)

#### **4. The National Standards Authority**

The National Standards Authority was established by the National Standards Authority Act 1996. It aims to “inspire consumer confidence and protect industry interests through setting standards and issuing certification in the quality and safety of goods and services”.<sup>123</sup> Amongst other functions, it provides independent certification of products, processes and services so that a trader or organisation can prove that they reach a certain standard which is recognised by consumers and other stakeholders.

The Legal Metrology Service (LMS) is a statutory body within the NSAI. Under the Metrology Acts 1980 to 1998, it is involved in the regulation of measurements, in particular those made for the purpose of trade, such as gas meters, taximeters and capacity serving measures. It ensures uniformity and accuracy of measures in Ireland by carrying out inspections and calibrations, and it has the power to bring prosecutions for breaches of the relevant legislation. This ensures that consumers

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<sup>122</sup> See “Recall of Heinz Mum’s Own Spaghetti Bolognese” 23 July 2009, available at [http://www.consumerconnect.ie/eng/News+\\_Research/Product\\_Recalls/](http://www.consumerconnect.ie/eng/News+_Research/Product_Recalls/) and also at [http://www.fsai.ie/news\\_centre/food\\_alerts/fa23072009.html](http://www.fsai.ie/news_centre/food_alerts/fa23072009.html)

<sup>123</sup> See <http://www.nsai.ie/index.cfm/area/page/information/aboutus>

are not mislead by the use of false measures. Issues relating to the information displayed on packaged goods are regulated by the National Consumer Agency.

The National Standards Authority is a public body and thus subject to the Freedom of Information Act. However, other than this it is not primarily designed as a source of consumer information and does not regularly publish consumer alerts or warnings. Rather, it aims to protect the consumer interest (and national interests generally) by regulating standards in industry.

Website: [www.nsai.ie](http://www.nsai.ie)

## **5. The Irish Medicines Board**

The fundamental role of the Irish Medicines Board is to protect and enhance public and animal health through the regulation of human and veterinary medical products. The IMB regulates clinical trials and monitors products on the market to ensure their safety and efficacy. Before a medicinal product can be authorised for use, an application must be made to the IMB, and it conducts inspections and sampling of products both before and after authorisation. Pharmaceutical companies are obliged, under the conditions of authorisation to market their medicinal products in Ireland, to submit adverse reactions associated with use of their products to the IMB. In addition, healthcare professionals and consumers are encouraged to report any suspected adverse reaction associated with a medicinal product to the IMB. The IMB also regulates medical devices such as contact lenses, condoms, hospital beds, pregnancy tests, blood glucose monitors and pacemakers.

The IMB is subject to the Freedom of Information Act, and so it is possible to request information under that Act, subject to the restrictions in that Act with regard to commercial sensitive material. This aside, it publishes important consumer information, on its website, in particular notices relating to the safety and/or quality of medicinal products. “Advisory” notices contain routine safety information, “warning” notices contain urgent safety information and “recall” notices contain urgent safety information relating to a product recall. In addition, the IIMB publishes a Drug Safety Newsletter, disseminates messages via email and mobile phone “text mes-

sages” to those on its circulation lists, and issues press releases to warn the public of faulty goods where necessary.<sup>124</sup>

Website: [www.imb.ie](http://www.imb.ie)

## 6. The Financial Services Regulator

The Financial Regulator is a statutory body established in 2003, and it regulates firms that provide financial services in Ireland. One of its functions is to protect consumers by ensuring compliance with the consumer protection code and consumer legislation<sup>125</sup> and by providing independent information to consumers about the risks and benefits of different financial products, thus helping consumers make informed choices about their finances. It does this in a number of ways. Its consumer website gives consumers information on financial products and services in simple, jargon-free English.<sup>126</sup> Information is given on issues such as how to change your insurance or mortgage, advice when buying a home or car, managing your money, planning for the future and how to tackle debt. A “jargon-buster” section explains technical terms used by firms providing financial services and a “cost comparison” compares the costs of different financial services. It runs extensive advertising campaigns, particularly on television, and it has an Information Centre located in Dublin City Centre. The Financial Regulator also provides a list of regulated advisors and the corporate website lists warning notices on firms that have been operating in Ireland without authorisation – although arguably this information should be easily accessible on the consumer website also.

Other regulators with a role in regulating financial services include the National Consumer Agency (credit intermediaries, pawnbrokers and warranties issued by retailers), the Irish Travel Agents Association (certain types of travel insurance) and the Pensions Board (regulates certain types of pensions). These would also issue information and guidance for consumers, and ensure compliance with legislation.

Website: [www.itsyourmoney.ie](http://www.itsyourmoney.ie) or [www.financialregulator.ie](http://www.financialregulator.ie)

<sup>124</sup> See for example: “‘Tan jab’ may pose risk to health warns Irish Medicines Board” Press Release issued on 27 February 2009, available at <http://www.imb.ie/EN/News/IMB-issues-safety-alert-on-Melanotan.aspx?page=1&year=0&categoryid=38>

<sup>125</sup> Such as the Consumer Credit Act 1995 or the European Communities (Distance Marketing of Financial Services) Regulations 2004, SI No. 853 / 2004.

<sup>126</sup> [www.itsyourmoney.ie](http://www.itsyourmoney.ie)

## **7. The Commission for Communications Regulation**

ComReg is the statutory body responsible for the regulation of the electronic communications sector (telecommunications, radiocommunications and broadcasting transmission) and the postal sector. Its remit also includes regulation of the mobile phone companies in Ireland. It enables competition in the communications sector by regulating market entry and access to networks. The Commission provides proactive consumer information measures, such as consumer guides and comparative pricing Websites (such as [www.callcosts.ie](http://www.callcosts.ie)) and implements a consumer care function on behalf of all consumers of electronic communications and services. The primary emphasis is to provide users with sufficient relevant information so that they can deal with their service providers and to ensure that operators have adequate procedures in place to address customer issues. It also produces reports of interest to consumers, such as reports on the quality of service provided by An Post (the national postal service).

Website: [www.comreg.ie](http://www.comreg.ie)

[www.askcomreg.ie](http://www.askcomreg.ie)

## **8. Other Regulators and Public bodies**

It has already been mentioned that Ireland has numerous regulatory bodies, many of which are in some way obliged to protect consumers by providing certain information. Many of these regulatory bodies are sector-specific, and it would take too long to list them all. For example, the Commission for Taxi Regulation, established under the Taxi Regulation Act 2003, ensures compliance with taxi legislation, and it publishes information on consumers' rights – including national tariffs – on its website. It also ensures compliance with the requirement that all taxis contain certain information regarding tariffs, additional charges and the driver's taxi licence. The Pharmaceutical Society of Ireland, the pharmacy regulator, has an online register that allows the public and patients to check if pharmacists are registered with it, and so prevents people falsely claiming they are registered pharmacists. The Irish Medical Council has a similar register for doctors and other medical practitioners.

Websites

The Commission for Taxi Regulation: <http://www.taxireg.ie/index.html>

The Pharmaceutical Society of Ireland: <http://www.pharmaceuticalsociety.ie/>

The Irish Medical Council: <http://www.medicalcouncil.ie/>

#### Overview of the Freedom of Information Act 1997 - 2003

The Freedom of Information Act grants a right of access to records held by public bodies upon the making of a request.<sup>127</sup> It also requires public bodies to publish certain types of information regarding its structure, organisation and functions, and information regard the classes of records held by the public body and the arrangements in place for obtaining access to those records.<sup>128</sup> It provides a right of amendment of personal information which is incomplete, incorrect or misleading.<sup>129</sup> Finally, where a person is affected by an act of a public body it gives a right to a written statement of the reasons for that act, provided the individual has a material interest in a matter affected by the act.<sup>130</sup>

#### The Right of Access to Public Records

Section 6(1) of the Freedom of Information Act states that “every person has a right to and shall, on request ... be offered access to any record held by a public body”. A person who wishes to exercise the right of access must make a request, generally in writing, addressed to the head of the public body concerned for access to the record concerned.<sup>131</sup> It is the duty of the public body to give “reasonable assistance” to a person seeking a record under the Act.<sup>132</sup> The head of the public body must, as soon as possible but at least within 4 weeks after the receipt of the request, decide whether to grant or refuse the request, in full or in part, and inform the applicant of this decision.<sup>133</sup>

Access to the record may be granted in a number of ways, including the provision of a copy of the record, a computer disk or other electronic device containing the in-

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<sup>127</sup> Section 6.

<sup>128</sup> Section 15. See also section 16.

<sup>129</sup> Section 17.

<sup>130</sup> Section 18.

<sup>131</sup> Section 7(1).

<sup>132</sup> Section 6(2).

<sup>133</sup> Section 8.

formation, or a reasonable opportunity to inspect the record.<sup>134</sup> If request is made for access in a particular form or manner such access shall be given in that form or manner unless another form of access is significantly more efficient, or the form of access requested would conflict with a legal duty or obligation of a public body, breach copyright, be physically detrimental to the record, or prejudice, impair or damage any interest protected by Part III (relating to exempted records).<sup>135</sup>

Scope of the Act

**(a) Who can make a request?**

Anybody can make a request for a record, and there is no general requirement that they have a particular interest in the information. In making the decision whether to grant or refuse access to the information, the public body cannot take into account any reason the applicant has or may have for the request.

**(b) From which public bodies can you request a record?**

The Act applies to “public bodies”, including government departments, the Health Service Executive, the Companies Registration Office, the Irish Medicines Board, the Food Safety Authority of Ireland, the National Consumer Agency, publicly-funded hospitals, universities, and local authorities. There are some exclusions however, such as An Garda Síochána (the police), and the Act is not as far reaching as Freedom of Information legislation in other jurisdictions, e.g. the UK or Australia.

Records in the hands of contractors employed by public bodies are covered by the Act to the extent that they relate to the service being provided to the public body.<sup>136</sup>

**(c) What kind of information can you request?**

The right of access concerns the right of access to records, as opposed to information. Therefore access “need only be provided to information held in recorded form, but not to unrecorded verbal information, or information of which someone has

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<sup>134</sup> Section 12.

<sup>135</sup> Section 12.

<sup>136</sup> Section 6.

knowledge".<sup>137</sup> Generally speaking, it only applies to records created after the coming into force of the Act.

#### **(d) Formalities**

Freedom of Information requests should be made in writing (including emails) stating that the request is being made under the Act. They should be addressed to the FOI Liaison Officer of the public body. Contact details for the Officer are available on the website of each public body, and on the website of the Information Commissioner.

If you are looking for records you should provide as much information as possible to allow the public body to find it. If you want it in a particular format (e.g. a photocopy, transcript, computer disk; or if you want to examine it) you should state this clearly in your request. This is provided for in s.7 of the Act:

7(1) A person who wishes to exercise the right of access shall make a request, in writing or in such other form as may be determined, addressed to the head of the public body concerned for access to the record concerned-

(a) stating that the request is made under this Act

(b) containing sufficient particulars in relation to the information concerned to enable the record to be identified by the taking of reasonable steps, and

(c) if the person requires such access to be given in a particular form or manner ... specifying the form or manner of access.

The public body must provide reasonable assistance in helping you with your request (s.6(2)).

Some information may be freely available, or available informally, without the need for a formal request. However, if someone applies for information

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<sup>137</sup> M. McDonagh *Freedom of Information Law* (2<sup>nd</sup> ed., Thomson Round Hall) p.42.

which is only available through an official request, but does not use the official FOI system, the public body shall, if appropriate, cause the person to be informed of the right of access and shall assist, or offer to assist, the person in the preparation of such a request (s.7(7)).

(e) Excluded records

Part III exempts certain records from the scope of the Act, to protect interests such as the security of the State, the maintenance of law enforcement or private interests such as privacy and confidentiality. Some exemptions are subject to a public interest test, while others are not. Some exemptions are mandatory, i.e. the public body cannot release the information, whereas others are discretionary, which means that even though they fall within the scope of an exemption, the public body may choose to release them. It is possible for only part of a record to be exempt, in which case partial access may be granted (e.g. by “blacking out” sections of the copy).<sup>138</sup> The following is a brief summary of the records which are exempt under Part III of the Act:

- Section 19 provides that the public body may refuse to release records of meetings of government and records which contain information (including advice) for a meeting of the Government.
- Section 20 exempts records containing matter relating to the deliberative processes of the public body concerned (including opinions, advice, recommendations, and the results of consultations considered by the body). This is subject to a public interest test so it does not apply if the public interest would, on balance, be better served by granting than by refusing to grant the request. In addition, this exception does not apply to certain records, for example to the reasons for the making of a decision by a public body..
- Section 21 provides that a request may be refused if the record concerned could, in the opinion of the head of the public body, reasonably be expected to

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<sup>138</sup> See section 13.

(a) prejudice the effectiveness of tests, examinations, investigations, inquiries or audits conducted by or on behalf of the public body concerned or the procedures or methods employed for the conduct thereof;

(b) have a significant, adverse effect on the performance by the body of any of its functions relating to management (including industrial relations and management of its staff), or

(c) disclose positions taken, or to be taken, or plans, procedures, criteria or instructions used or followed, or to be used or followed, for the purpose of any negotiations carried on or being, or to be, carried on by or on behalf of the Government or a public body.

This is subject to a public interest test so it does not apply if the public interest would, on balance, be better served by granting than by refusing to grant the request.

- Section 22 exempts records which would be inadmissible in court proceedings because of legal professional privilege or because it would constitute contempt of court. It also exempts opinions, advice, recommendations, or the results of consultations, considered by Parliament.
- Section 23 provides for an exemption where access to the record could reasonably be expected to prejudice the investigation of offences, law enforcement, public safety, national security or the fairness of criminal proceedings. There are a number of exceptions to this exemption, which are subject to a public interest test. Section 23 also exempts records which if released would reasonably be expected to facilitate the commission of an offence or to reveal the identity of a person who has given information to a public body in confidence in relation to the enforcement of the law.
- Section 24 exempts a record where access to it could reasonably be expected to adversely affect the security or defence of the State, international relations of the State or matters relating to Northern Ireland.
- Section 26 relates to confidential information. A record is exempt if it contains information given in confidence and its disclosure would be likely to prejudice the giving to the body of further similar information from the same person or other

persons and it is of importance to the body that such further similar information as aforesaid should continue to be given to the body. This is subject to a public interest test. Alternatively a record may be exempt if disclosure of the information concerned would constitute a breach of a duty of confidence. This second basis of exemption is not subject to a public interest test, although the public interest may be taken into account when deciding whether a duty of confidence exists. In both cases the duty of confidence must be owed to somebody other than the public body. If confidential information is to be released, e.g. in the public interest, there is a requirement that third parties be consulted before this decision is made.

➤ Section 27 exempts commercially sensitive information. It exempts:

- a) trade secrets of a person other than the requester concerned
- b) financial, commercial, scientific or technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation,
- c) information whose disclosure could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates.

This is subject to a public interest test, so the information may be released where the public interest would, on balance, be better served by granting than by refusing to grant the request. In addition, commercially sensitive material may be accessed if

- a) the person to whom the record concerned relates consents to the access being granted, or
- b) information of the same kind as that contained in the record is available to the general public, or
- c) the record relates only to the requester, or
- d) the information contained in the record was given to the public body concerned by the person to whom it relates and the person was informed on behalf of the body, before its being so given, that the information belongs to a

class of information that would or might be made available to the general public, or

e) disclosure of the information concerned is necessary in order to avoid a serious and imminent danger to the life or health of an individual or to the environment.

- Section 28 provides that access shall not be granted where it would involve the disclosure of personal information. This applies unless the information relates to the person making the request, or the person about whom the information relates consents to the disclosure, or was informed that it might be made available to the public, or the information is of a type generally available to the general public, or disclosure of the information is necessary in order to avoid a serious and imminent danger to the life or health of an individual.
- Section 30 exempts records which contain information in relation to research being or to be carried out by or on behalf of a public body and disclosure of the information or its disclosure before the completion of the research would be likely to expose the body, any person who is or will be carrying out the research on behalf of the body or the subject matter of the research to serious disadvantage. It also exempts records where disclosure of information contained in the record could reasonably be expected to prejudice the well-being of a cultural, heritage or natural resource or a species, or the habitat of a species, of flora or fauna. This is subject to a public interest test.
- Section 31 prohibits disclosure where access to the record could reasonably be expected to have a serious adverse affect on the financial interests of the State or on the ability of the Government to manage the national economy. It is subject to a public interest test.
- Section 32 confirms that where a different enactment provides for the non-disclosure of public records, the record cannot be released.

#### The Appeal Process

The public body may decide to release all of the information requested, to release part of it, or to refuse all of it on the basis of one of the exemptions listed above. If the requester is unhappy with this decision they must first appeal the decision to the public body. The Freedom of Information Act provides for a system of internal review within the public body.

If the requester is still not happy with the decision of the public body to refuse access to records, they can appeal to the Information Commissioner. Similarly, a third party who is unhappy with a decision of the public body to release information concerning them may appeal to the Information Commissioner. One of the Information Commissioner's functions is to carry out an independent review of decisions of public bodies in relation to FOI requests. The Commissioner will examine the records in question and will also invite submissions from the requester, the public body and any third parties who would be affected by the decision. Following such review, the Commissioner may affirm or vary the decision of the public body, or annul the decision and, if appropriate, make such decision in relation to the matter concerned as he or she considers proper.<sup>139</sup>

The Commissioner's decision is final and can only be appealed to the High Court on a point of law.

#### Charges for FOI Requests

The details of when payment is necessary, and the rates of payment, are as follows<sup>140</sup>:

Type of Request / Appeal	Original Request	Internal Review	Appeal to OIC
Access to personal information relating to the applicant	No Fee	No Fee	No Fee
Amendment to records (Section 17 of FOI Act)	No Fee	No Fee	No Fee
Statement of reasons (Section 18 of FOI Act)	No Fee	No Fee	No Fee
Appeal of decision to charge a fee	No Fee	No Fee	No Fee
Access to a non-personal record by a non-medical card holder	€15	€75	€150

<sup>139</sup> Section 34.

<sup>140</sup> This information has been taken from the website of the Office of the Information Commissioner, <http://www.oic.gov.ie/en/MakeanFOIRequest/Fees/>.

Request for a non-personal record by medical card holder or dependant of medical card holder	€10	€25	€50
Third parties appealing a decision of a public body to release their information on public interest grounds	-	-	€50

In addition, copying charges (e.g. a photocopy charge of 4c per page, a CD ROM charge of €10.16) and a search and retrieval fee of €20.95 per hour may apply, unless

- the records being sought contain only personal information, unless a significant number of records are involved.
- the release of the records would be of particular assistance to any individual or group seeking to understand an issue of 'National Importance'
- where the cost of collecting the fee is greater than the fee itself

The number of hours of search and retrieval time which can be charged by a public body is limited to the number of hours it would take to find the records in a well organised filing system. The charge is only imposed in respect of the physical act of searching.

## **Part A. General Principles**

### **I. Structure of consumer information law**

#### **1. What is the function of consumer information within the system of consumer protection in your country? What role does it play with regard to consumer protection by means of preventative control or admission restrictions (e.g. health standards or import standards)?**

In general, consumer law in Ireland is closely linked to the policy of strengthening the position of the consumer *vis a vis* business. More specifically, the laws relating to consumer information in Ireland serve to remedy the “information deficit” suffered by consumers, by ensuring that businesses provide certain information to consumers or regulatory bodies and do not mislead consumers. This can be linked to and motivated by economic concerns (e.g. to ensure that consumers do not enter into transactions which they would not have entered into if they had all the relevant information, and that traders who do provide information are not at a disadvantage to those who do not), and by health and safety concerns (e.g. consumers are not in a position to discern the ingredients of food or drugs purchased, so it is important that regulatory bodies receive and test this information and ensure quality standards are met). In cases where these economic concerns are paramount, information is generally to be provided directly to consumers (e.g. through labelling or pre-contractual information requirements), whereas when health and safety is at issue information must be provided to regulators who may prevent the goods from being sold in Ireland (e.g. information on drug safety must be provided to the Irish Medicines Board which may refuse approval for a particular drug to be sold in Ireland). Sometimes these concerns may overlap, in which case information is generally expected to be provided directly to the consumer, e.g. nutritional claims about food relate to health and safety and the economic interest of the consumer.

#### **2. What are the bases of claim for consumers to obtain information about production processes or health hazards of products, services or work performances?**

The main ways in which a consumer can obtain information about production process, or the health hazards of products, services or work performances would be the following:

(i) The consumer may make a request to obtain information held by a public body under the Freedom of Information Acts.

(ii) The consumer may obtain information through mandatory labelling of the health risks of certain products, such as cigarettes or prescription drugs

(iii) It may be possible to obtain information under a court order for discovery if harm has been caused by a product and an action is being taken in tort.

There is no general legal provision for consumers to directly claim information from businesses about their production process or health hazards.

### **3. Are these rules mandatory or is the consumer allowed to abandon information rights in general?**

In general consumer protection rules in Ireland are mandatory. There are however some exceptions, e.g. Regulation 7 of the European Communities (Distance Marketing of Consumer Financial Services) Regulations 2004.

### **4. Are information rights in general or in particular developed by case law? If so, have they been codified in the meantime?**

There is very little case law on the specific issue of consumer information in Ireland, and there is in fact a marked reluctance by regulatory bodies such as the National Consumer Agency to rely on court proceedings to enforce the right to information on labelling, packaging or internet sites,<sup>141</sup> except in cases where there are recurring breaches, or evidence of intent on the part of the trader. Rights under the Freedom of Information Act have been developed to a limited extent by court cases, but more so by the decisions of the Information Commissioner, although strictly speaking these do not have value as precedents. In general, consumer information law is statute-based, although based on many different statutes which are often difficult to piece together.

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<sup>141</sup> There is evidence that many internet sites are not meeting all the statutory information requirements: White and Donnelly "Regulation and Consumer Protection: A Study of the Online Market" (2006) 13(1) *Dublin University Law Journal* 27.

**5. Is the relation of the claims to information mentioned in questions A.I.2 and A.I.4 subsidiary or is there a concurrence between the different bases of claim? Are they (currently) in any way coordinated, maybe even integrated into a single code?**

There is a general lack of coordination of consumer protection regimes in Ireland, and there is a large amount of overlap between different regulatory bodies charged with consumer protection. Although different bodies have signed memoranda of understanding to deal with this overlap (i.e. different bodies agree to take on different priorities) this does not reduce the confusion of consumers (or sometimes businesses) themselves. A single code would be extremely useful, but is unlikely to occur in the near future, particularly given the sectoral nature of consumer protection law in Ireland.

**6. If there are legal regulations on consumer information in your country: Can they primarily be assigned to private law, public law or criminal law? Why has this option of regulation been chosen?**

The division or categorisation of law into “private” “public” and “criminal” is not necessarily as important in non-Roman legal traditions, and the framework for consumer information law stretches across all three aspects of law.

The consumer information measures in this country are enforced mostly by the criminal law, in the sense that breach of the regulation is a criminal offence, usually punishable by a financial penalty or fine.<sup>142</sup>

Some of the statutes in which they are found would generally be classified as public law statutes, in the sense that they involve the creation of a public body to regulate a specific area, but the public body’s functions are generally backed up by criminal sanctions. Some of these sanctions are quite creative, and specific to a particular body. For example, the National Consumer Agency can issue compliance notices or seek undertakings from businesses as a preliminary measure, rather than having to immediately push for a prosecution or criminal sanction. The ability to obtain infor-

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<sup>142</sup> On the interaction of criminal sanctions in the Consumer Protection Act 2007 and the general criminal law see: N. Reilly “The impact of the Unfair Commercial Practices Directive on Irish criminal law” (2006) 16(1) *Irish Criminal Law Journal* 15.

mation by means of the Freedom of Information Acts could be classified as public law.

There are also instances of what could be considered regulation via the private law. For example, section 74 of the Consumer Information Act allows consumers to bring an action in damages, including exemplary damages, against a trader who engages in a “prohibited” act of practice, which includes most misleading practices. Similarly, consumers may be able to bring actions in contract and/or tort law for pre-contractual misrepresentations and misstatements, and the Distance Selling Regulations allow consumers to terminate or rescind a contract where certain information is not provided.

**7. In case the provisions can be assigned to private law, are they primarily contract law or tort law provisions?**

Both contract and tort law provisions are utilised, although arguably contract law is primarily used. See more generally the answer to Q. 6.

**8. What possibilities, besides the rights to information mentioned in questions A.I.2 and A.I.4 do consumers have in order to obtain information on the quality of products, work performances and services as well as on infringements, production processes or health hazards from authorities or private persons?**

As discussed in the Introduction, Ireland has several public bodies with an obligation to provide or regulate consumer information. In addition to this, the media plays an important role in providing information in Ireland. For example, the Irish Times has a dedicated consumer rights section each Monday, which highlights recent issues and usually includes a section on a product comparison. In addition, there are a number of active blogs on consumer issues, including:

<http://www.irishtimes.com/pricewatch/>

<http://irishconsumerist.blogspot.com/>

<http://www.boards.ie/vbulletin/forumdisplay.php?f=580>

<http://www.valueireland.com/>

In addition, voluntary organisations such as the Consumers' Association of Ireland produce information on the quality of products and services, in its magazine *Consumer Choice*. However, despite the title of this organisation, there is no general concept of a voluntary "consumer association" in Ireland, i.e. a voluntary organisation with inherent powers to represent or bring an action on behalf of consumers. The Consumers Association of Ireland is non-statutory and has no special or specific rights to information or to representation, for example before the Oireachtas (Parliament), even when a consumer issues are being discussed. These powers are given to the National Consumer Agency (a statutory body) or alternatively actions may be brought by individual consumers without any need for a connection or link to a consumer association, or, in some instances, by traders.<sup>143</sup>

**9. Do the authorities or persons mentioned in question A.I.8 receive general funding by the state or a remuneration / reimbursement from the state for specific actions relating to informing consumers?**

Private media bodies, such as the *Irish Times*, do not receive State funding. The Consumers' Association of Ireland is an independent, non-profit organisation working on behalf of Irish consumers, which raises fund by charging for its magazine / membership. Indeed, the difficulty with all of these sources of information is cost – they are generally only available to those with internet access or the means to pay a subscription fee to receive the newsletter.

**10. Are the authorities mentioned in question A.I.8 or the issued information controlled by the state (through random samples)?**

The regulatory authorities carry out their own inspections, including random sampling where appropriate. They are mostly independent statutory organisations, in the sense that they were established by the State but are independent of the Government, at least in theory. The information issued by the media and the Consumers' Association of Ireland is not regulated by the State, although there are controls in place such as the threat of an action for defamation or an action for breach of confidentiality.

## **II. Historical Development**

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<sup>143</sup> See for example the Consumer Protection Act 2007.

**1. When, in what context and for what reasons were the rights to information and the consumer information institutions mentioned in A.I.2 to A.I.10 established?**

**2. Can certain waves in the establishment of information rights be distinguished in your country? Were they released within a mutual context (in terms of time and subject matter?)**

**3. Have there been phases of counteracting or correction? Has the extent of the rights to information or the involved group of people at some point been highly extended, restricted, modified or defined?**

**4. What were the reasons for a legislative action?**

#### **(a) Consumer Information Institutions**

Public bodies in Ireland, such as those listed above, have been established in an ad hoc, unplanned and uncoordinated manner.<sup>144</sup> In the last 15 years the “default position” of the Irish government to a particular problem has been to establish a specialist agency, and thus there has been a proliferation of these bodies in this time. However, a number of reasons for the establishment of certain public bodies charged with regulating or providing consumer information can be established. For example, the Food Safety Authority and National Standards Authority were set up to protect perceived needs in the area of food safety and standards in industry respectively. The National Consumer Agency was established in 2007 as a result of a 2005 Report by the Consumer Strategy Group entitled *Make Consumers Count: A New Direction for Consumers*. This Report highlighted considerable gaps in consumer protection in Ireland, including a lack of a uniform and co-ordinated approach to consumer education, information, and awareness, and a general lack of representation and promotion of the consumer voice in Government policy and decision-making. However, the Government has since announced its intention to amalgamate the Agency with the Competition Authority. Other bodies were set up to deal with specific sectors which were in need of regulatory control, and often the “consumer information” provided as a result was merely a by-product of this regulation.

For example, the Commission for Taxi Regulation was set up to generally regulate

<sup>144</sup> See P.Clancy and G. Murphy *Outsourcing Government: Public Bodies and Accountability* (TASC, 2006) p.21.

the provision of taxis in Ireland, but increased information rights for consumers have developed as a result.

### **(b) Consumer Information Rights**

The Freedom of Information Act 1997 was primarily designed to improve transparency and accountability in the public service. Prior to its introduction, all official information was secret unless its publication was specifically authorised<sup>145</sup> and the Irish Public Service was “dominated by a culture of secrecy”.<sup>146</sup> In the 1980s there was an extensive campaign for freedom of information legislation, and this campaign was fuelled in the 1990s by questions about accountability of politicians raised as a result of the “Beef Tribunal”. In addition, major reforms of the public service were taking place at this time. Eventually, following an extensive consultation process, the Freedom of Information Act was introduced in 1997. The Act’s role in the provision of consumer information is an incidental one, but it has turned out to be extremely useful, as so much information of relevance and importance to consumers is in fact held and regulated by public bodies.

Other sources of consumer legislation, such as the Consumer Protection Act 2007, which prohibits misleading consumer information, or the Regulations on product labelling, discussed below, were implemented as a result of EC Directives.

### **III. Private sources of information**

**1. What is the role of voluntary product information given by businesses within the consumer information system in your country? What percentages of businesses provide this kind of product information or participate in voluntary control systems? What are (possible) reasons for low participation? Are there voluntary agreements of businesses to provide certain information?**

Certain sectors in Ireland voluntarily provide product information, or have codes of practice with consumer information obligations included in them, i.e. agreements to provide certain information. For example, the Irish food and drink industry has adopted a voluntary system of food labelling aimed at increasing consumer aware-

<sup>145</sup> Under the Official Secrets Act 1963.

<sup>146</sup> See the website of the Information Commissioner: [www. http://www.oic.gov.ie/en/](http://www.oic.gov.ie/en/)

ness of the Guideline Daily Amount (GDA) food labelling system.<sup>147</sup> A consistent logo system was agreed by a significant number of Irish food companies and retailers. This is now used on over 60% of all branded food and drink packages and an even higher volume of supermarket 'own label' products.<sup>148</sup> The Irish Insurance Federation (the representative body for insurers in Ireland) has adopted several voluntary Codes of Practice, including codes of practice on advertising and sales material, illustrations of future benefits and on life assurance selling, and these includes certain information obligations. These codes are currently being updated, so more information is not currently available. Often such codes of practice or voluntary systems are used in the self-interest of the industry, whether it is to encourage consumers to purchase products or to avoid the possibility of regulation and the introduction of a system of mandatory consumer information rights.

Alternatively, voluntary systems may be put in place because of an absence of legislation, or while legislation is being enacted. For example, a current major legal issue in Ireland is the question of multi-unit developments (apartment blocks, condominiums, small housing units) which to date have been unregulated and largely left to the realm of company law, which has proved to be very unsuitable. In 2008 a code of practice was set out by developers who are members of the Irish Home Builders Association, partly in response to a public outcry about the lack of regulation. The Code sets out specific commitments for developers in the establishment of a multi-unit development, particularly with regard to information sharing and transparency in their dealings with consumers and others involved in servicing this sector. From a consumer perspective, the Code is intended to ensure that purchasers are provided with relevant information in sufficient time to enable them to make informed purchasing decisions. Legislation on this issue is currently before the Oireachtas, after recommendations of both the National Consumer Agency and the Irish Law Reform Commission.

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<sup>147</sup> See *The Irish Times*, Oct 8, 2008. "Campaign on Food Labelling Unveiled". See also [www.gdaguide.ie](http://www.gdaguide.ie)

<sup>148</sup> Source: [www.fdi.ie](http://www.fdi.ie)

**2. If there are voluntary agreements in your country to provide information, as mentioned in question A.III.2: In what way is this information provided to the consumer? Does the state review the accuracy of the information (with random samples)?**

Verifying the accuracy of information in codes would appear to fall within the realm of the National Consumer Agency. Section 88 of the Consumer Protection Act 2007 provides that a person representing one or more traders may submit a code of practice to the National Consumer Agency for its review or approval.<sup>149</sup> The Agency will approve the code if it is satisfied that the code of practice protects consumer interests and is not inconsistent with any consumer protection legislation, and may withdraw such approval if at some point in the future all or part of the code fails to protect consumer interests or is in any manner inconsistent with consumer protection legislation. However, as with other areas of consumer protection, the Agency is concerned primarily with the information provided to consumers, and does not carry out the sampling itself. This would be done in coordination with another authority. In addition, although traders do not have to submit a code of practice to the Agency, presumably if an issue arose as to a particular code (i.e. if it appeared on the Agency's "risk-list") the matter would be investigated in the same way as any other misleading or false information provided by a business would be investigated.

## **Part B. : General view of the consumer information regulations**

### **I. Questions going beyond individual bases of claims**

#### **1. General considerations**

*a. In case your country does possess consumer specific information provisions, to what subject matter do they apply?*

#### **General information rights**

There is a right to information held by public bodies under the Freedom of Information Acts. This does not apply to any particular subject matter but rather its scope is

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<sup>149</sup> The Financial Regulator is responsible for the development of Codes of Conduct and Practice applicable to all entities for which it has responsibility other than the non-investment business service activities of credit unions. These are statutory codes of conduct.

defined by the meaning of public body. However there are some exclusions. See the discussion in the introduction.

Under the Consumer Protection Act 2007 provisions on misleading advertising apply generally to all trades and businesses providing goods and services to consumers.

### **Specific information Rights**

Consumer information laws which oblige a business to provide certain information to the consumer tend to be subject or context specific. The subject matter covered includes the following:

- **Online Contracts** (the Protection of Consumers in Respect of Contracts made by means of Distance Communication Regulations)
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- **Online Financial Contracts** (The European Communities (Distance Marketing of Consumer Financial Services) Regulations 2004).
  
- **Products** (The European Communities (General Product Safety) Regulations 2004 apply to all “products” intended for consumers, including in the context of providing a service, whether new, used or reconditioned. It does not apply to second-hand products supplied as antiques or as products to be repaired or reconditioned prior to being used, provided that the supplier of such a product clearly informs the person to whom he or she supplies the product that such repair or reconditioning is necessary prior to use of the product.)
  
- **Children’s toys** (The European Communities (Safety of Toys) Regulations, 1990 (SI. No 32 / 1990)
  
- **Medical substances** (the Medical Preparations (Labelling and Package Leaflets) Regulations, 1993 and 1994)

- **Dangerous Substances** (The European Communities (Classification, Packaging, Labelling and Notification of Dangerous Substances) Regulations 2003 to 2008)
  
- **Biocides** (The European Communities (Classification, Packaging and Labelling of Plant Protection Products and Biocide Products) Regulations 2001 & 2008 )
  
- **Textiles** (The European Communities (Names and Labelling of Textile Products) Regulations, 1998)
  
- **Footwear** (The European Communities (Labelling of Footwear) Regulations, 1996)
  
- **Transport** (e.g. Taxi Regulation Act 2003)

There are many information and labelling provisions relating to different types of food and food supplements. These include:

- **Pre-packaged food** (The European Communities (Labelling, Presentation and Advertising of Foodstuffs) Regulations, 2002)

- **Food supplements** (European Communities (Food Supplements) Regulations, 2003)
  
- **Organic Food** (The European Communities (Organic Farming) Regulations, 2004)
  
- **Beef** (Regulation (EC) No. 1760/2000)
  
- **Fish products** (Regulation (EC) No. 104/2000 and 2065/2001)

**If Regulation (EC) 178 / 2002 applies in your country, does the specific information law for consumers regard areas other than food law?**

The principles of Regulation (EC) 178 / 2002 have been enacted in Ireland by three Statutory Instruments. The European Communities (General Food Law) Regulations 2007,<sup>150</sup> covers traceability in retail food business establishments, those processing food of non-animal origin and some other businesses not requiring approval. The European Communities (Food and Feed Hygiene) Regulations 2005<sup>151</sup> covers traceability in most food business establishments requiring approval and engaged in the handling and processing of products of animal origin. The European Communities (Hygiene of Fishery Products and Fish Feed) Regulations 2006,<sup>152</sup> covers traceability in food business establishments requiring approval and engaged in the handling and processing of fish and shellfish.

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<sup>150</sup> S.I. No. 747 of 2007

<sup>151</sup> S.I. No. 910 of 2005, as amended by S.I. No. 387 of 2006.

<sup>152</sup> S.I. No. 335 of 2006

In addition, the European Communities (General Product Safety) Regulations 2004<sup>153</sup> implements General Product Safety Directive (95/2001). It provides that producers cannot place a product on the market unless it is safe and it provides for a recall system for unsafe products. Regulation 6 provides that the producer shall adopt measures so as to “be informed of the risks which the product might pose” or<sup>154</sup> “choose to take appropriate action, including, if necessary to avoid such risks, withdrawal of the product in question from the market, adequately and effectively warning consumers, or recall of the product from consumers.” It is stated that recall shall take place as a last resort where other measures do not suffice to prevent the risks involved. Examples of measures which can be taken include “an indication, by means of the product or its packaging, of the identity and details of the producer and the product reference or, where applicable, the batch of products to which it belongs, except where not to give such indication is justified” and “in all cases where appropriate, the carrying out of sample testing of marketed products, investigating and, if necessary, keeping a register of complaints and keeping distributors informed of such monitoring”. Producers must inform the National Consumer Agency if they know, or, ought to know<sup>155</sup> that a product which he or she has placed on the market poses a risk to the consumer. If the business is conducting a recall, it is obliged to notify the NCA of the actions it proposes taking.

The regulations also place duties on distributors and traders. Distributors and traders must monitor products for product safety and inform the producer of the product (if it not themselves), the National Consumer Agency and consumers as to any defects in it or risks it may pose to consumers that he or she becomes aware of in relation to it. They must keep and provide to the Agency the documentation necessary for tracing the origin of the product, and cooperate in actions taken by the producer and the Agency to avoid any risk.<sup>156</sup>

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<sup>153</sup> SI No 199 / 2004.

<sup>154</sup> The legislation available at [www.irishstatutebook.ie](http://www.irishstatutebook.ie) states “or” but I would query whether this should be an “and”.

<sup>155</sup> On the basis of information in his or her possession and as a professional

<sup>156</sup> Regulation 7.

Finally, the National Consumer Agency has responsibility for the monitoring and processing of non-food product recalls in Ireland. If it is of the opinion that a product presents a hazard to the consumer it has the power to order an operator to remove the item from the market and can prosecute if s/he fails to do so.

*b. Does a rule state an information duty in our country, in case a person is offered products, services or work performances, which do not fulfil the particular security requirements?*

Dangerous food products must be reported to the Food Safety Authority (on the basis of the Food Safety Authority of Ireland Act, 1998, as amended). Dangerous products in general are reported to the National Consumer Agency (on the basis of the European Communities (General Product Safety) Regulations 2004, as amended.) The Department of Health may also be contacted. The issue of reporting dangerous products to the authorities is discussed elsewhere in the questionnaire.

*c. Is there a term for maturity of information (information must / should not be handed on regarding to the age of the data)? If so, what is the time limit after which information is regarded as too old?*

The right under the Freedom of Information Act applies to any record "held by a public body" seemingly regardless of how old it is. No limitation period is mentioned in the legislation. However, in practice such information would probably be regarded as commercially sensitive, and it won't be issued or published by the Authority if it is not in the public interest, which it is unlikely to be after a certain period of time or after the incidence to which the information is concerned (e.g. hygiene conditions in a restaurant or place of food production) has been rectified.

*d. Concerning the question, whether there is a right to information: is the interest of the consumer measured against the interests of the general public or other involved parties, e.g. regarding costs? For which bases of claim?*

Legislation which interferes with the principle of freedom of contract by imposing information obligations on one of the parties would generally be expected to be pro-

portionate to the aims being pursued, although the basis for this could perhaps be described as economic and political rather than legal. Any information requirement could thus be said to represent a balance between the interests of the general public and the interests of business e.g. compliance costs.

The public interest will also be taken into account in specific cases where there is an issue regarding the provision of information. The public interest is an issue, for example, when the court is deciding whether or not to issue a prohibition notice under the Consumer Protection Act 2007, which *inter alia* prohibits businesses from providing misleading information. It provides that the court is to consider all interests involved, and, in, particular, the public interest.

The most obvious example of the public interest being taken into account is with regard to the Freedom of Information Act. As discussed in the introduction, certain records are exempt from being released under the Act, but in some cases this exemption is subject to a public interest test, such that the information may be released if it is in the public interest to do so.

For example, in *X v South Eastern Health Board*<sup>157</sup> records held by a public body about a private nursing home were released even though they were of a commercially sensitive nature, because there was said to be “an overriding public interest in ensuring that the health, security and welfare of elderly and vulnerable members of society is seen to be protected”.<sup>158</sup>

The interests of third parties will also be taken into account with regard to confidential information (section 26), commercially sensitive information (section 27), or personal information (section 28) held by a public body. Such information may be released if it is in the public interest to do so, but there is a consultation process whereby the third parties must be consulted in the making of this decision.<sup>159</sup> Third parties who object to such information being released may appeal to the Information Commissioner.<sup>160</sup>

<sup>157</sup> Decision of the Information Commissioner, Letter Decision No.020533, February 16, 2004.

<sup>158</sup> Ibid.

<sup>159</sup> Section 29.

<sup>160</sup> Section 34.

## 2. Dealing with (supposedly) incorrect or incomplete information

*a. What constitutes a breach of the duty to inform? How is a breach determined? Which problems occur in practice? Are there any proposals for solutions? Who bears the burden of proof that the information issued is incorrect?*

In general, the provision of false information to a regulatory authority (e.g. falsifying records or sample results) such as the Food Safety Authority would be a criminal offence.

The provision of false information to consumers (e.g. misleading information, or false price “reductions”) is also a criminal offence, but in practice many of these cases will reach a compromise rather than result in a criminal prosecution, particularly where the breach is owing to a lack of knowledge or awareness on the part of the trader, and where an undertaking to comply with the law is given.

Regarding the burden of proof in cases brought under the Consumer Protection Act 2007, s.68 of the Consumer Protection Act 2007 states “If, in any proceedings under this Act, the truth of a factual claim in a representation is an issue and the trader who made the representation, or on whose behalf the representation was made, does not establish on the balance of probabilities that it is true, then the representation shall be presumed to be untrue.” (i.e. the trader should prove on the balance of probabilities that the statement was true – it can be said that the evidential burden of proof as shifted to the trader, but the legal burden of proof, i.e. the overall burden to prove that an offence has been committed, remains on the prosecution).

*b. If the breach of the duty to inform entitles to claim for damages: Is this claim dependent on negligence? Which other requirements and objections are decisive? (How) Can the authority/the company free itself from liability? How is the situation handled if information turns out to be wrong later on, but seemed correct according to the state of knowledge when the information was given?*

Section 74 of the Consumer Protection Act 2007 provides for a right to damages if a trader provides misleading information. The claim is not dependent on negligence. The consumer can simply bring an action if they are “aggrieved by a prohibited act

or practice” (including misleading information under the meaning of the Act). Exemplary (punitive) damages may be payable.

## **II. The right to receive information from authorities**

### **1. Provision, processing and control of information by authorities**

*a. Is the authority obliged to check whether information that is to be released is correct? If there is no such obligation: Is it at least obliged to communicate doubts it is aware of with regard to the correctness of the information?*

The right in the Freedom of Information Act is a right to access a record, rather than a right to information *per se*. Thus, the right is simply one to see what records are held by a public body, and there is no guarantee as to the correctness of that information. There is no express obligation in the Act to ensure that the information in the record is correct. In addition, the Act provides immunity from legal proceedings to public bodies who grant access to records in accordance with the Act, and to the authors of those records, and, in certain situations, to the person who supplied the public body with the records.<sup>161</sup> This would mean for example that if a record contains defamatory material the public body, the author of the record, nor the person who supplied the record would not be liable in defamation. However, this only applies to acts which were required or authorised by the Act, and would not provide general immunity from defamation in a suitable case. Nor would it protect somebody who, having gained access to the defamatory material in the record, proceeds to publish it or distribute it.

One exception to this in the Act relates to personal information. The Act gives individuals a right to amend records of personal information held by public bodies on the grounds that it is incomplete, incorrect or misleading.<sup>162</sup> However, this only applies to personal information, and would not apply to business information.

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<sup>161</sup> Section 45.

<sup>162</sup> Section 17.

*b. Is the authority obliged to ensure that information is comprehensible (e.g. for assessing technical measurements, or scientific doubts in risk assessment)? If yes, what is the scope of its obligation to process information?*

The general duty of the public body is to provide access to a record, and not to information *per se*. However, section 6(2) of the Freedom of Information Act states that the public body is under a duty to give “reasonable assistance” to a person seeking a record under the Act. In particular, if the person has a disability, they must be given reasonable assistance so as to facilitate the exercise of their rights under the Act.<sup>163</sup> In addition, section 28 of the Disability Act 2005 requires public bodies to ensure that information imparted by it, is provided in an accessible format to persons with disabilities. However, arguably if the record is accessible (e.g. by providing an audio copy to somebody with impaired sight) then there is no further obligation to explain the contents of the records.

In addition, if a request is vague the public body has an indirect obligation to assist in focusing the request. A request may not be refused on the grounds of being either voluminous in nature or not sufficiently focused unless the body has first offered to assist the requester.

*c. Is the consumer entitled to claim a more rapid collection of information (in cases of delay)?*

No.

*d. In how far is the flux of information between authorities guaranteed? Is there a joint database? Are authorities obliged to notify and/or hand on specific information to other authorities? In how far are authorities connected to a European information network or in how far is this planned?*

The National Consumer Agency is the Irish contact point for the RAPEX system for communication of information about hazardous products. If there is a recall of non-food products, the Agency is required to notify the European Commission via the RAPEX system. In addition, the Food Safety Authority of Ireland implements the Rapid Alert System for Food and Feed (RASFF) within Ireland.

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<sup>163</sup> Section 6(2)(b).

*d. How is provision and dissemination of information ensured in less densely populated areas or for particular population groups (senior citizens, handicapped people, migrants)?*

Information is sometimes translated into different languages for migrant groups, and all official information should be available in Irish for those in Gaeltacht areas. Information specifically aimed at senior citizens will often be announced on the radio and television, and delivered by post (as opposed to online) or through medical services such as local doctors.

As mentioned already, section 6(2) of the Freedom of Information Act states that the public body is under a duty to give “reasonable assistance” to a person seeking a record under the Act. In particular, if the person has a disability, they must be given reasonable assistance so as to facilitate the exercise of their rights under the Act.<sup>164</sup> In addition, section 28 of the Disability Act 2005 requires public bodies to ensure that information imparted by it is provided in an accessible format to persons with disabilities.

*e. Does the State carry out quality controls in certain areas regularly? If yes, in which areas? Is a business obliged to accept such controls? Are there any legal/actual possibilities known about how such controls can be circumvented or falsified? Are the results of these control measures accessible, upon request or without making a request?*

Yes, the State authorities carry out regular quality controls, particularly in the area of food safety by the Food Safety Authority of Ireland. FSAI reports and guidance notes are published on the website. Their annual report gives an overview of their activities for a given year and will provide information on the number of queries received during the year and the source of those queries.

If a consumer complains about a food business, the complaint is forwarded to the relevant official agency for investigation. Any further information on the investigation is only available from the Official Agency and it is their decision what information they feel they can make available to the consumer given the confidential nature of the investigation and possible legal proceedings. If the consumer is unhappy with

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<sup>164</sup> Section 6(2)(b).

the information received from the Official Agency, then they may use the Freedom of Information Act to access additional information but they need to take into account that by its nature, some of the information will need to be kept confidential. In general, information relating to an individual inspection will be disclosed only in the event of an enforcement action being taken or there being a serious risk to public health.

## **2. Organisation of authorities**

*a. Is a central authority (maybe especially designed for these purposes) responsible for handling the requests for information? Or is the respective authority responsible for the requests that possesses the information or is able to examine the matter? How can the consumer find the competent authority? Are there (on the internet/in a telephone exchange) joint contact points or contact persons? What happens with requests directed at the wrong authority?*

With regard to Freedom of Information requests, the initial request should be made to the public body holding the record. For example, a request regarding the hygiene standards in a particular restaurant would be made to the Food Safety Authority. If the request is made to a public body which does not hold the record, but the head of that body knows that the record is held by one or more other public bodies, the head must pass on a copy of the request to the other public body within two weeks. If the request for information is refused, then it may be reviewed, first by internal review, and then by the Information Commissioner.

With regard to general consumer information (e.g. misleading information) consumer's first point of call would most likely be either the National Consumer Agency. It has a dedicated helpline, web page and email contact details.

In the event that a consumer contacts the wrong helpline they would be informed of the mistake and the correct authority would be suggested to them.

*b. Are there any time limits for handling requests? If yes: What are the time limits? Are they usually abided by? How is ensured that similar or parallel requests do not cause too much administrative work?*

There are time limits for making decisions on requests for access to information under the Freedom of Information Acts. Public bodies should acknowledge receipt of request within 10 working days. Decisions on requests for access must be given “as soon as may be”, and at least within 20 working days of the day on which the request was received. If no fee for search and retrieval and/or photocopying is due or the amount of the deposit paid covers the fee, access to the record should be granted immediately. If such a fee is charged, access to the record is granted within 5 working days of receipt of the fee.

There is the possibility of an extension on this time limit when a large number of requests have been made. The statutory provision in question is s.9 of the Freedom of Information Act, which provides that the period for consideration of the request (20 working days) may be extended for another 20 working days if

( a ) the request relates to such number of records that compliance within the time period is not reasonably possible or

( b ) the number of other requests relating either to the record or records to which the specified request relates or to information corresponding to that to which the specified request relates or to both that have been made to the public body concerned before the specified request was made to it and in relation to which a decision regarding access has not been made is such that compliance with that subsection within the period specified therein is not reasonably possible

In other words, although it's not altogether clear from the statute, the extension period is available if the particular person makes many requests or many people make similar requests.

### **3. Public Databases**

*a. Which kind of information is available via databases (e.g. on the internet)? Does the access to or use of these data depend on additional criteria (age of the consumer, potential interest in receiving the information required)?*

Section 15 and 16 of the Freedom of Information Act provide that public bodies have to publish certain information about their structure, functions, services and procedures. In addition, the Information Commissioner encourages public bodies to provide relevant information on their websites.

More specifically, the databases of the National Consumer Agency and Food Safety Authority contain information on traders and businesses against whom actions have been brought by the Agency / Authority. This information is freely available, but not particularly detailed or accessible. Further information could be sought via a Freedom of Information request.

*b. Are results of official quality or safety controls automatically made accessible online free of charge? Does the state compile and publish on the internet rankings concerning the performance of businesses with regard to the results of the control?*

No.

### **4. Warning notices**

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### III. Guaranteeing the protection of companies and data

#### 1. Industrial and business secrets

a. *Are there specific rules for cases in which consumer information rights collide with business law, especially provisions concerning competition rules or trade and business secrets? If so, please name these rules.*

b. *If industrial and business secrets are exempt from the obligation to release information in your country: What is the definition of industrial and business secrets in your country? Who decides whether specific information constitutes an industrial or business secret or not? If businesses are deciding the previous question: Is there a negative list indicating which kind of information needs in no way be protected as industrial or business secrets or as other privileged information?*

The Freedom of Information Act allows individuals to access records held by public bodies, and as discussed in the introduction, this could allow access to information which would be of benefit to consumers e.g. the results of safety and quality checks carried out by regulatory bodies. However, there are exemptions to protect the interests of businesses. The main two exemptions which would apply here are section 26, which exempts confidential information, and section 27, which exempts commercially sensitive information.

#### **Confidential information – section 26**<sup>165</sup>

Section 26 provides that a public body shall refuse access to records where

(a) the record concerned contains information given to the public body in confidence and on the understanding that it would be treated by it as confidential, and its disclosure would be likely to prejudice the giving to the body of further similar information from the same person or other persons and it is of importance to the body that such further similar information should continue to be given to the body,

Or

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<sup>165</sup> See generally M.McDonagh *Freedom of Information Law* (2<sup>nd</sup> ed., 2006, Thomson Round Hall) Chapter 12.

(b) disclosure of the information concerned would constitute a breach of a duty of confidence provided for by a provision of an agreement or enactment or otherwise by law

Reason (a) is subject to a public interest test, whereas reason (b) is not. However, because this exemption affects the interests of third parties, this is subject to a process of consultation with the third parties involved.<sup>166</sup>

The difference between (a) and (b) is that (a) aims to protect the interests of the public body (i.e. the public body wishes to ensure that information will continue to be provided to them) whereas (b) protects the interests of the confiding party, i.e. third party interests or business interests. The duty of confidentiality therefore only exempts records where their disclosure would be in breach of an obligation to a third party, and not an obligation to the public body itself. However, confidential information may come under both exemptions (a) and (b).

The next question which can be asked is what constitutes confidential information? At common law, the criteria for the establishment of a duty of confidence were set out in *Coco v A.N. Clark (Engineers) Ltd*:

“In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself . . . must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it.”<sup>167</sup>

This test has been endorsed by both the Information Commissioner<sup>168</sup> and the High Court.<sup>169</sup> The question as to whether or not information is confidential can be reviewed by the Information Commissioner and this decision can be appealed on a point of law to the High Court and ultimately the Supreme Court.

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<sup>166</sup> Section 29.

<sup>167</sup> *Coco v A.N. Clark (Engineers) Ltd* [1969] FSR 415 per Megarry J.

<sup>168</sup> *Ford and Office of Public Works* Long Form Decision Nos 98049, 98056, 98057, March 31, 1999, cited in M.McDonagh *Freedom of Information Law* (2<sup>nd</sup> ed., 2006, Thomson Round Hall) p.311.

<sup>169</sup> *Sheedy v Information Commissioner* [2004] 2 IR 533.

## **Commercially sensitive material – section 27<sup>170</sup>**

Section 27 provides that access to records held by a public body will be refused where the record contains:

(a) trade secrets of a person other than the requester concerned,

(b) financial, commercial, scientific or technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation, or

(c) information whose disclosure could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates.

Exemption (a) is class based, in that it protects trade secrets, whereas exemptions (b) and (c) are harm-based, in that they are measured by the potential harm disclosure could cause.

To be considered a trade secret, the information must meet the following requirements:

1. The information must be used in trade or business.
2. The owner must limit the dissemination of the information or at least not encourage or permit widespread publication. Account will be taken of the extent to which the information is known outside the business and by persons engaged in the business, and measures taken to guard the secrecy of the information.
3. The value of the information to the owner and its competitors.
4. The effort and money spent by the owner in developing the information.
5. The ease or difficulty with which others might acquire or duplicate the secret.<sup>171</sup>

<sup>170</sup> See generally M.McDonagh *Freedom of Information Law* (2<sup>nd</sup> ed., 2006, Thomson Round Hall) Chapter 13.

There is no requirement of technicality for the purposes of s.27, so the exemption will apply to non-technical trade secrets. For example, general pricing information may not qualify as a trade secret if it is publicly available, but detailed information about a company's pricing strategy could fall within the concept of a trade secret.

Information which is not a trade secret may nonetheless be exempted if it is of a commercially sensitive nature i.e. if its disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person / business. The focus here is on the harm that can be caused by the disclosure of the information, rather than on the type of information disclosed.

With regard to disclosure resulting in loss to the third party, the loss must be "material" and "financial", so it would appear that the loss must be pecuniary, and would not apply where the adverse effect is simply adverse publicity.<sup>172</sup> One important thing to note is that the "gain" which may be caused is gain to the person "to whom the information relates", rather than gain to its competitors or a third party. It has been suggested that this aims to prevent a business "from engineering the disclosure of the information in an attempt to benefit itself, for example, by encouraging a journalist to make an application for access to relevant records".<sup>173</sup>

These exemptions are subject to a public interest test, so that records, or parts of records, may be released where the public interest would, on balance, be better served by granting than by refusing to grant the request. However, because these exemptions concern the interests of third parties, this is subject to a process of consultation with the third parties involved.<sup>174</sup>

A good example of the public interest test can be seen in *X v South Eastern Health Board*.<sup>175</sup> There, records held by a public body about a private nursing home were released even though they were of a commercially sensitive nature, because there

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<sup>171</sup> M.McDonagh *Freedom of Information Law* (2<sup>nd</sup> ed., 2006, Thomson Round Hall) p.363, relying on *Henry Ford and Sons Ltd and the Office of Public Works*, Decision of the Information Commissioner, March 31, 1999.

<sup>172</sup> See *Electricity Supply Board and Department of Public Enterprise* Decision of the Information Commissioner, December 13, 2000.

<sup>173</sup> M.McDonagh *Freedom of Information Law* (2<sup>nd</sup> ed., 2006, Thomson Round Hall) p.368.

<sup>174</sup> Section 29.

<sup>175</sup> Decision of the Information Commissioner, Letter Decision No.020533, February 16, 2004.

was said to be “an overriding public interest in ensuring that the health, security and welfare of elderly and vulnerable members of society is seen to be protected” and “a significant public interest in the public knowing how health boards respond to, and investigate, complaints made to them by members of the public in relation to specific nursing homes.”<sup>176</sup>

In addition to the public interest test, there are a number of exceptions to this exception. Thus records may be disclosed if :

- the person to whom the record concerned relates consents, in writing or in such other form as may be determined, to access to the record being granted to the requester concerned,
  
- information of the same kind as that contained in the record in respect of persons generally or a class of persons that is, having regard to all the circumstances, of significant size, is available to the general public
  
- the record relates only to the requester
  
- information contained in the record was given to the public body concerned by the person to whom it relates and the person was informed on behalf of the body, before its being so given, that the information belongs to a class of information that would or might be made available to the general public, or
  
- disclosure of the information concerned is necessary in order to avoid a serious and imminent danger to the life or health of an individual or to the environment.

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<sup>176</sup> Ibid.

*c. Can an authority inform a business if it releases information on the latter, or does it have to? If the company is informed, does this happen before, at the same time or after the release of the information? Can the business object to the release?*

Section 29 of the Freedom of Information Act provides for a consultation procedure if information relating to a third party is to be released. Before deciding to grant a request involving personal information, confidential information or commercially sensitive information, the head of the public body must notify any affected third party in writing of the request and the third party may, within 3 weeks, make submissions to the head in relation to the request. The public body must consider any such submissions before deciding whether to grant or refuse to grant the request. The public body will then inform the third party of the decision, and if the decision is to grant access to the information the third party has a right of appeal to the Information Commissioner. Similarly, if the Information Commissioner is dealing with a refusal to grant access to a record involving a third party, and is deciding whether or not an exemption should apply, they may seek submissions from the third party involved, and in some cases it has been held that they must do in order to ensure procedural fairness.<sup>177</sup> However, there is no express provision for third parties to be consulted during internal reviews of decisions made.

*d. Does your country have any experience with an opposing party's right to adopt a transaction for themselves in the way that the entitlement to receive information on a company from an authority must be denied if the business agrees to provide the information itself?*

No.

## **2. Data protection**

*a. What is the role of data protection in the framework of releasing information and how is data protection ensured?*

In Ireland, personal information held by both private and public institutions is protected by the Data Protection Acts 1988 – 2003. These Acts restrict disclosure of personal information and personal data, in particular by providing that information

<sup>177</sup> *South Western Area Health Board v Information Commissioner* [2005] 2 IR 547.

provided for a particular process cannot be used for other purposes.<sup>178</sup> There is clearly a potential for conflict between the right to privacy protected in the Data Protection Acts, and the right to information protected in the Freedom of Information Acts. However, s.1(5)(a) of the Data Protection (Amendment) Act 2003 provides that rights under that Act “shall not prejudice the exercise of a right conferred by the Freedom of Information Act”. This would appear to allow the right to access information in the FOI Act to override the requirements of the Data Protection legislation. However, this would presumably be subject to the constitutional right to privacy, which could potentially trump both sets of legislation. In addition, the Freedom of Information Act itself takes account of the right to privacy, and has restrictions on the types of personal information which may be given out under a FOI request.

*b. May authorities pass on the name and address of persons having made a request to receive information on a company to its entrepreneurs?*

There is nothing in the Irish legislation to prevent a public body from identifying the requester to the third party. However, the Department of Finance’s Central Policy Unit on the FOI Act says that it is “generally desirable” to give the requester an opportunity to comment before his or her identity is disclosed to the third party.

*c. Which are the limits of providing information in your legal system?*

#### **IV. Specific aspects of (pre-) contractual rights to information**

##### **1. Minimum information**

**Is it the entrepreneur’s legal duty or is he obliged to inform the consumer about certain facts before the conclusion of a contract?**

##### **(a) Pre-contractual rights to information at common law**

Generally speaking, at common law there is no obligation to provide information before entering into a contract, nor is there a duty of good faith recognised at common law. In *Walford v Miles*<sup>179</sup> it was stated that a duty of good faith when entering into or negotiating a contract was “inherently repugnant to the adversarial position of the parties when involved in negotiations”. There are a number of specific exceptions to

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<sup>178</sup> Section 2.

<sup>179</sup> [1992] 2 AC 128, 138.

this. For example, in insurance contracts, there is a specific duty of good faith to disclose information relevant to the insurance application. When somebody acts as surety for the debts of another the bank may be under a duty to ensure that they obtain legal advice,<sup>180</sup> and in situations where there is a presumption of undue influence the court will take into account whether independent legal advice was obtained.<sup>181</sup> In addition, a pre-contractual misrepresentation may be actionable either in contract or in tort. Silence, however, will not count as a misrepresentation, except in exceptional circumstances. Thus in one Irish Supreme Court decision it was stated:

“In general, mere silence will not be held to constitute a misrepresentation. Thus, a person about to enter into a contract is not, in general, under a duty to disclose facts that are known to him but not to the other party. However, in certain circumstances, such a party may be under a duty to disclose such facts. A duty of disclosure will arise, for example, where silence would negate or distort a positive representation that has been made, or where material facts come to the notice of the party which falsify a representation previously made.”<sup>182</sup>

### **(b) Legislative obligations to provide pre-contractual information**

Certain pre-contractual information requirements have been introduced by legislation such as the European Communities (Protection of Consumers in Respect of Contracts Made by Means of Distance Communication) Regulations, 2001 and the European Communities (Distance Marketing of Consumer Financial Services) Regulations 2004. In addition, under the Consumer Protection Act 2007 an omission of a material fact could constitute a “misleading” commercial practice. There is no specific form requirement as to how information has to be given, although it must be clear and intelligible.

<sup>180</sup> *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773

<sup>181</sup> *Carroll v Carroll* [2000] 1 ILRM 210 (SC)

<sup>182</sup> *O'Donnell v Truck and Machinery Sales* [1998] 4 IR 191, 202 – 203 per O'Flaherty J

## 2. Legal consequences

**Do consumers have any rights in case they have not received the necessary information (cancellation of contract, compensation for damage)? If yes: Is this right subject to a time limit and what is the time limit?**

If the information required to be provided under the Distance Selling Regulations and the Distance Marketing of Consumer Financial Services is not provided, the contract is not enforceable against the consumer and it is a criminal offence.

Consumers have a right to damages for a misleading omission under the Consumer Protection Act 2007.. Section 75 states that a consumer “who is aggrieved by a prohibited act or practice shall have a right of action for relief by way of damages, including exemplary damages” against any trader who commits or engages in the prohibited act or practice, or if such trader is a body corporate, any director, manager, secretary or other officer of the trader, or a person who purported to act in any such capacity, who authorised or consented to the doing of the act or the engaging in of the practice. No express time limit is expressed, so presumably the time limit would be the statutory limit for tortious actions, which is 6 years.<sup>183</sup>

## 3. Other functionally equivalent rules

**Does your country’s legal system provide other rules intended to protect consumers from concluding a contract without having all necessary information?**

As mentioned above, contract law does not have any general requirement that consumers must have all necessary information before entering into a contract. However, there are some specific requirements. For example, if a person is providing collateral for a bank loan to a third party, the bank must ensure that the consumer is provided with details of the loan, so as to guard against the possibility that the consumer entered into the transaction under undue influence.<sup>184</sup> In addition, under the law of misrepresentation, a duty to disclose will arise where silence would distort a

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<sup>183</sup> Statute of Limitations 1957, section 11.

<sup>184</sup> See *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773.

positive representation that has been made, or where material facts come to the notice of the party which falsify a representation previously made.<sup>185</sup>

## **VI. Product labelling and quality control**

**1. Is there a mandatory system for product labelling in your country, e.g. obligation to label goods or services that are harmful to health?**

**4. If there is an obligation to label products/services in your country, please describe the labelling system.**

Mandatory labelling aims to ensure that consumers make an informed choice about what they are buying, and to ensure that consumers are not misled. There are numerous pieces of legislation regarding product labelling in Ireland. These were designed to enforce European Directives. The following is a selection of some of the mandatory labelling rules.

### **A. Mandatory Labelling of Food Items**

More information on the labelling of food in Ireland is available from the Food Safety Authority “Labelling of Food in Ireland, 2007”, which is available at [www.fsai.ie](http://www.fsai.ie). The following is intended as a summary only.

#### **1. Pre-packaged Food**

The general rules on the labelling of pre-packaged food are governed by the “General Labelling Directive”,<sup>186</sup> and its amendments, as implemented in Ireland by the European Communities (Labelling, Presentation and Advertising of Foodstuffs) Regulations, 2002.<sup>187</sup> This is horizontal labelling legislation which applies to all foodstuffs and is applicable to all pre-packaged foodstuffs intended for the ultimate consumer within the EU.

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<sup>185</sup> See *Gill v M'Dowell* [1903] 2 IR 463; *With v O'Flanagan* [1936] Ch 575; *O'Donnell v Truck and Machinery Sales* [1998] 4 IR 191.

<sup>186</sup> Council Directive 2000/13/EC, on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs.

<sup>187</sup> S.I. No. 483 of 2002.

The packaging of food stuffs must be clear and accurate, legible and easy to understand, and must be in English. If a label is in Irish it must also be in English. The following mandatory information must appear on a food label:

- The name under which the product is sold
- A list of ingredients in descending order of weight, including the ingredients of a compound ingredient (e.g. you cannot say “pastry” but must detail what ingredients are in the pastry”), the species of any meat (e.g. beef) and any additives with technological functions (e.g. preservatives / E numbers).
- It is necessary to state the quantity as a percentage on the label (quantitative ingredient declaration) where the ingredient or category of ingredient is included in the name of the food or usually associated with the name of the food or emphasised on the label in words, pictures or graphics or where it is essential to characterise and distinguish the food from products with which it might be confused because of its name or appearance.
- A declaration of allergens
- The net quantity, using the metric system
- The date of minimum durability
- Any special storage instructions or conditions of use
- The name or business name and address of the manufacturer or packager, or  
  
of a seller within the European Union
- The place of origin of the foodstuff if its absence might mislead the consumer
- Instructions for use where necessary
- Beverages with more than 1.2% alcohol by volume must declare their actual alcoholic strength.

There are a number of exceptions to these rules. For example an indication of the date of minimum durability is not required for beverages with greater than 10% volume of alcohol, vinegar or cooking salt. However, the Food Safety Authority of Ireland still recommends that best practice should be the inclusion of a date of minimum durability on the labels of all food products. Certain foodstuffs such as

fresh fruit and vegetables, carbonated water, vinegar, pepper or butter, do not need a list of ingredients, provided no other ingredients have been added.

These rules are enforced by the Food Safety Authority of Ireland, the National Consumer Agency and the Health Service Executive.

## 2. Warnings where there is a danger to the health of consumers

This section deals with specific warnings which must be included on labels where there is a danger to the health of consumers.

- Ingredients to which consumers could be allergic must be identified so that consumers who have allergies or intolerances can avoid them. It must be clearly stated that these ingredients are present e.g. where the ingredient 'starch' (or modified starch) originates from a source that contains gluten, the cereal origin of the starch must always be given in the list of ingredients, e.g. wheat starch. Ingredients which must be identified in this way are: cereals containing gluten, crustaceans, molluscs, eggs, fish, soybeans, lupins (i.e. from the pea family), milk (including lactose), celery and celeriac mustard, sesame seeds, sulphur dioxide and sulphites at concentrations of over ten parts per million, expressed as SO<sub>2</sub>, peanuts, tree nuts (almonds, hazelnuts, walnuts, cashews, pecans, Brazil nuts, pistachios and macadamia/Queensland nuts). However, this requirement does not apply when it is clear from the nature of the food that it contains an allergen e.g. cheese and butter are clearly milk products and do not need a warning label. These rules were introduced by Commission Directive 2003/89/EC (amended by 2005/26/EC and 2006/142/EC and 2007/68/EC and corrected by 2005/63/EC as implemented in Ireland by the European Communities (Labelling, Presentation and Advertising of Foodstuffs) Regulations 2002 to 2008.
- Food containing sweeteners must declare "with sweeteners" near the product name. Food containing sugar and sweeteners must declare "with sugar(s) and sweetener(s)" near the product name. Food containing aspartame must declare "contains a source of phenylalanine".
- Food containing more than 10% polyols must declare "excessive consumption may produce laxative effects".

- Drinks other than tea and coffee which contain caffeine in excess of 150mg/l must also provide a warning message on the label such as ‘High caffeine content (Xmg/100ml)’. This is because of the reaction some people would have to caffeine. In addition some people are sensitive to the flavouring Quinine and thus it must be identified where it is an ingredient: “Flavouring: Quinine”. This requirement is found in Directive 2002/67/EC, as implemented by (Amendment) (No.3) Regulations, 2003 (S.I. No. 528 of 2003).
- Commission Directive 2004/77/EC amends Directive 94/54/EC as regards the labelling of certain foods containing glycyrrhizinic acid and its ammonium salt. This Directive provides for additional labelling of confectionery and beverages containing glycyrrhizinic acid or its ammonium salt above certain limits because of the possibility that these flavourings can give rise to hypertension. The phrase “contains liquorice” or ‘contains liquorice – people suffering from hypertension should avoid excessive consumption’ should be used, depending on the quantity of the substance in the foodstuff.

### 3. Nutrition Labelling<sup>188</sup>

In addition to this, there is a system of nutrition labelling in Ireland. Council Directive 90/496/EEC regarding nutrition labelling (as amended by Commission Directive 2003/120/EC) is implemented by the European Communities (Nutrition Labelling For Foodstuffs) Regulations, 2005 (S.I. No. 65 of 2005). Nutrition labelling is voluntary but is compulsory where a nutrition or health claim is made on the label. However, if a label carries nutrition labelling, even when it is not required, it must comply with the Regulations. This labelling includes information such as the energy value of foods, specified in kilojoules and kilocalories, and the amount of protein, carbohydrate and fat, specified numerically in grams. The exact format of labelling required can vary depending on the context.<sup>189</sup>

Any foodstuffs with nutritional or health claims (i.e. a claim that a food has an enhanced nutritional value because of the inclusion or exclusion of certain substances, or a claim that a food can there is a relationship between a type of food and an im-

<sup>188</sup> See The Food Safety Authority “Labelling of Food in Ireland, 2007” (2007), pp.33 – 41.

<sup>189</sup> See The Food Safety Authority “Labelling of Food in Ireland, 2007” (2007) pp. 33 - 39

provement in health, including weight loss) must comply with Regulation (EC) No. 1924/2006 on nutrition and health claims made on foods. Nutrition and health claims must not be false, ambiguous or misleading; give rise to doubt about the safety and/or the nutritional adequacy of other foods; encourage or condone excess consumption of a food; state, suggest or imply that a balanced and varied diet cannot provide appropriate quantities of nutrients in general; or refer to changes in bodily functions which could give rise to or exploit fear in the consumer, either textually or through pictorial, graphic or symbolic representations.

Only certain nutrition claims are permitted and all health claims must undergo an approval and authorisation process at European level, appear on a Community authorised list and adhere to conditions necessary for their use. Where a health claim is made on foods (with the exception of generic advertising) nutrition information must be provided on the label in a particular format in accordance with Directive 90/496/EC on Nutrition Labelling. Health claims are only permitted if the following information is included in the labelling, or if no such labelling exists, in the presentation and advertising: a) a statement indicating the importance of a varied and

balanced diet and a healthy lifestyle b) the quantity of the food and pattern of consumption required to obtain the claimed beneficial effect c) where appropriate, a statement addressed to persons who should avoid using the food, and d) an appropriate warning for products that are likely to present a health risk if consumed to excess.

#### 4. Food Supplements

Directive 2002/46/EC as amended by Directive 2006/37/EC regulates food supplements. It is implemented in Ireland by the European Communities (Food Supplements) Regulations, 2003 (S.I. No. 539 of 2003). Only certain permitted vitamin or mineral preparations may be used for the manufacture of food supplements. Derogations are allowed until 31st December 2009 for ingredients and ingredient sources on application to the Food Safety Authority of Ireland as long as they do not pose a risk to public health in Ireland, and a safety dossier has been submitted to the FSAI. In addition to the labelling requirements of Directive 2000/13/EC, described above, the label of a 'food supplement' must declare:

- (a) the names of the categories of nutrients or substances that characterise the product or an indication of the nature of those nutrients or substances
- (b) the portion of the product recommended for daily consumption
- (c) a warning not to exceed the stated recommended daily dose
- (d) a statement to the effect that food supplements should not be used as a substitute for a varied diet
- (e) a statement to the effect that the products should be stored out of the reach of young children.

In Ireland, the FSAI must be notified where food supplements are manufactured in or

are imported into Ireland and are being placed on the Irish market for the first time. The provision of supplementary material, such as the labelling of the product, marketing material and certificates proving the products/ingredients are fit for human consumption may also be required.

#### 5. Food for particular nutritional uses

Council Directive 89/398/EEC regarding food intended for particular nutritional uses and Commission Directive 2001/15/EC on substances that may be added for specific nutritional purposes in foods for particular nutritional uses are implemented in Ireland by European Communities (Foodstuffs Intended for Particular Nutritional Uses) Regulations, 2005 (S.I. No. 66 of 2005). In addition to the Framework Directive there are specific rules, including labelling rules, for the following groups of dietary foods:

- infant formulae and follow-on formulae (Commission Directive 2006/141/EC, implemented in Ireland by European Communities (Infant Formulae and Follow-on Formulae) Regulations, 2004 (S.I. No. 242 of 2004) and the European Communities (Infant Formulae and Follow-On Formulae) (Amendment) Regulations, 2007 (S.I. No. 242 of 2007).)

- processed cereal-based foods and baby foods for infants and young children (Commission Directive 2006/125/EC, implemented in Ireland by European Communities (Processed cereal-based foods and baby foods for infants and young children) Regulations, 2004 (S.I. No. 433 of 2004).)
- food intended for use in energy-restricted diets for weight reduction (Commission Directive 96/8/EC, implemented in Ireland by European Communities (Foods intended for Use in Energy-Restricted Diets for Weight Reduction) Regulations, 1998 (S.I. No. 242 of 1998).
- dietary foods for special medical purposes (Commission Directive 1999/21/EC, as amended, implemented in Ireland by European Communities (Dietary Foods for Special Medical Purposes) Regulations, 2001 (S.I. No. 64 of 2001) and the European Communities (Dietary Foods for Special Medical Purposes) (Amendment) Regulations, 2007 (S.I. No. 241 of 2007).)

## 6. Genetically Modified Organisms

Regulation (EC) No. 1830/2003 concerning the traceability and labelling of genetically modified organisms does not yet appear to have been implemented in Ireland.

## 7. Organic Food

To be considered “organic” food must be produced in compliance with the standards laid down Council Regulation (EC) No. 2092/1991, as amended, as implemented in Ireland by the European Communities (Organic Farming) Regulations, 2004 (S.I. No. 112 of 2004). An organic operator must be registered with the Department of Agriculture, Fisheries and Food and submit their enterprise to inspection by an approved inspection body. The words "Certified Organic" or "Organic Certification"

should appear on the product label followed by one of three codes depending on which private inspection body in Ireland is certifying the produce. The packaging may also include the logo of the inspection body or the “Community” logo, although it does not have to do so.

## 8. Vertical Legislation

Vertical legislation or specific commodity legislation contains mandatory labelling provisions for specific products such as beef (Regulation (EC) No. 1760/2000), fishery products (Regulation (EC) No. 104/2000 and 2065/2001) fruit jams and jellies (Directive 2001/113/EC), cocoa and chocolate products (Directive 2000/36/EC ), fruit juices and fruit nectars (Directive 2001/112/EC) coffee extracts and chicory products (Directive 1999/4/EC regulates coffee extracts and chicory extracts).

### **B. Mandatory Labelling of Medical Substances**

The Medical Preparations (Labelling and Package Leaflets) Regulations, 1993 and 1994 provide that certain information is to be contained in the packaging of medical substances. These Regulations give effect to EC Council Directive 92/27 of 31st March, 1992 on the labelling of medicinal products for human use and on package leaflets.

The outer packaging must contain:

(a) the name of the medical preparation followed by the common name where the preparation contains only one active ingredient and if its name is an invented name; where a medical preparation is available in several pharmaceutical forms and/or the strength (baby, child or adult as appropriate) must be included in the name of the medical preparation;

( b ) a statement of the active ingredients expressed qualitatively and quantitatively per dosage unit or according to the form of administration for a given volume or weight, using their common names;

( c ) the pharmaceutical form and the contents by weight, by volume or by number of doses of the product;

( d ) a list of those excipients known to have a recognised action or effect. However, if the product is injectable, or a topical or eye preparation, all excipients must be stated;

( e ) the method and, if necessary, the route of administration;

- ( f ) a special warning that the medical preparation must be stored out of reach of children;
- ( g ) a special warning, if this is necessary for the medical preparation concerned;
- ( h ) the expiry date in clear terms (month/year);
- ( i ) special storage precautions, if any;
- ( j ) special precautions for disposal of unused medical preparations or waste materials derived from such preparations, if appropriate;
- ( k ) the name and address of the holder of the authorisation for placing the medical preparation on the market;
- ( l ) the number of the authorisation for placing the medical preparation on the market;
- ( m ) the manufacturer's batch number;
- ( n ) in the case of self-medication, instructions on the use of the medical preparations

The package leaflet must contain extensive information including any appropriate precautions for use and forms of interaction with other medical preparation and substances such alcohol or tobacco. The leaflet should include a description of the undesirable effects which can occur under normal use of the medical preparation and, if necessary, the action to be taken in such a case. The information must take into account the particular condition of certain categories of users (e.g. children, pregnant or breastfeeding women, the elderly, persons with specific pathological conditions), and mention, if appropriate, potential effects on the ability to drive vehicles or to operate machinery.

### **C. General Product Safety**

#### **1. The General Product Safety Directive**

The European Communities (General Product Safety) Regulations 2004<sup>190</sup> implements General Product Safety Directive (95/2001). It provides that producers cannot place a product on the market unless it is safe. One of the factors to be taken into account when deciding whether or not a product is safe is “the presentation of the product, the labelling, any warnings and instructions for its use and disposal and any other indication or information regarding the product”.<sup>191</sup> In addition, Regulation 6 provides that a producer “shall, in relation to any product which he or she has placed on the market, provide consumers with all relevant information relating to the product to enable them to assess the risks inherent in the product throughout the normal or reasonably foreseeable period of its use, where such risks are not immediately obvious without adequate warnings, and to take precautions against those risks”.

## 2. Children’s Toys

With regard to children’s toys, the European Communities (Safety of Toys) Regulations, 1990 (SI. No 32 / 1990) provides that toys cannot be put on the market unless they are safe. These Regulations implement Council Directive 88/378/EEC on the approximation of the laws of the Member States concerning the safety of toys. Toys must carry a CE mark indicating that they conform to the relevant harmonised EC standards and/or that they have been approved by an Approved Body. If the “CE” mark is placed on a toy it is presumed that it is safe. A Certificate to use the CE mark can be granted by approved bodies on inspection, and it can be withdrawn or suspended if as a result of sample checks or otherwise, the body suspects that the toy is not safe.

Information which must be included on the toy or the packaging includes appropriate warnings and indications of precautions in English and Irish or in English. For example, toys which might be dangerous for children under 36 months of age shall bear a warning, for example: 'Not suitable for children under 36 months' or 'Not suitable for children under three years' together with a brief indication of the specific risks calling for this restriction. It is an offence not to do so, or to attach a false or misleading mark to the toy.

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<sup>190</sup> SI No 199 / 2004.

<sup>191</sup> Regulation 4.

### 3. The Consumer Protection Act 2007

In addition, section 50 of the Consumer Protection Act 2007 provides for the making of Ministerial regulations where the Minister considers it to be in the interest of consumers to have a product, or a class or type of product, marked with or accompanied by any information and to regulate or prohibit the supply of a prescribed product, or a product of a prescribed class or type, if any such regulation is not complied with. Section 50(2) provides for a similar type of regulation with regard to advertising. The Minister may not make a regulation under this section unless the Minister is satisfied that in the context (a) the average consumer would need the stamp, mark, tag, label or information in order to make an informed transactional decision and (b) if such material information was withheld, omitted or concealed, it would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make. If such a regulation is made, a trader who supplies a product in contravention of it, or who publishes an advertisement in contravention of it, will be guilty of an offence.

### 4. Mandatory labelling of Other Products

There are numerous other Irish national labelling requirements which implement EU Directives. These include:

The European Communities (Classification, Packaging, Labelling and Notification of Dangerous Substances) Regulations 2003 to 2008

The European Communities (Classification, Packaging and Labelling of Plant Protection Products and Biocide Products) Regulations 2001 & 2008

The European Communities (Names and Labelling of Textile Products) Regulations, 1998

The European Communities (Labelling of Footwear) Regulations, 1996

The European Communities (Energy Labelling of Household Electric Refrigerators and Freezers) (Amendment) Regulations 1995 & 2004

The European Communities (Energy Labelling of Household Electric Ovens) Regulations 2002

The European Communities (Energy Labelling of Household Dishwashers) Regulations, 1998 & 1999

#### **D. Traffic Lights & Daily Guideline Amount Labelling**

As can be seen from the above, the focus of labelling requirements in Ireland has been the implementation of EU labelling directives. Within the United Kingdom, the Food Standards Agency (FSA) has been working on a number of initiatives, including the (voluntary) 'Multiple Traffic Light' system, which would show the levels of nutrients as either high, medium or low, and which is particularly useful in relation to foods where research has shown that consumers have difficulty in assessing nutritional quality, and which quite often are eaten either frequently or in large quantities.<sup>192</sup> However, despite some discussion of this in the Irish Dáil (Parliament) Debates, and the results of a survey of 17,000 consumers that found that 80% of respondents found traffic light labelling more comprehensible than guideline daily amount labelling,<sup>193</sup> no progress has been made in this regard. The Irish food and drink industry views traffic light labelling as an “over-simplistic approach” and does not generally support it.<sup>194</sup> Instead, it has focused on funding initiatives aimed at increasing consumer awareness of the Guideline Daily Amount (GDA) food labelling system.<sup>195</sup> A consistent logo system was agreed by a significant number of Irish food companies and retailers. This is now used on over 60% of all branded food and drink packages and an even higher volume of supermarket 'own label' products.<sup>196</sup>

The GDA labelling system looks like this:

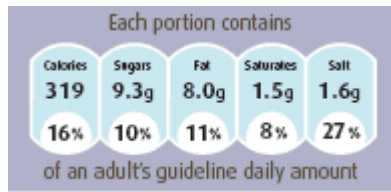
<sup>192</sup> See <http://www.eatwell.gov.uk/foodlabels/trafficlights/> and

<sup>193</sup> Dr Upton Dáil Éireann, Volume 633, 08 March, 2007.

<sup>194</sup> Dr Louise Sullivan, 17 June 2008, Joint Committee on European Scrutiny, Available at [www.oireachtas.ie](http://www.oireachtas.ie)

<sup>195</sup> See The Irish Times, Oct 8, 2008. “Campaign on Food Labelling Unveiled”. See also [www.gdaguide.ie](http://www.gdaguide.ie)

<sup>196</sup> Source: [www.fdi.ie](http://www.fdi.ie)



### E. “Safe Pork” Labelling

In addition ad hoc labelling systems have been introduced as a reaction to food scares. For example, in December 2008 there was a recall of all Irish pork products when Dioxins, which have been associated with an increased risk of cancer, were found in pork produced at ten Irish pig farms. Pork which suppliers could prove did not come from an affected pig farm was then allowed back on the shelves, with a new label to certify that the pork comes from a manufacturer that has not been supplied with animal feed contaminated with dioxins.

### F. Environmentally Friendly products

The Eco-label scheme is run in Ireland by the NSAI, and it aims to inform consumers that the product they are purchasing has a reduced environmental impact. It is a voluntary scheme. To obtain the mark the manufacturer must establish, by testing and in other ways, that his product meets the relevant criteria, and submits the data to the NSAI. The NSAI assesses the data and if satisfied that the criteria have been met, submits its recommendation to the European Commission, which then notifies all other competent bodies. If no objection is raised within thirty days, the award of the label may proceed.

**The following questions are of great interest to us:**

*a. Where and how are the results published?*

N/A

*b. Is the entrepreneur entitled to make a counterstatement or statement?*

There would be no reason why they could not make a statement to the press in a suitable case.

*c. If the entrepreneur is obliged to publish product information or results of control measures himself on the product or in the company: in which form, at which place and in which time limit does he have to publish this information?*

This doesn't seem to apply.

*d. Which sanctions might a company face in case of lacking or outdated information? Are there fines/administrative fines for entrepreneurs who deliberately and falsely advertise their products/services with positive control outcomes or labels?*

If this information was placed on packaging, it could as a misleading or prohibited or commercial practice under the Consumer Protection Act 2007, in which case it would be investigated by the National Consumer Agency and a fine could be imposed.

**1. Misleading Commercial Practice** – Sections 42 – 47 of the Consumer Protection Act 2007 provide that it is an offence for a trader to provide false or misleading information, or to omit or conceal material information, in relation to a list of matters where that information would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make. The list of matters includes the main characteristics of the product, including the risks it presents to consumers. It is also a misleading practice to claim to abide to a code of practice if the trader fails to comply with a firm, verifiable, commitment in that code, or if the trader omits or conceals material information. A trader who engages in a misleading commercial practice is liable to a fine and an action for damages may be brought against them by a consumer.

**2. Prohibited Commercial Practice** – Section 55 of the Consumer Protection Act 2007 contains a list of “prohibited commercial practices”, including making a representation that the trader or product has an approval, authorisation or endorsement

that they does not have, or making such a representation when the trader or product is not in compliance with that approval, authorisation or endorsement, or displaying a quality, standard or trust mark or symbol, or some equivalent type of mark or symbol, without having obtained necessary authorisation to do so. A trader who contravenes s.55 commits an offence and on conviction is liable to pay a fine.

*e. For how long are entrepreneurs entitled to advertise their products/services with positive control outcomes or labels?*

I am not aware of a limit, provided it does not mislead consumers.

*f. Who carries out the quality and/or safety controls necessary for product labelling, how often and what are the criteria applied? For which areas? And do citizens or the entrepreneurs controlled have an influence on intervals between controls or individual dates for controls? Who bears the costs for controls that are conducted upon request by someone?*

The Food Safety Authority and the National Standards Authority would conduct such safety controls, at their discretion.

The FSAI continually monitors food on the market for the protection of public health. This monitoring is carried out in conjunction with the official agencies and their associated laboratories.<sup>197</sup> Once the investigations are complete, the prosecution will be carried out by the Authority if the issue relates to non-compliance with safety legislation or standards, but if the issue relates to false or misleading advertising or information (i.e. anything under the remit of the Consumer Protection Act 2007) the issue will be dealt with by the National Consumer Agency.

The FSAI may make such charges as the Board considers appropriate in consideration of the performance by the Authority of its functions, the provision by it of services (other than a service consisting of the provision of advice for the Minister or another Minister of the Government) and the carrying on by it of activities. In Ireland, charges for official controls have traditionally only applied in the meat sector,

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<sup>197</sup> See the FSAI website for more information on monitoring activities: [http://www.fsai.ie/monitoring\\_enforcement/monitoring.html](http://www.fsai.ie/monitoring_enforcement/monitoring.html)

e.g. the slaughtering of animals) and Ireland has yet to fully integrate Regulation 882/2004/EC. Recent indications from the Food Safety Authority indicate that it favours “full subsidiarity” whereby Member States will be free to decide on the best ways to finance official food control.<sup>198</sup>

*g. In case of controls carried out by authorities: in which way are the controls structured? Is there a standard authority for control and labelling, e.g. in a ministry (for these purposes) or are the inspectors subordinate to municipalities?*

*h. Does the system cause higher costs, most importantly due to the fact that more staff is required?*

**5. If there is no product labeling system in your country: Were there considerations to introduce such a labeling system? If yes, why wasn't it introduced?**

N/A

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<sup>198</sup> See Food Safety Authority *FSAI News July – August 2009*. Available at: [http://www.fsai.ie/uploadedFiles/News\\_Centre/Newsletters/Newsletters\\_Listing/newsletter\\_july\\_aug\\_09.pdf](http://www.fsai.ie/uploadedFiles/News_Centre/Newsletters/Newsletters_Listing/newsletter_july_aug_09.pdf)

## **Part C. : Practical Enforceability**

### **I. Enforceability of the right to information**

#### **1. Are there any mechanisms to settle disputes especially for consumer information acts? If no, are there any other mechanisms for settling disputes? Are these mechanisms being used?**

As regards public bodies, the National Consumer Agency has a wide discretion in how it deals with disputes regarding the provision of misleading consumer information. It aims to negotiate and facilitate compliance with the law, evaluating the seriousness of the purported offence and determining whether or not the offence was caused by lack of awareness of the law (which is usually remedied by education) or whether there was a level of intent, which would be more serious and could result in a prosecution. It has a range of methods of enforcement in its arsenal, including compliance orders, prohibition orders, undertakings, on the spot fines (or fixed payment notices) and, as a measure of last resort, the possibility of bringing a prosecution.

Any dispute under the Freedom of Information Act is dealt with by the Information Commissioner.

#### **2. If, in your country, entrepreneurs are obliged to inform the consumer (as e.g. in Art. 19 section 1 of the Regulation (EC) Nr. 178/2002): how is made sure that entrepreneurs fulfil this duty?**

The National Consumer Agency and Food Safety Authority would monitor the situation.

**3. Does the legal system of your country provide possibilities for consumer associations and similar institutions to sue businesses which did not comply with legal requirements concerning consumer information legislation? Notice: Actions for prohibitory injunction, lawsuits due to unfair competition, representative action in concrete disputes between consumer and entrepreneur etc. are to be considered.**

In general, only the national authority with a duty to monitor legal requirements concerning consumer information legislation can bring an action. One exception to this is in the Consumer Protection Act 2007, as any body, including individual consumers or traders, may obtain injunctions against other traders under the Act. Section 71 states that “Any person, including the Agency or any other public body that is prescribed for the purposes of this subsection, may apply to the Circuit Court or High Court for an order prohibiting a trader or person from committing or engaging in a prohibited act or practice.”

#### **Part D. : Final appreciation, assessment**

**1. What is, in your opinion, the level of consumer information and consumer protection in your country?**

As discussed in the introduction, to the extent that consumer information rights have been paid any attention in Ireland, it is with regard to issues such the prohibition on misleading or false information, labeling requirements on products or on information which must be provided when entering into online contracts or when obtaining financial products, rather than on any broader question of a general right to information regarding consumer products or services, with a correlating right to bring an action to enforce that right to information, or obtain redress for its breach. Instead, the focus has been on regulation, with the establishment of public bodies with an obligation to protect consumers by ensuring standards in products and food, and to (sometimes) provide consumers with information held by public bodies by means of the Freedom of Information Act.

**2. Do you think the system for consumer information is successful, or what needs to be changed to make consumer protection more effective?**

Despite the fact that many of the issues mentioned in the questionnaire aren't specifically dealt with in the Irish context, and there is no general right to demand information from traders and enterprises, the system seems to work well for the most part, and there isn't currently (as far as I am aware) any real demand for an extension of consumer information rights. However, this is not to say that such a consumer demand could not exist in the near future, for example, with regard to a narrowing of the exceptions under the Freedom of Information Act or increased information requirements in labels and packaging.

**3. Which negative practical impacts or problems with the norm could be observed so far? Which other impacts do you expect?**

Perhaps the main difficulty with consumer law in Ireland is the overly complex nature of consumer legislation, and the overlapping functions and duties of many of the State and regulatory bodies. Some form of codification of the law would be extremely useful.

**Problems that have not been addressed**

**Are there any significant problems in the field of consumer information legislation in your country that haven't been addressed in this questionnaire?**

No - most things are covered in the Introduction or throughout the questionnaire.

**Is there anything else you think is worth mentioning in the context of consumer information rights in your country?**

Please see the Introduction.

## **Anhang 6: Länderbericht Schweden**

### **Part A. General Principles**

#### **I. Structure of the consumer information law**

##### **1. What is the function of consumer information within the system of consumer protection in your country?**

Which role does it play with regard to consumer protection by means of preventive control or admission restrictions (e.g. health standards or import standards)?

Consumer information plays a significant role in the consumer protection system. Consumer information in the broad sense that is used in the study has multiple functions. It promotes rational consumer choice and thus has an efficiency function. It also counteracts the risk of bodily harm and thus has a safety function. Overall, one may describe consumer information rights as promoting the revelation of important facts and it thus has the function to minimize information asymmetries.

Some consumer information is standardized by regulative measures in such a manner that consumers may use the information as the prime source of evaluation of goods, services etc., such as the Annual Percentage Rate of Charge (APR) for consumer credits, and content and origin information concerning foodstuffs. The consumers can also find customer evaluations, customer polls and product tests made by authorities, media, consumer organisations etc. The consumers use these types of information to avoid unwanted products and to render good value on the market.

Safety information as to potentially hazardous products is of course of vital importance. Manuals and labels containing warnings of incorrect handling, as well as food content information, contribute to the avoiding of unnecessary dangers.

Sellers and service providers have duties of disclosure, sometimes even amounting to a duty to recommend the consumer to refrain from some ill-advised action. These duties on the businesses are at the same time consumer rights. These rights have great precontractual and contractual importance. The consumers use this type of information for precontractual product evaluation and selection purposes, and may invoke breach of contract in case of unfulfilled expectations.

The backbone of the Swedish product safety system is found in the public law rules of Product Safety Act of 2004 (hereafter PSA).<sup>199</sup> PSA is an implementation of Directive 2001/95/EC on general product safety. PSA is accompanied by the governmental Product Safety Ordinance (hereafter PSO),<sup>200</sup> and with enforcement rules issued by the relevant state authorities.

According to PSA § 13(1) producers of goods and service providers shall provide consumers with the safety information necessary to enable consumers to assess the risks of the goods or the services, and to take precautions against those risks. PSA § 14 requires businesses themselves to issue warning information to the purchasers (not necessarily consumers) when hazardous goods or services have been delivered. PSA §§ 15–19 deals with recall of goods and services. PSA §§ 27–30 gives the relevant authorities the authority to issue sale or export bans, or to order businesses to take some action, e.g. to issue safety or warning information.<sup>201</sup> PSA § 33 obliges the relevant authorities to issue warning information when such information or recall cannot be prescribed someone capable of issuing warning information or conducting a recall.

Apart from PSA there is some specific safety legislation and production process legislation granting information rights for consumers (either by reference to PSA or not). Another statute of notable importance in the field of consumer information

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<sup>199</sup> Produktsäkerhetslag (2004:451). Amended up to 2009:842.

<sup>200</sup> Produktsäkerhetsförordning (2004:469).

<sup>201</sup> Norin A., *Ny produktsäkerhetslag*, *Ny Juridik*, 3:04, p. 13.

rights is the Marketing Practices Act of 2008 (hereafter MPA).<sup>202</sup> MPA is an implementation of the Unfair Commercial Practices Directive 2005/29/EC.

Another possibility to access information is to request information from public authorities monitoring the field in question. If the authority in question have the documents asked for they are generally accessible. Even if the right to access public documents – hereafter named *the principle of publicity* (Sw: *offentlighetsprincipen*) – is farreaching, this right is rarely used by consumers or consumer organizations in order to access information about preventive control or admission restrictions. For media, however, the principle is used as a routine to scrutinize different parts of business life. Sales bans and injunctions, the results of health and environment inspections, etc. are this way reported to the general public.

A new type of access is founded on the principle of publicity. Decisions on sales bans or on disciplinary measures in certain licensed professions and have always been public. In order to promote consumer choice and observance of the laws, some authorities post such information on their homepages, or have set up databases of the license registers or warning lists, which are freely accessible from the Internet.<sup>203</sup> Due to the Directive on privacy and electronic communications<sup>204</sup> the access from the Internet have however been restricted, and decisions concerning natural persons have nowadays been anonymized before posting.

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<sup>202</sup> Marknadsföringslag (2008:486). Amended up to 2009:1084.

<sup>203</sup> E.g.: The Swedish Consumer Agency (*Konsumentverket*) at <http://www.kov.se>: – Posted product warnings: <http://www.kov.se/Sok/?quicksearchquery=varning>. – Link to RAPEX, the EU rapid exchange system of hazardous products set up by the EU Commission (DG SANCO): [http://ec.europa.eu/consumers/dyna/rapex/rapex\\_archives\\_en.cfm?WT.ac=Foretigare/Ext./Varningar fran Rapex](http://ec.europa.eu/consumers/dyna/rapex/rapex_archives_en.cfm?WT.ac=Foretigare/Ext./Varningar fran Rapex).

The Swedish Financial Supervisory Authority (Finansinspektionen) at <http://www.fi.se>: – Company register: [http://www.fi.se/Templates/InstitutStartPage\\_\\_\\_6052.aspx?la=en](http://www.fi.se/Templates/InstitutStartPage___6052.aspx?la=en). – Investor alerts: [http://www.fi.se/Templates/AlertListPage\\_\\_\\_6164.aspx?link=investor](http://www.fi.se/Templates/AlertListPage___6164.aspx?link=investor).

<sup>204</sup> 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.

## **2. What are the bases of claim for consumers to obtain information about production processes or health hazards of products, services or work performances?**

*Notice: Please enumerate every provision that can grant (also) consumers a right to information – if necessary under additional conditions and irrespective of whether the claimant is regarded as consumer or not. At this point an enumeration of the respective provisions is enough. Details are the subject matter of Part B in the Questionnaire. Please also enclose the original name of the provision.*

In a largely uncodified private law system as the Swedish system, one regularly has to solve problems in a systematically tolerable way also when there is no direct statutory basis. Sometimes solutions are found by analogy to statutory bases, and other times decisions are based on the interest of the general functionality of the society (for example the determining factor may be the needs of commercial life, the interest of consumer protection, or the personal integrity of individuals). This means that a *basis* of claim may be found in other sources of law than statutes. Another feature of Swedish legal thinking is that it is realistic, or pragmatic. It is the factual effects of actions rather than the labelling of them that should be decisive in answering the question whether there is a certain right or obligation. This means that a *basis* of *claim* may be found whenever there is a possible sanction of whatever gravity against a certain action or omission, to the advantage of the consumer.

There is a vast number of provisions granting consumers indirect rights to information in this broad sense. For example, a non-disclosure of negative characteristics of the product or service that the consumer has bought in the reasonable belief it did not have those characteristics may constitute a defect. This defect may give the consumer the right to rescind the contract. According to some consumer contract legislation performance is defect if the business has failed to provide safety information pursuant to PSA or MPA. Another example is labelling, for example of foods-

tuffs. There may be a statutory based obligation to label certain contents of food. The failure to provide such labelling, or to mislead with the label might constitute a breach of contract. It might also lead to that the supervising authority orders the business to label the foodstuffs, or to correct the misleading label. As mentioned under A.I.1, the principle of publicity gives the general public the right to access public documents. The principle gives opportunities for any natural or legal person to request direct access to documents or to have them copied for free (if under ten copies) or for the production cost. The request may be made anytime during the opening hours of the public body without having to disclose one's identity and without having to declare the purpose of the request. The request must be handled swiftly. Considering this, there are few limits to what could be considered a consumer right to information.

There are, however, only some provisions granting consumers rights to information, in the narrow sense that the required information

- a) is a prerequisite for a *valid contract*,
- b) is a requirement for the *validity of certain terms of contract*,
- c) may be the object of a *compulsory disclosure procedure* instigated by the consumer, the Swedish Consumer Agency or its General Director, the Consumer Ombudsman, or any consumer organization,
- d) gives directly rise to a *breach of contract* if omitted, or
- e) gives directly rise to *non-contractual damages* if omitted.

For example, in the case of incorrect labelling of foodstuffs, the right for the consumer to acquire the correct information does not follow directly from the state authority's regulations. Such a right can only be considered to stem indirectly from these regulations since the more direct legislative basis would be found in consumer sales law combined with the regulations. Whether such a construction of a right is possible is subject to consideration in every individual case and does not grant the

consumer a right to the information itself but merely a private law action based on defective goods.<sup>205</sup>

The alternative basis of a right c) above – *compulsory disclosure procedure* – does not include requests founded on the principle of publicity. It is necessary to exclude the thousands of statutes on different levels that give the public authorities rights to information, which become indirectly accessible for the public due to the principle of publicity.

However, even if the requirements above generally seem to only include individually exercisable rights, as opposed to exclusively collectively exercisable rights, this is not entirely the case concerning compulsory disclosure procedures. These rights of collective character have been included due to their close connection to consumer interests. The limitation to the consumer agency, the Consumer Ombudsman and consumer organizations might seem random, since also other authorities might be regarded as protecting consumer interests, but the line must be drawn somewhere. Another reservation must be made. The consumer agency is the supervising authority in a number of fields. Sometimes a statute only states that the agency has the supervisory responsibility for a type of product, and not outright that the supervisory powers include compulsory disclosure. If the product falls within the area of product safety these powers follow from PSA § 26. If the product does not fall within this area, and the statute does not explicitly give the agency disclosure powers, one may

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<sup>205</sup> See Consumer Sales Act (1990:932) [see Annex # 9, the act being relevant for other reasons] § 18(1). The provision states that goods sold in contravention of sales bans based upon PSA are defective (18 § 1 konsumentköplagen, 1990:932). The same follows from Consumer Services Act (1985:716) [see Annex # 5, the act being relevant for other reasons] §§ 9(2) and 15(2) as to services (9 § andra stycket and 15 § andra stycket konsumenttjänstlagen, 1985:716). Cf. also Consumer Services Act §§ 5(1), 9(1)(2) and 15(1)(2). § 5(1) states a duty upon the business to observe especially that the service is not conducted in contravention of statutory regulations or decisions by public organs mainly aiming at securing that the object of the service is reliable from a safety perspective (5 § 1), and § 9(1)(2) and 15(1)(2) declares that services with a result that derogates from such regulations or decisions are defective irrespective of fault (9 § första stycket 2, 15 § första stycket 2). Cf. also Consumer Services Act § 21(2) and (3), granting a consumer the right to rescind the contract if service has been conducted in contravention of a sales ban based on PSA (21 § andra and tredje stycket).

not draw the conclusion that such powers are lacking.<sup>206</sup> Nonetheless, these cases will not be dealt with in this report.

As was already mentioned PSA § 13(1) requires businesses to give safety information to enable consumer to assess and prevent risks. PSA 13(3) states that the Government is to decide in what form safety information is to be delivered. PSO § 5(4) requires that safety information *inter alia* is to be supplied to consumers who demands such information. PSA § 27(1) declares that injunctions may be imposed by the responsible authority in individual cases to ensure that the requirements of the act and its further regulations are respected. These provisions combined therefore give the consumer a statutory basis for a claim.

MPA § 24(1) declares that a business which does not supply information voluntarily may be compelled to do so. MPA § 24(3)(3) states that information that is material according to § 10(3) is to be supplied to consumers who demand such information, and that this right is backed up by a right to demand an injunction. The Consumer Ombudsman, a business affected by the marketing, or organizations of consumers, businesses or employees may seek injunction before the Market Court, MPA § 47. In cases of minor importance the Consumer Ombudsman may issue an injunction for the business's own approval within a specified time limit, MPA § 28. If the business does not approve the Consumer Ombudsman may bring the case before the Market Court.

In some cases a provision could pragmatically be construed as to give a consumer a disclosure right. However, if this does not follow directly from the statutory text it is here not considered as a basis of claim.<sup>207</sup>

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<sup>206</sup> One may compare the Payment Terms in Credit Sales Ordinance (1988:160) (förrordningen om betalningsvillkor vid kreditköp, 1988:160) with the Payment Terms in Credit Sales Ordinance (1985:252) (förrordningen om vissa betalningsvillkor vid kontoköp, 1985:252). The former one states that the Swedish Consumer Agency has disclosure powers in some instances, the latter not.

<sup>207</sup> Cf. Money Deposit Activity Act (2004:299) § 16 [Annex # 34] with Investor Protection Act (1999:158) § 20(2) [Annex # 27] and Payment Transfers within the European Economic Area Act (1999:268) § 5 [Annex #

The concept of right to information connected to the concept of bases of claim taken in this relatively narrow sense is used in the provisions enumerated below. Most of these provisions refers to PSA, which in turn refers to PSO § 5(4), or declares that certain information is deemed material in accordance with MPA § 10(3). Only instances where the party can act in a consumer/private capacity are enumerated, why provisions requiring a business character will not be mentioned. The #-numbers indicate the relevant annex forms for the provisions.

*Parliamentary acts Provision*

- # 1 Air Traffic Act (1957:297) § 9:10(2)<sup>208</sup>
- # 2 Air Traffic Act § 9:12<sup>209</sup>
- # 3 Air Traffic Act § 9:13<sup>210</sup>
- # 4 Work Environment Act (1977:1160) § 1:2(6)<sup>211</sup>
- # 5 Consumer Services Act (1985:716) § 33(2)<sup>212</sup>
- # 6 Radio and TV Act (1996:844) § 9:7<sup>213</sup>

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28]. The former provision does not state that the required information is “material” and therefore not individually requirable by the consumer (only that marketing not fulfilling the requirements is “unfair”), which is surprising considering the similarity with the latter provisions, which qualifies the same type of information (only differing in the type of service provider) as material. The former provision is referred to here of another reason, namely the explicit compulsory disclosure procedure connected to the explicit consumer information right. See also *e.g.* Tobacco Act (1993:581) § 15 (15 § tobakslagen, 1993:581) and Alcohol Act (1994:1738) § 12 (12 § alkohollagen, 1994:1738), which both states that marketing not fulfilling the requirements is “unfair” towards consumers, however not stating the information to be material.

<sup>208</sup> 9 kap. 10 § andra stycket luftfartslagen (1957:297). Consolidated by SFS 1986:166. Amended up to SFS 2009:777.

<sup>209</sup> 9 kap. 12 § luftfartslagen.

<sup>210</sup> 9 kap. 13 § luftfartslagen.

<sup>211</sup> 1 kap. 2 § sjätte stycket arbetsmiljölagen (1977:1160). Consolidated by SFS 1991:677. Amended up to SFS 2009:870.

<sup>212</sup> 33 § andra stycket konsumenttjänstlagen (1985:716). Amended up to SFS 2008:491.

<sup>213</sup> 9 kap. 7 § radio- och TV-lagen (1996:844). Amended up to SFS 2008:498.

- # 7 Radiation Protection Act (1988:220) § 5a<sup>214</sup>
- # 8 Flammable and Explosive Goods Act (1988:868) § 4(2)<sup>215</sup>
- # 9 Consumer Sales Act (1990:932) § 19(4)<sup>216</sup>
- # 10 Consumer Credit Act (1992:830) § 8<sup>217</sup>
- # 11 Consumer Credit Act § 9<sup>218</sup>
- # 12 Consumer Credit Act § 36<sup>219</sup>
- # 13 Medicine Act (1992:859) § 3 a<sup>220</sup>
- # 14 Personal Protective Equipment for Private Use Act (1992:1326) § 8<sup>221</sup>
- # 15 Safety of Toys Act (1992:1327) § 7<sup>222</sup>
- # 16 Dangerous Imitations of Foodstuffs Act (1992:1328) § 3<sup>223</sup>
- # 17 Package Travels Act (1992:1672) § 7(3)<sup>224</sup>
- # 18 Package Travels Act § 22<sup>225</sup>
- # 19 Medicine Technincal Products Act (1993:584) § 1(2)<sup>226</sup>
- # 20 Consumer Contract Terms Act (1994:1512) § 8<sup>227</sup>
- # 21 Money Deposit Guarantee Act (1995:1571) § 11 a(1)<sup>228</sup>
- # 22 Certain Environmental and Safety Requirements on Pleasure  
Boats (1996:18) § 3<sup>229</sup>

<sup>214</sup> 5 a § strålskyddslagen (1988:220). Amended up to SFS 2009:436.

<sup>215</sup> 4 § andra stycket lagen (1988:868) om brandfarliga och explosiva varor. Amended up to SFS 2009:439.

<sup>216</sup> 19 § fjärde stycket konsumentköplagen (1990:932). Amended up to SFS 2008:492.

<sup>217</sup> 8 § konsumentkreditlagen (1992:830). Corrected by SFS 2004:312. Amended up to SFS 2008:493.

<sup>218</sup> 9 § konsumentkreditlagen.

<sup>219</sup> 36 § konsumentkreditlagen.

<sup>220</sup> 3 a § läkemedelslagen (1992:859). Amended up to SFS 2009:811.

<sup>221</sup> 8 § lagen (1992:1326) om personlig skyddsutrustning för privat bruk. Amended up to SFS 2004:460.

<sup>222</sup> 7 § lagen (1992:1327) om leksakers säkerhet. Amended up to SFS 2004:461.

<sup>223</sup> 3 § lagen (1992:1328) om farliga livsmedelsimitationer. Amended up to SFS 2004:462.

<sup>224</sup> 7 § tredje stycket lagen (1992:1672) om paketresor. Amended up to SFS 2008:494.

<sup>225</sup> 22 § lagen om paketresor.

<sup>226</sup> 1 § andra stycket lagen (1993:584) om medicintekniska produkter. Amended up to SFS 2009:457.

<sup>227</sup> 8 § lagen (1994:1512) om avtalsvillkor i konsumentförhållanden. Amended up to SFS 2007:2.

<sup>228</sup> 11 a § första stycket lagen (1995:1571) om insättningsgaranti. Amended up to SFS 2009:698.

# 23 Duty of Reporting Certain Financial Business Activity Act

(1996:1006) § 6<sup>230</sup>

# 24 Consumer Protection in Time Share Contracts Act (1997:218)§ 6<sup>231</sup>

# 25 Consumer Protection in Time Share Contracts Act § 20<sup>232</sup>

# 26 Measures Against Noise and Pollution from Mobile

Machines Act (1998:1707) § 2(2)<sup>233</sup>

# 27 Investor Protection Act (1999:158) § 20(2)<sup>234</sup>

# 28 Payment Transfers within the European Economic Area Act

(1999:268) § 5<sup>235</sup>

# 29 Electronic Trade and Other Services of the Information Society

Act (2002:562)§ 15<sup>236</sup>

# 30 Vehicle Act (2002:574) § 1:2 a<sup>237</sup>

# 31 Vessels Safety Act (2003:364) § 6:12(2)<sup>238</sup>

# 32 Financial Advice to Consumers Act (2003:862) § 4(1)(3)<sup>239</sup>

# 33 Financial Advice to Consumers Act § 8<sup>240</sup>

# 34 Money Deposit Activity Act (2004:299) § 16<sup>241</sup>

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<sup>229</sup> 3 § lagen (1996:18) om vissa säkerhets- och miljökrav på fritidsbåtar. Amended up to SFS 2004:475.

<sup>230</sup> 6 § lagen (1996:1006) om anmälningsplikt avseende viss finansiell verksamhet. Amended up to SFS 2009:709.

<sup>231</sup> 6 § lagen (1997:218) om konsumentskydd vid avtal om tidsdelat boende. Amended up to SFS 2008:501.

<sup>232</sup> 20 § lagen om konsumentskydd vid avtal om tidsdelat boende.

<sup>233</sup> 2 § andra stycket lagen (1998:1707) om åtgärder mot buller och avgaser från mobila maskiner. Amended up to SFS 2004:1080.

<sup>234</sup> 20 § andra stycket lagen (1999:158) om investerarskydd. Amended up to SFS 2008:502.

<sup>235</sup> 5 § lagen (1999:268) om betalningsöverföringar inom Europeiska ekonomiska samarbetsområdet. Amended up to SFS 2009:69.

<sup>236</sup> 15 § lagen (2002:562) om elektronisk handel och andra informationssamhällets tjänster. Amended up to SFS 2009:359.

<sup>237</sup> 1 kap. 2 a § fordonslagen (2002:574). Amended up to SFS 2009:224.

<sup>238</sup> 6 kap. 12 § andra stycket fartygssäkerhetslagen (2003:364). Amended up to SFS 2009:501.

<sup>239</sup> 4 § första stycket 3 lagen (2003:862) om finansiell rådgivning till konsumenter. Amended up to SFS 2007:560.

<sup>240</sup> 8 § lagen om finansiell rådgivning till konsumenter.

<sup>241</sup> 16 § lagen (2004:299) om inlåningsverksamhet. Amended up to SFS 2009:362.

- # 35 Price Information Act (2004:347) § 12<sup>242</sup>
- # 36 PSA § 13<sup>243</sup>
- # 37 PSA § 26<sup>244</sup>
- # 38 Distance and Doorstep Selling Act (2005:59) § 2:8<sup>245</sup>
- # 39 Distance and Doorstep Selling Act § 3:6<sup>246</sup>
- # 40 Distance and Doorstep Selling Act § 4:4<sup>247</sup>
- # 41 Insurance Contracts Act (2005:104) § 2:9<sup>248</sup>
- # 42 Insurance Contracts Act § 10:10<sup>249</sup>
- # 43 Insurance Contracts Act § 19:8<sup>250</sup>
- # 44 Insurance Contracts Act § 20:6<sup>251</sup>
- # 45 Insurance Agency Act (2005:405) § 6:8<sup>252</sup>
- # 46 MPA § 24(3)(3)<sup>253</sup>
- # 47 Services on the Internal market Act (2009:1079) § 18<sup>254</sup>

*Governmental ordinances Provision*

- # 48 Payment Terms in Credit Sales Ordinance (1988:160) § 7<sup>255</sup>
- # 49 Marking of Textiles Ordinance (1993:969)§ 7<sup>256</sup>

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<sup>242</sup> 12 § prisinformationslagen (2004:347). Amended up to SFS 2008:507.

<sup>243</sup> 13 § produktsäkerhetslagen.

<sup>244</sup> 26 § produktsäkerhetslagen.

<sup>245</sup> 2 kap. 8 § distans- och hemförsäljningslagen (2005:59). Amended up to SFS 2009:1087.

<sup>246</sup> 3 kap. 6 § distans- och hemförsäljningslagen.

<sup>247</sup> 4 kap. 4 § distans- och hemförsäljningslagen.

<sup>248</sup> 2 kap. 9 § försäkringsavtalslagen (2005:104). Amended up to SFS 2008:509.

<sup>249</sup> 10 kap. 10 § försäkringsavtalslagen.

<sup>250</sup> 19 kap. 8 § försäkringsavtalslagen.

<sup>251</sup> 20 kap. 6 § försäkringsavtalslagen.

<sup>252</sup> 6 kap. 8 § lagen (2005:405) om försäkringsförmedling. Amended up to SFS 2009:363.

<sup>253</sup> 24 § tredje stycket 3 marknadsföringslagen.

<sup>254</sup> 18 § lagen (2009:1079) om tjänster på den inre marknaden.

<sup>255</sup> 7 § förordningen (1988:160) om betalningsvillkor vid kreditköp. Amended up to SFS 1989:217.

- # 50 Electrical Equipment Ordinance (1993:1068) § 2 a<sup>257</sup>
- # 51 Marking of Shoes Ordinance (1995:670) § 7<sup>258</sup>
- # 52 Prohibition of Certain Dangerous Lighters Ordinance (2006:1085) § 7 a<sup>259</sup>
- # 53 Prohibition of Certain Dangerous Lighters Ordinance § 7 c<sup>260</sup>

### **3. Are these rules mandatory or is the consumer allowed to abandon information rights in general?**

These rules are mandatory. Nonetheless, the general rule in Swedish private law is that a mandatory *private* law right may freely be given up *after* the claim has arisen, pecuniary or non-pecuniary. A waiver of mandatory rights (a settlement, a novation, or a unilateral waiver) will therefore generally be respected.

The opposite is however probably true for most information rights of public law nature, even if a waiver would affect the consumer's position in respect of private law. Also, one may qualify the abovementioned general private law rule on waiver. In a few consumer cases it has been found that the waiver must have been done in ignorance of the mandatory nature of that right and that the business had a duty to inform the consumer about the mandatory nature. This is a clear departure from the principle of *iuris ignorantia nocet*, but has so far only been done in cases where the consumer by mistake has revived a prescribed debt.<sup>261</sup> One may also question whether not private law rights aiming at the wellbeing of the consumer, such as the right embedded in Consumer Sales Act § 19(4) to invoke that goods are defect due

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<sup>256</sup> 7 § förordningen (1993:969) om märkning av textilier. Amended up to SFS 2008:515.

<sup>257</sup> 2 a § förordningen (1993:1068) om elektrisk materiel. Corrected in and amended up to SFS 2004:472.

<sup>258</sup> 7 § förordningen (1995:670) om märkning av skor.

<sup>259</sup> 7 a § förordningen (2006:1085) om förbud mot vissa farliga tändare. Amended up to SFS 2007:684.

<sup>260</sup> 7 c § förordningen om förbud mot vissa farliga tändare.

<sup>261</sup> Supreme Court cases NJA 2002 p. 358 and NJA 2004 p. 499.

to failure to provide safety information according to the PSA, ought to be treated in the same privileged way.

The information rights flowing from the principle of publicity are not waivable.

**4. Are information rights in general or in particular developed by case law? If so, have they been codified in the meantime?**

It is quite common that legislative action is preceded by case law, and one may also find examples of this concerning information rights. It would however probably be fair to say that information rights generally are created by legislation. When it comes to case law on contracts, the distinction between implication in fact (Swedish: *tolkning*; German: *Auslegung*) and implication by law (*utfyllning*; *Ausfüllung*) must be noted. When case law development is considered, it is primarily implication by law that comes to mind. If there is a development as to the implication in fact this is generally not thought of as a creation of rights, but merely an adjustment of the method of interpretation. If, however, the implication in fact concerning one specific contract type repeatedly discovers an information right, one might be able to speak of creation of rights through case law.

One example to show that it might be hard to determine the original source of a consumer information right is the Financial Advice to Consumers Act 2003. According to this act the advisor is obliged not only to give advice but also to advise the consumer to refrain from some ill-advised action proposed by the consumer. One may want to describe the current legislative basis as a mere codification of what follows from the fundamental purpose of the contract, or from case law implication, or as a specification of general fiduciary duties to act according to the interests of the principal as expressed in the almost obsolete Commercial Code 1736 §§ 18:3–4.

Provided that one may categorize defects due to lack of information as positively stating a right to information, there was some development of information rights in

older case law, supporting the theory on core characteristics (*kärnegenskaper*). According to the former Sale of Goods Act 1905 specific goods could be deemed defective only in cases of fraud or guarantee non-conformities. However, if the goods sold lacked the core characteristics of goods of that type, one could (fictitiously) assume a guarantee concerning those characteristics. The development of this theory became redundant at the adoption of the current Sale of Goods Act 1990, according to which a deviation from the buyer's reasonable expectations constitutes a defect, § 17(3).

Product liability was initiated and developed in case law long before the adoption of the Product Liability Act in 1992.<sup>262</sup> A part of product liability may be described as contractual or founded on unilateral promises, since liability may be based on guarantees and constructive guarantees. In cases of liability due to misleading information forming a constructive guarantee, one may say that the outcome is based on an infringement of a consumer information right.

The principle of publicity was enacted in the 1766 Freedom of Press Act. It has been kept principally unaltered since.

**5. Is the relation of the claims to information mentioned in questions A.I.2. and A.I.4. subsidiary or is there a concurrence between the different bases of claim? Are they (currently) in any way coordinated, maybe even integrated in a single code?**

There is no single code of consumer information rights, or any coordination between different types of information rights. Instead, one uses the division between public, contract and tort law. An information right in one of these fields does not disqualify an information right in another. Quite the opposite, the information rights in public law may support the finding of the same in contract and tort, and an information right in contract may support a similar right in tort.

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<sup>262</sup> Produktansvarslag (1992:18).

**6. If there are legal regulations on consumer information in your country: Can they primarily be assigned to private law, public law or criminal law? Why has this option of regulation been chosen?**

If we use the term consumer information in a narrow sense, *i.e.* only comprising legislation destined for business to consumer relations, most of the legislation is of private law nature. The main exception to this is marketing law rules, which are described as belonging to public consumer law.

However, if the concept is used in the broader sense used here, the norms on consumer information are primarily found in public law. Notwithstanding this fact, these norms may give concrete guidance in the application of more vague private law norms.

The reasons for these regulatory choices lay behind the legislative purposes. Rules concerning bodily safety should not be subject to party autonomy to the same extent as rules on consumer trade. Marketing law rules are made public law out of efficiency reasons. If marketing law would be restrained to contractual situations, much of the effect would diminish. There would be no *ex officio* surveillance of marketing methods and contract terms, and the reaction against unwanted behaviour would be binding only in the actual contractual relation.<sup>263</sup>

**7. In case the provisions can be assigned to private law, are they primarily contract law or tort law provisions?**

The private law norms (not necessarily statutory) are – at a nominal count – primarily found in contract law. However, tort law norms are generally of a more vague nature and may also apply cumulatively. In many of the public law provisions enumerated in A.I.2, there is no necessary contractual connection between the consumer and the business, and in some of the provisions the typical situation would rather be pre-

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<sup>263</sup> Cf. Governmental bill, *prop.* 2003/04:121, *Ny produktsäkerhetslag*, p. 60.

contractual. Whether a lack of information harms the consumer, it would in many cases be possible to invoke either or both contract and tort.

**8. What possibilities, besides the rights to information mentioned in questions A.I.2 and A.I.4 do consumers have in order to obtain information on the quality of products, work performances and services as well as on infringements, production processes or health hazards from authorities or private persons?**

As already mentioned the general rule is that public documents (incl. pictures, sound recordings and other sources of information) are freely accessible, which flows from the constitutional principle of access to public documents (the publicity principle, *offentlighetsprincipen*) as laid down in the current Freedom of the Press Act 1949 § 2:1.<sup>264</sup> Public documents comprises such material that has been received or generated by an official authority (state or municipal).

Tryckfrihetsförordningen, FPA (in Swedish TF), is of traditional reasons named as an ordinance, "förordning", even if it is a parliamentary act, "lag" (and even a "grundlag", a fundamental act, Grundgesetz.)

"Documents" and "public documents" are defined in FPA § 2:3 (2 kap. 3 § TF).

§ 2:3(1)

Document is understood to mean any written or pictorial matter or recording which may be read, listened to, or otherwise comprehended only using technical aids. A document is official if it is held by a public authority, and if it can be deemed under Article 6 or 7 to have been received or drawn up by such an authority.

"Recording" and "compilation" are defined in the second paragraph (as "paragraph" is understood in English):

§ 2:3(2)

A recording under paragraph one is deemed to be held by a public authority, if it is available to the authority using technical aids, which the authority itself employs, for communication in such form that it may be read, listened to, or otherwise

<sup>264</sup> Tryckfrihetsförordningen (1949:105).

comprehended. A compilation of information taken from material recorded for automatic data processing is however regarded as being held by the authority only if the authority can make it available using routine means.

Compilation is narrowed in by § 2:3(3):

A compilation of information taken from material recorded for automatic data processing is not however regarded as being held by the authority if the compilation contains personal information and the authority is not authorised in law, or under a statutory instrument, to make the compilation available. Personal information is understood to mean any information which can be referred back directly or indirectly to a private person.

The semiofficial translation uses the expression "private person". The usual English concept would, I believe, be "natural person". This paragraph makes a compilation, e.g. a register, a public document that is produced by one authority only within that authority or other authorities that uses that compilation. If, for example, the police has on line access to the enforcement authority's debtor register, the register is not a public document with the police, but with the enforcement authority. If a transcript of the register (or part of it) is made by the police, it is a public document with the police.

"Received" is defined in § 2:6:

A document is deemed to have been received by a public authority when it has arrived at the authority or is in the hands of a competent official. A recording under Article 3, paragraph one, is instead deemed to have been received by the authority when it has been made available to the authority by another in the manner indicated in Article 3, paragraph two.

Competition documents, tenders and other such documents which it has been advertised shall be delivered under sealed cover are deemed not to have been received before the time appointed for their opening.

Measures taken solely as part of the technical processing or technical storage of a document which a public authority has made available shall not be construed to mean that the document has been received by that authority.

The concept of “drawn up” [by the authority] is defined in § 2:7:

A document is deemed to have been drawn up by a public authority when it has been dispatched. A document which has not been dispatched is deemed to have been drawn up when the matter to which it relates has been finally settled by the authority, or, if the document does not relate to a specific matter, when it has been finally checked and approved by the authority, or has otherwise received final form.

The provisions of paragraph one notwithstanding, a document of the nature referred to below is deemed to have been drawn up

1. in the case of a day book, ledger, and such register or other list as is kept on an ongoing basis, when the document has been made ready for notation or entry;
2. in the case of a court ruling and other decision which shall be pronounced or dispatched under relevant provisions of law, and records and other documents insofar as they relate to such a decision, when the decision has been pronounced or dispatched;
3. in the case of other records and comparable memoranda held by a public authority, when the document has been finally checked and approved by the authority or has otherwise received final form, but not the records of Riksdag committees, auditors of local authorities, official commissions of inquiry or local authorities where they relate to a matter dealt with solely in order to prepare the matter for decision.

Working documents are thus not public documents, in the sense that they are accessible to the public.

A request under Freedom of Press Act can be made in any form. A request must contain enough information for the authority to understand what is sought for. A request is precise enough if it asks for all documents in one case file, all decisions of one specific type of matter or all case files of one specific type of matter. Is it then legally possible to overburden the authority? It used to be possible, but not under the new Publicity and Secrecy Act (2009:400), *offentlighets- och sekretesslagen*. §§ 6:4–5 of this states that information is to be given to individuals and authorities unless secrecy should prevail or it would hamper the due execution of the authority's tasks. Also, the fees for copies have a restraining effect, and the usual speed in the delivery of the documents will be slowed down if the request is burdensome, however workable, since the authority must *ex officio* conduct a secrecy test of all documents before handing them out.

There are limitations to publicity principle, with regard to the interests of individuals (private persons and businesses) and the community. The possibility to limit public access are set out in a general statute, the Publicity and Secrecy Act 2009.<sup>265</sup> According to § 30:23 secrecy prevails *inter alia* in state authorities' control and supervision of commercial life concerning facts related to individuals' business activities, subject to special legislation. This means that such information is public in want of specific statutory ground. However, the legislative support for secrecy is found in the Publicity and Secrecy Ordinance.<sup>266</sup>

PSA § 35(2) notes that the Publicity and Secrecy Act is applicable in public service. According to Publicity and Secrecy Act § 30:23(1)(1) and the Publicity and Secrecy Ordinance § 9(1)(1) secrecy prevails in cases of public supervision etc. concerning production, trade, transportation or business life in general for facts concerning individuals' business circumstances, inventions or research results if it can be assumed that the individual would be harmed by the revelation of the facts. The same applies for facts concerning other economic or personal circumstances for those (*i.e.* authorities and their employees) who have entered into business or similar relations with the individual, Publicity and Secrecy Act § 30:23(1)(2) and and the Publicity and

<sup>265</sup> *Offentlighets- och sekretesslag* (2009:400).

<sup>266</sup> *Offentlighets- och sekretessförordning* (2009:641).

Secrecy Ordinance § 9(1)(2). The government may in a certain case deviate from Publicity and Secrecy Act § 30:23(1)(1) and declare facts to be public if the government finds it to be important that the facts are revealed.

Secrecy prevails in municipal authorities' dealings concerning permission and handling of flammable goods, Publicity and Secrecy Act § 30:28. This does however not apply for decisions.

In the product safety area the Publicity and Secrecy Ordinance make exceptions from secrecy if the public interest of circumstances concerning the risk of bodily harm is of such a weight that the facts should be revealed.<sup>267</sup> In relation to some provisions also the interests of the health of individuals, the environment and good faith and fair dealing in business may outweigh the interest of secrecy.<sup>268</sup>

There are non-governmental organizations, and organs that are formally detached from the governmental structure thus being of private character, that have some impact. The NGO Sveriges Konsumenter is well known, and it runs the formerly state owned well-spread and renowned consumer magazine Råd & Rön.<sup>269</sup> The Swedish Consumers Insurance Bureau is run by the governmental authorities the Swedish Consumer Agency and the Financial Supervisory Authority together with the Swedish Insurance Federation, the trade association of Swedish insurance companies.<sup>270</sup> The Swedish Consumers Banking and Finance Bureau is similar.<sup>271</sup> These bureaus have considerable impact on consumer behaviour.

<sup>267</sup> Cf. Publicity and Secrecy Ordinance Annex, no. 119–121.

<sup>268</sup> Cf. Publicity and Secrecy Ordinance Annex, no. 124.

<sup>269</sup> <http://www.sverigeskonsumenter.se/>

<sup>270</sup>

[http://www.konsumenternasforsakringsbyra.se/artikel/article.asp?\\_tp\\_article\\_id=54&avd=ART\\_CON&menu=ART\\_CON](http://www.konsumenternasforsakringsbyra.se/artikel/article.asp?_tp_article_id=54&avd=ART_CON&menu=ART_CON)

<sup>271</sup> <http://www.konsumentbankbyran.se/content.asp>.

**9. Do the authorities or persons mentioned in question A.I.8 receive general funding by the state or a remuneration/reimbursement from the state for specific actions relating to informing consumers?**

No, not to the reporters' knowledge, apart from the fact that the abovementioned bureaus are partly state owned. A public authority may however apply for higher grants in order to be able to make special efforts, such as having information campaigns.

**10. Are the authorities mentioned in question A.I.8 or the issued information controlled by the state (through random samples)?**

Public authorities and private organs with public functions are being monitored by other public authorities such as higher authorities, courts, the Swedish National Audit Office, the Parliamentary Ombudsmen and the Chancellor of Justice. The three last mentioned regularly audit public authorities randomly, *ex officio*.

## **II. Historical development**

**1. When, in what context and for what reasons were the rights to information and the consumer information institutions mentioned in A.I.2. to A.I.10. established?**

*Notice: A genesis of each norm or history of each consumer protection institution is not necessary. A brief depiction of the essential development lines is sufficient.*

PSA had its forerunner with a wider applicability in the 1988 Product Safety Act.<sup>272</sup> Before PSA 1988, there were only some provisions in the 1975 Marketing Practices Act on the prohibition of marketing unsafe products.<sup>273</sup>

<sup>272</sup> Produktsäkerhetslag (1988:1604).

<sup>273</sup> Marknadsföringslag (1975:1418).

As mentioned before, the principle of publicity stems from the Freedom of Press Act 1766.

**2. Can certain waves in the establishment of information rights be distinguished in your country? Were they released within a mutual context (in terms of time and subject matter)?**

Yes. Most of these waves are clearly induced by EC legislation.

**3. Have there been phases of counteracting or correction? Has the extent of the rights to information or the involved group of people at some point been highly extended, restricted, modified or defined?**

Yes, there have been waves of adjustments, also clearly induced by EC legislation.

**4. What were the reasons for a legislative action?**

Mostly implementation of EC legislation.

### **III. Private sources of information**

**1. What is the role of voluntary product information given by businesses within the consumer information system in your country? What percentages of businesses provide this kind of product information or participate in voluntary control systems? What are (possible) reasons for low participation?**

**Are there voluntary agreements of businesses to provide certain information?**

Voluntary product information is hard to discern from marketing. There is of course a massive information flow from businesses to consumers that cannot be explained by the existence of legislation.

If measures must be taken to counteract the risk for bodily harm, the relevant authority must take up negotiations with the business in order to make the business to take necessary action on a voluntary basis. This does not apply in urgent matters or when the facts indicates that negotiations would not be useful, PSA § 32.

The reporters' are unaware of any statistics concerning voluntary product information. There are voluntary agreements between businesses to provide certain information to their customers. This is not seldom the case within business associations within specific trades.

**2. If there are voluntary agreements in your country to provide information, as mentioned in question A.III.2: In what way are these information provided to the consumer? Does the state review the accuracy of the information (with random samples)?**

The voluntary agreements can oblige the business to provide the information in its marketing, precontractual information and in standard form contracts. It is unusual for state organs to perform random review actions, and to the reporters' knowledge, this is never done specifically concerning information rights.

## **Part B. General view of the consumer information regulations**

### **I. Questions going beyond individual bases of claims**

#### **1. General considerations**

*a. In case your country does possess consumer specific information provisions:*

*To what subject of matter do they apply? If Regulation (EC) 178/2002 applies in your country: Does the specific information law for consumers regard areas other than food law?*

The PSA applies to all types of goods and services, apart from antiques and goods that are to be renovated or repaired, § 3. Some provisions in PSA does not apply when there is specific product legislation covering the same subject, §§ 4 and 5.

*b. Does a rule state an information duty in your country, in case a person is offered products, services or work performances, which do not fulfill the particular security requirements?*

The information supplied is an important factor in the assessment of whether the security requirements are fulfilled, PSA §§ 9(2) and 10(2).

*c. Is there a term for maturity of information (information must/should not be handed on regarding to the age of the data)? If so, what is the time limit after which information are regarded as too old?*

There is no such general term. As to food stuffs and medical products, most products must be labelled with a best before date. For vehicles, elevators and other machinery that must be inspected regularly, there are labels indicating when next inspection is due.

*d. Concerning the question, whether there is a right to information: is the interest of the consumer measured against the interests of the general public or other involved parties, e.g. regarding costs? For which bases for claim?*

In legislative preparation the benefits of a measure is always compared with the costs. Cost-benefit analysis is also an important factor in applying tort and contract law.

## **2. Dealing with (supposedly) incorrect or incomplete information**

*a. What constitutes a breach of the duty to inform? How is a breach determined? Which problems occur in practice? Are there any proposals for solutions? Who bears the burden of proof that the information issued is incorrect?*

Incorrect or insufficient information would constitute a breach of the duty to inform. Whether a breach will have a sanction will depend on the circumstances in the particular case. The burden of proof of that information received from another person is incorrect generally lies on the person claiming that the information was incorrect.

*b. If the breach of the duty to inform entitles to claim for damages: Is this claim dependent on negligence? Which other requirements and objections are decisive? (How) Can the authority/the company free itself from liability? How is the situation handled if information turns out to be wrong later on, but seemed correct according to the state of knowledge when the information was given?*

For most cases a right to damages require negligence. In the case of consumer sales and consumer services, however, a damage caused by a defect entitles the consumer compensation unless the business is able to show that the defect arose as a consequence of an impediment beyond its control and which the business could not reasonably have been expected to have anticipated at the time of the sale and the consequences of which the business could not reasonably have avoided nor overcome, Consumer Sales Act § 30(1) and Consumer Services Act § 31(3).

Authorities may be liable for negligent use of authoritative power, Tort Act (1972:207) § 3:2 or for providing erroneous information or advice negligently, § 3:3.<sup>274</sup> The State was, before the amendment of § 3:3, in one case not found liable though the Swedish Consumer Agency was found to have acted negligently in informing the public of car seal wax products.<sup>275</sup> Today, this would found liability.

*c. How is the damage calculated?*

*Are moral damages compensated in case of violation of the duty to inform? If yes: Under which conditions?*

*Are punitive damages (or similar) granted in case of violation of the duty to inform?*

A right to damages generally presupposes economic loss. Moral damages are compensated only in certain cases specified in legislation, which are not present here. Punitive damages are not used.

*d. When exactly commences the limitation period for claims based on the breach of the duty to inform? What is the statutory limitation period?*

The commencement of the limitation period for these claims depend on the foundation of the claim. The general prescription period is ten years counting from the rise of the damage, Limitations Act § 2(1).<sup>276</sup> If the claim is based on contract law legislation, the limitation period may be shorter. In the case of consumer sales<sup>277</sup> and consumer services,<sup>278</sup> the period is three years commencing from delivery of the goods or services.

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<sup>274</sup> 3 kap. 2 och 3 §§ skadeståndslagen (1972:207).

<sup>275</sup> See the Supreme Court judgment NJA 1987 p. 535.

<sup>276</sup> Preskriptionslag (1981:130).

<sup>277</sup> Consumer Sales Act § 23(3).

<sup>278</sup> Consumer Services Act § 17(1). A limitation period of ten years is applicable for services on real property, § 17(1).

*e. Does the business have the possibility/right to correct or comment (incorrect) information issued by authorities in public (right to a counterstatement)? And is it published (automatically) by the authority, if the situation in the respective company improves?*

There is no positive right to correction or similar. There is however a right to damages.<sup>279</sup>

## **II. The right to receive information from authorities**

### **1. Provision, processing and control of information by authorities**

*a. Is the authority obliged to check whether information that is to be released is correct?*

*If there is no such obligation: Is it at least obliged to communicate doubts it is aware of with regard to the correctness of the information?*

This depends of how the question is understood. If someone, voluntarily or in the course of fulfilling a duty, sends a document to an authority, there is no obligation to check the correctness of the information before releasing it upon request. In the case of documents or oral information produced by the authority itself there is of course an obligation to strive for correctness, which may ultimately be founded on the constitutional obligations observe objectivity and impartiality, Instrument of Government § 1:9. The authority is also obliged to help the public and to express itself clearly and comprehensibly, Administration Act §§ 4 and 7.

The authority may issue warning information when such information cannot be prescribed someone capable of issuing warning information. Before issuing the warning information the authority ought to give the business an opportunity to express its opinion on the matter.<sup>280</sup>

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<sup>279</sup> Tort Liability Act (1972:207) §§ 3:2–3. 3 kap. 2 och 3 §§ skadeståndslagen (1972:207).

<sup>280</sup> Governmental bill, *prop.* 1988/89:23 *om produktsäkerhetslag*, p. 110.

The publicity principle is applicable also for the supervisory activity, but the principle of proportionality embedded therein may speak for secrecy.

*b. Is the authority obliged to ensure that information is comprehensible (e.g. for assessing technical measurements, or scientific doubts in risk assessment)? If yes, what is the scope of its obligation to process information?*

Authorities are obliged to conduct their activities objectively and based on facts. Authorities that are established to counteract safety hazards must of course estimate whether the businesses surveilled fulfil their obligations. If the authorities find that the information issued by the businesses is incomprehensible and that this causes risks, the authorities may take action, see A.I.2.

The publicity principle is applicable also for the supervisory activity, but the principle of proportionality embedded therein may speak for secrecy, see question before.

*c. Is the consumer entitled to claim a more rapid collection of information (in cases of delay)?*

No. Any person may criticize the authorities, and to file complaints to authorities auditing other authorities, but there is no positive right to claim action in a certain case.

*d. In how far is the flux of information between authorities guaranteed? Is there a joint database?*

*Are authorities obliged to notify and/or hand on specific information to other authorities?*

*In how far are authorities connected to a European information network or in how far is this planned?*

Public authorities has a general duty to assist other authorities, Administration Act 1986 § 6.<sup>281</sup> The reporters cannot give a full picture of the level of cooperation between national authorities. However, in the case of product safety, the supervising

<sup>281</sup> 6 § förvaltningslagen (1986:223).

authorities has a duty to instantly notify the Swedish Consumer Agency of decisions, recommendations, agreements with businesses and businesses own actions concerning product safety.<sup>282</sup> In the areas of food stuffs and medical products a high level of coordination seem to have been developed between a large number of authorities coming into contact with these types of products.<sup>283</sup> From these examples, the reporters' assume that the general level of cooperation and coordination is high.

Cooperation between European authorities seem to be the rule. In the case of product safety, the Swedish Consumer Agency has a duty to instantly pass on information received from national authorities and its own actions to the European Commission.<sup>284</sup> The agency shall also receive and pass on information from the Commission to the national authorities.<sup>285</sup> In the food stuffs area there is a close cooperation between the authorities of the Nordic countries.<sup>286</sup> The National Food Administration also follows the work of the the European Food Safety Authority (Efsa).<sup>287</sup> The Medical Products Agency strives for active participation and influence in the work of the European Medicines Agency (EMA).<sup>288</sup> The Swedish Work Environment Authority cooperates with the Senior Labour Inspectors Committee (Slic).<sup>289</sup>

<sup>282</sup> Information Exchange within the EEA concerning Hazardous Consumer Goods Ordinance (1993:1322, reprint 2004:473) §§ 3, 4 and 7; 3, 4 and 7 §§ *förordningen (1993:1322, omtryck 2004:473) om informationsutbyte inom EES i fråga om farliga konsumentvaror.*

<sup>283</sup> As to food stuffs, cf. <http://www.slv.se/sv/grupp2/Import-och-export/Allman-information-om-livsmedelsimport-och-handel-inom-EU/> and <http://www.slv.se/sv/grupp2/Livsmedelskontroll/Sa-har-fungerar-livsmedelskontrollen-/#vad> from where it follows that the National Food Administration cooperates with a large number of authorities such as the municipalities and counties of Sweden, the Swedish Board of Agriculture, the Medical Products Agency and the Swedish Customs. As to medical products, cf. <http://www.lakemedelsverket.se/malgrupp/Halso---sjukvard/Forskrivning/Veterinarmedicinska-lakemedel/> concerning veterinary medical products. According to the Instruction for the Medical Products Agency Ordinance § 5 the agency shall cooperate with the Swedish Consumer Agency; 5 § *förordningen (2007:1205) om instruktion för Läkemedelsverket.*

<sup>284</sup> Information Exchange within the EEA concerning Hazardous Consumer Goods Ordinance §§ 5(1)–(2), 6(2) and 8.

<sup>285</sup> Information Exchange within the EEA concerning Hazardous Consumer Goods Ordinance §§ 5(3) and 6(1).

<sup>286</sup> <http://www.slv.se/sv/Internationellt/Nordiskt-samarbete/>

<sup>287</sup> <http://www.slv.se/sv/Internationellt/Efsa---myndigheten-for-livsmedelssakerhet-/>

<sup>288</sup> <http://www.lakemedelsverket.se/overgripande/Om-Lakemedelsverket/Verksamhet/Samarbete-inom-EU/>

<sup>289</sup> <http://www.arbetsmiljoverket.se/inspektion/>

*e. How is provision and dissemination of information ensured in less densely populated areas or for particular population groups (senior citizens, handicapped people, migrants)?*

Public authorities has a service obligation towards the public. The service must be given to a suitable extent concerning the question at hand, the individual's need of help and the authority's activities, Administration Act § 4(1). The adequacy of product safety information is *inter alia* regarded on the basis of the risks for certain groups of consumers, especially children and elders, PSA §§ 9(4) and 10(4). The reporters are unaware of any special public authority measures for certain groups of inhabitants within the field of consumer information. Authorities and general, consumer friendly information about their work are easy to find on the Internet.

*f. Does the State carry out quality controls in certain areas regularly?*

*If yes, in which areas?*

*Is a business obliged to accept such controls? Are there any legal/actual possibilities known about how such controls can be circumvented or falsified?*

*Are the results of these control measures accessible, upon request or without making a request?*

The reporters are unable to describe how the supervision takes form in the whole consumer information area. In the product safety area the relevant authorities have a right to access areas, buildings and other spaces where goods are handled, however not dwellings, PSA § 26. A possible way of circumvention would be to store the products in an eledged dwelling. CE marking is often left for the individual business to accomplish. This is of course a less credible system than to let all marking be subject of state authorization. In the area of food safety there is a system of self control, which of course may be misused. For a few years ago Swedish media reported that a large food store chain systematically repacked and remarked minced meat. It might have been a case of misunderstanding of the rules, but there is certainly room for abuse.

Regularly or continuously controlled products are *inter alia*

- motor vehicles<sup>290</sup>
- assembly tents<sup>291</sup>
- amusement park appliances<sup>292</sup>
- elevators<sup>293</sup>
- workplaces<sup>294</sup>

medical products<sup>295</sup>

The control results are to the knowledge of the reporters not objects of automatic and continuous publication. However, they are accessible upon request. The publicity principle may be invoked to get access to information as to what businesses has not complied with public requirements.

## 2. Organisation of authorities

*a. Is a central authority (maybe especially designed for these purposes) responsible for handling the requests for information? Or is the respective authority responsible for the requests that possesses the information or is able to examine the matter?*

*How can the consumer find the competent authority? Are there (on the internet/in a telephone exchange) joint contact points or contact persons?*

*What happens with requests directed at the wrong authority?*

There is no central authority for requests of information in general.

As to product safety, the Swedish Consumer Agency is responsible for the supervision of PSA, unless another public organ has been identified as supervising authority in legislation. The Swedish Consumer Agency is also responsible for making the

<sup>290</sup> Vehicle Act § 2:9.

<sup>291</sup> Inspection of Assembly Tents Ordinance § 4; *förordning (1993:1633) om besiktning av samlingsstält*.

<sup>292</sup> Inspection of Amusement Park Appliances Ordinance § 3; *förordning (1993:1634) om besiktning av tivolianordningar*.

<sup>293</sup> Control of Elevators and Certain Other Motor Driven Appliances in Building Structures Ordinance § 5(2)(2); *förordning (1999:371) om kontroll av hissar och vissa andra motordrivna anordningar i byggnadsverk*.

<sup>294</sup> <http://www.arbetsmiljoverket.se/inspektion/>

<sup>295</sup> Medical Products Agency, Myndighetssamarbete och förbättringsförslag för säkerhetsuppföljning av läkemedel, Rapport, December 2005, p. 4.

Commission's references to the CE standard public in Sweden by announcements. The agency is furthermore responsible for communicating measures taken in the area of product safety – even where the agency is not the supervising authority – but that does not extend to an overarching coordinative function. Instead the supervising authorities seem to organize the coordination between themselves, see B.II.1.d. For instance, in the food sector, there is internal coordination between the National Food Administration, the Board of Agriculture, the Customs Office, the Medical Products Agency and the municipal health administrations.

If an individual addresses the wrong authority by mistake, the authority "ought" to direct the individual to the right authority, Administration Act § 4(3). The "ought" is construed as an obligation, with the exception of deliberate misdirections.<sup>296</sup>

*b. Are there any time limits for handling requests? If yes: What are the time limits? Are they usually abided by?*

*How is ensured that similar or parallel requests do not cause too much administrative work?*

No, there are no specified time limits, only the general duty to handle requests as soon as possible, Administration Act § 4(2). Authorities generally seem to abide by this duty. In the vast majority of the cases the request is approved and the documents delivered the same day as the request was made.

The reporters are unaware of how the authorities deal with similar or parallel requests. On the European level it seems that the cooperation is aimed at efficient work division, see B.II.1.d.

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<sup>296</sup> Cf. Jermsten R., *Förvaltningslag (1986:223)*, Karnov Lagkommentarer på Internet, per July 1, 2009, n. 11 with references.

### **3. Public Databases**

*a. Which kind of information is available via databases (e.g. on the internet)? Does the access to or use of these data depend on additional criteria (age of the consumer, potential interest in receiving the information required)?*

The Internet databases of the authorities are generally quite large. They usually contain or link to the relevant legislation, and a user friendly description of the authorities' general mandate, their organization, their sanction system and their place in the hierarchy of public authorities, and their relationships with other authorities.

At least the National Work Environment Authority and the Medical Products Agency has recently made their diary list (*i.e.* a list on current applications and decisions concerning individual control etc.) available on the Internet, indicating the individual businesses' names. In the food sector, where the practical supervision generally is conducted locally by municipal administrations, the publicity function seem to rely on media.

Generally, the provision of information is not subject to additional criteria. However, the access to personal data of others may be subject to the purpose of the person asking for the information.

*b. Are results of official quality or safety controls automatically made accessible online free of charge? Does the state compile and publish on the internet rankings concerning the performance of businesses with regard to the results of the control?*

No, not to the knowledge of the reporters.

#### **4. Warning notices**

Under which conditions are authorities entitled or obliged to issue product, services or work performance warnings? How certain must the correctness of the information be?

PSA § 33 obliges the relevant authorities to issue warning information when such information or recall cannot be prescribed someone capable of issuing warning information or conducting a recall. The certainty of correctness of the information is not discussed in the preparatory works of PSA or its forerunner.<sup>297</sup>

### **III. Guaranteeing the protection of companies and data**

#### **1. Industrial and business secrets**

*a. Are there specific rules for cases in which consumer information rights collide with business law, especially provisions concerning competition rules or trade and business secrets? If so, please name these rules.*

Yes. For instance, PSA § 35(1) forbids everyone involved in a supervision matter to reveal business circumstances in an unauthorized manner.

For the purposes of the Act on the Protection of Trade Secrets ((1990:409) § 1(1); 1 § första stycket lagen (1990:409) om skydd för företagshemligheter) a “trade secret” means such information concerning the business or industrial relations of a person conducting business or industrial activities which that person wants to keep secret and the divulcation of which would be likely to cause a damage to him from the point of view of competition.

Information is defined in § 1(2):

The term “information” comprises both information documented in some form, including drawings, models and other similar technical prototypes, and the knowledge of individual persons about specific circumstances even where it has not been documented in some form.

<sup>297</sup> *Prop.* 2003/04:121, p. 130 and 197. *Prop.* 1988/89:223, p. 112 ff.

*b. If industrial and business secrets are exempt from the obligation to release information in your country:*

*What is the definition of industrial and business secrets in your country?*

*Who decides whether specific information constitutes an industrial or business secret or not?*

*If businesses are deciding the previous question: Is there a negative list indicating which kind of information needs in no way be protected as industrial or business secrets or as other privileged information?*

Business secrets may be exempt from publicity, see a. There is a statutory definition of business secrets in the Business Secrets Act § 1,<sup>298</sup> but this definition is not decisive – however probably of some guidance – for the application of the Publicity and Secrecy Act.<sup>299</sup> Public authorities and, on appeal, courts decide whether facts are to be revealed or not. A consequent application of a definition of business secrets in relation to the Publicity and Secrecy Act is complicated by the fact that in cases where it is found that secrecy should prevail, it is not possible to learn what was decisive for anyone else than the authority or court handling the request.

*c. Can an authority inform a business if it releases information on the latter, or does it have to? If the company is informed, does this happen before, at the same time or after the release of the information? Can the business object to the release?*

Before an authority takes action, it should initiate negotiations with the business, PSA § 32. This does not apply in matters of urgency.

Requests to hand out public documents are not forwarded, nor generally notified to the person the information relates to, and approvals of such requests may not be appealed by that person. The authority may however find it necessary to inform itself on the nature of the documents by asking that person questions.

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<sup>298</sup> Lag (1990:409) om skydd för företagshemligheter.

<sup>299</sup> Cf. Publicity and Secrecy Act § 6:4.

A business is not informed when a request of public documents concerning the business is made. The procedure is not of contradictory nature. The interests of the business are to be regarded by the authority *ex officio*. A decision to release information cannot be appealed, Publicity and Secrecy Act § 6:7 *e contrario*.

*d. Does your country have any experience with an opposing party's right to adopt a transaction for themselves in the way that the entitlement to receive information on a company from an authority must be denied if the business agrees to provide the information itself?*

Not to the reporters' knowledge. Such an agreement would not affect the right to access public documents.

## **2. Data protection**

*a. What is the role of data protection in the framework of releasing information and how is data protection ensured?*

*Personal data of individuals is generally protected by the Personal Data Act.<sup>300</sup>*

*b. May authorities pass on the name and address of persons having made a request to receive information on a company to its entrepreneurs?*

No.

*c. Which are the limits of providing information in your legal system?*

The answer would very much depend on who is supposed to provide information and under what circumstances. As described before, information within public authorities are generally public. There are no age limits. There are, however, rules on filing, whereas older documents are sorted out in clearly specified manners. Infor-

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<sup>300</sup> Personuppgiftslag (1998:204).

mation held by private entities does generally not have to be revealed by the entities.

Publicity and Secrecy Act consists of a number of exemptions. Enclosed to the report is a list of the titles to the Act.

The secrecy test is individual for every request. A secrecy marking of a document is only of indicative nature, Publicity and Secrecy Act § 5:5. There is no general obligation to mark documents with secrecy marks, but the authority may, facultatively, do so. Mandatory secrecy marking only applies to documents of great importance to national security, § 5:5.

Publicity and Secrecy Act chapters 15–20 deal with secrecy founded on public interests: Secrecy for the protection of national security or relations to other states or international organizations (15), the central finance policy, monetary policy or currency policy (16), public authorities conducting inspections, control or other supervisory measures (17), foremost of the interest of the prevention and punishment of crime (18), the economic interests of the public (19) and preserving species of animals and plants (20). Chapters 21–40 deal with the protection of individuals' personal and economic interests. All of these rules may be understood as exceptions from publicity.

For the purposes of this research project I believe that Publicity and Secrecy Act chapters 9, 17 and 30–33 are the most relevant.

There are three different levels of secrecy tests: Provisions may contain a direct condition of harm. In these cases publicity is the rule and secrecy is the exception. Only if a protected interest mentioned in the provision is harmed by making the information public secrecy will prevail. Provision may contain an indirect condition of harm. In these cases secrecy is the rule. The information will be released only if the protected interest is not harmed. Provisions may contain no condition, which therefore means absolute secrecy. There are only a few instances of absolute secrecy

(for example in public procurement until all offers are made public or the decision is made public, Publicity and Secrecy Act § 19:3(2), and in taxation matters, § 27:1–2). There are also provisions overriding secrecy and exceptions from secrecy, those of general or wide application gathered in Publicity and Secrecy Act chapter 10. Overriding secrecy means that secrecy will not be upheld even if other rules would lead to secrecy. Some examples are consent by the individual affected, access for the parties of the matter, see also Administration Act (1980:223) §§ 16–17, information concerning the environment, the power given to the Parliament and the Cabinet to make exceptions *in casu*, and the same organs' right to gain access to all documents. An authority may also release documents under certain conditions, e.g. Publicity and Secrecy Act § 6:4 stating that a party or a person representing a party may be forbidden to reveal the information to others.

In § 9:3 there is a reminder that the Protection of Business Secrets Act contain rules that apply outside of Publicity and Secrecy Act. The interplay between these can be said to be that the authority cannot apply the Protection of Business Secrets Act in order to reject a request of a document held by the authority. Instead it may apply chapters 30 or 31. In § 30:23 there is a provision of general application which is intended to protect business secrets that have been received by authorities in the course of investigation, planning, price regulation, permission or support matters in relation to production, trade, transportation or business life in general. The harm condition is indirect for information concerning the business and it is absolute for other information concerning third parties with business relations to the business affected. § 30:23 must be effected by the Cabinet through an ordinance. It has been effected by the Publicity and Secrecy Ordinance § 9 and the Annex to that provision. For example secrecy applies to investigation, planning and supervision by the Swedish Consumer Agency or the Consumer Ombudsman, Annex no. 19. The secrecy for affected businesses is overridden if the interest of public knowledge of circumstances concerning health, the environment or the good faith and fair dealing in trade, or some similar general interest carry such weight that the information ought to be released.

#### **IV. Specific aspects of (pre-) contractual rights to information**

*Notice for reports from EU member states: The mere implementation of the EU directive 2001/95/EC should not be mentioned because the directive is known. Therefore, only overshooting implementation or other specific aspects in implementing the directive are relevant.*

##### **1. Minimum information**

*Is it the entrepreneur's legal duty or is he obliged to inform the consumer about certain facts before the conclusion of a contract?*

*If yes: Is there a specific form requirement as to how the information has to be given?*

One may describe the lack of satisfactory communication of facts to a consumer concerning a product that a consumer is about to purchase as an infringement of a legal duty to inform. In some consumer contract legislation there are form requirements.

##### **3. Legal consequences**

*Do consumers have any rights in case they have not received the necessary information (cancellation of contract, compensation for damage)?*

*If yes: Is this right subject to a time limit and what is the time limit?*

Yes. For example, if a consumer credit contract has not been made up in writing, the creditor may not invoke terms that are less advantageous for the consumer than the default rule. In other cases, such as in consumer building contracts and consumer financial advice contracts, the burden of proof concerning the meaning of the contract is placed on the business. A lack of information may also lead to the conclusion that there is a fundamental breach of contract and that this breach entitles the consumer to terminate the contract or that the consumer is entitled to price reduction and/or damages. As for sometime limits, see B.I.1.d.

### **3. Other functionally equivalent rules**

Does your country's legal system provide other rules intended to protect consumers from concluding a contract without having all necessary information?

Yes, not the least market law rules.

## **V. Practical effects of the rules**

### **4. Which are the most important norms for consumer information?**

This is hard to evaluate. Contract law, product liability law, product safety law and the principle of publicity are all very important.

### **5. If your country possesses data on this question: Which bases for claims/causes of action are most often used by consumers, which by consumer associations?**

Non public consumer associations have not been that active in Sweden. This may be explained by the fact that the Swedish Consumer Agency, the municipalities' consumer advisors and some other consumer organs are working efficiently. The Swedish Consumer Agency is mostly active in the field of market law. Consumers most often invoke contract law rules, while NGO:s probably mostly uses the publicity principle.

### **6. Why are these bases for claims/causes of actions the ones most frequently used?**

Probably because they best serve the interests of the ones invoking them. If a consumer finds a product to be inferior, the consumer probably directs his or her energy to show that directly, rather than collecting information on the product type.

**7. If there are any statistic data on this issue: How often are requests made, on which basis and on which subject matter?**

The reporters are unaware of such statistics. Taking notes of requests could maybe be construed to be unconstitutional regarding the prohibition laid down in the Freedom of Press Act § 2:14(3) to ask the person of identity or purpose of the request of the public document.

**8. What were the main reasons for the information to be denied? Inability of the requester to meet formal requirements, or the fact that the information required was not available or that the information requested was protected as industrial or business secrets or for other considerations?**

If the authority cannot identify what document is requested, one may say that the requester has failed to meet the formal requirements. This is probably not very common. The probably most common ground for refusal is social and economic integrity of natural persons.

**9. Did individual (consumer) rights to information or different norms in their interaction lead to undesired side-effects in practice?**

Whether this is the case is hard to analyze, but probably, in the form of costly procedures of informing consumers of less important facts.

**10. If yes: In how far, and what was the reason? Change in the behaviour of the addressees of the norm, or unintended interaction of several provisions that were originally intended for other purposes?**

The reporters' are unaware of how farreaching unwanted side-effects have gone, and also of the reasons.

**11. Did individual rules concerning information lead to unexpected positive developments, for example the development of new products or mechanisms for quality control?**

See 7.

**12. Were there other economic or social impacts?**

The reporters are unaware of this.

**13. How long does it take, on average, to handle a request for information? Are there any maximum time limits by law and are they abided by?**

See 4, and B.II.2.b if the question is aiming at requests directed to public authorities.

**14. If repeated offenses against product standards (precisely: food safety standards) in a specific product category (precisely: meat) occurred in your country: Who would react to this information, how quickly and on which basis? From whom does the consumer receive the information first, and for which reason? In case of public warnings: Are the entrepreneurs or the product mentioned (notwithstanding the impacts on the whole industry or a specific producer)?**

Apart from that consumers and media would react if it would become known to them, the National Food Administration and the relevant municipalities' food inspectors would react. The authorities would hopefully react as fast as the circumstances would call for. The basis would according to the question be repeated offenses against product standards. The consumer would probably receive the information first from media or from public authorities acting through media. In general, information is usually precise enough as to point out who has wronged and where this has happened.

## **VI. Product labelling and quality control**

### **1. Is there a mandatory system for product labelling in your country, e.g. obligation to label goods or services that are harmful to health?**

Examples: traffic lights-labels for food, smileys for food companies, choking sizes for baby articles...

Yes.

2. If there is an obligation to label products/services in your country, please describe the labelling system. The following questions are of great interest to us:

*a. Where and how are the results published?*

The labels are usually attached to the product.

*b. Is the entrepreneur entitled to make a counterstatement or statement?*

Not applicable, see a. If a business finds that the supervising authority has applied the rules in a wrong way, the business may appeal to an administrative court.

*c. If the entrepreneur is obliged to publish product information or results of control measures himself on the product or in the company: in which form, at which place and in which time limit does he have to publish this information?*

The starting point is that products must meet statutory requirements, and if they do not, they are not marketable. The supervising authority may however, in accordance with the general principle of proportionality, give the business some time to amend its products, for instance by relabelling them, if the circumstances does not call for urgent action. The form, place and time limit is therefore dependent on the circumstances in the actual matter.<sup>301</sup>

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<sup>301</sup> *Prop.* 2003/04:121, p. 184 f.

*d. Which sanctions might a company face in case of lacking or outdated information? Are there fines/administrative fines for entrepreneurs who deliberately and falsely advertise their products/services with positive control outcomes or labels?*

The sanctions that may be used according to PSA are injunctions on providing information, labelling and product recall, sales bans, sanction fees and fixed sum penalties. Beside of this system there are sanctions for misleading commercial practices under the Marketing Practices Act. None of the sanctions according these acts require deliberate misbehaviour. Most of the sanctions are strict, and the sanction fees in these acts may be imposed in the case of negligence.

*e. For how long are entrepreneurs entitled to advertise their products/services with positive control outcomes or labels?*

There are no fixed time limits.

*f. Who carries out the quality and/or safety controls necessary for product labelling, how often and what are the criteria applied? For which areas? And do citizens or the entrepreneurs controlled have an influence on intervals between controls or individual dates for controls? Who bears the costs for controls that are conducted upon request by someone?*

For most products the controls are carried out by the businesses themselves, before the products are placed on the market. For especially dangerous product types the control is placed on the public organs. The control periodicity and criteria varies between product types. To the knowledge of the reporters', citizens and businesses does not – in theory – have any influence on the control point of time. The business bears its own costs, but may get compensation from the state for samples and the like if there are special reasons for that, PSA § 34(1). If the control is conducted by a supervising authority, the business must pay compensation to the authority if the product is deemed hazardous, PSA § 34(2) and PSO § 11.

*g. In case of controls carried out by authorities: in which way are the controls structured? Is there a standard authority for control and labelling, e.g. in a ministry (for these purposes) or are the inspectors subordinate to municipalities?*

Most supervising authorities are State organs (including county boards). Food stuffs supervision is – apart from customs, agricultural supervision etc. – carried out by both the National Food Administration and municipalities.

*h. Does the system cause higher costs, most importantly due to the fact that more staff is required?*

The reporters are unable to assess that, but would assume that this is not the case.

**2. If there is no product labelling system in your country: Were there considerations to introduce such a labelling system? If yes, why wasn't it introduced?**

## **Part C. : Cost burdens for the parties involved**

### **VI. Efforts for obtaining and issuing information**

**1. Which factual actions are necessary to fulfil the requirements of the respective rights to information?**

There is a large number of instances where consumers have a right to information, and many different types of information involved. The factual situations differ. Sometimes it is merely a question of a correct labelling of a product, sometimes it is more than that. Regarding the principle of publicity, it is very easy to get access to documents. This, however, requires the one wanting the document to have knowledge, or at least a good guess, of where to ask for it and to describe what is asked for.

**2. If there are estimates or calculations for costs caused by the procurement and issuing of information in your country:**

***What are the total costs?***

***Which actions are most expensive and/or time-consuming (obtaining information, release/publication, storing information, handling requests, examinations in and communication with companies, if necessary: processing and verifying information)?***

***Are the costs for procuring and issuing information estimated or reported on a regular basis?***

***If yes, in which way have they developed?***

There are no estimates or calculations made to the reporters' knowledge.

**3. If there was a cost estimate for bureaucracy costs when the right to information was enacted:**

**Which amount was estimated? In how far has this estimate proven true in practice?**

**In case of significant divergence – what are the reasons?**

Not applicable, see C.I.2.

**4. Were new purchases made or staff hired due to the right to information?**

Not to the reporters' knowledge.

## **VII. Bearing the costs**

**1. Do consumers have to contribute to covering the costs for procuring and issuing information? Does this contribution cover the costs?**

**In which way are consumers involved in covering the costs: by fees (independent of time and effort), or by compensation for the actual efforts made?**

**Is there a fix lump sum or are the costs calculated on an individual basis?**

No, there are no fees or the like. Of course, businesses may adjust their prices to cover their costs.

In the case of public documents, there is a fee to get copies of ten pages or more. The cost for ten pages is SEK 50, and SEK 2 for every additional page.<sup>302</sup>

**2. Are there any opportunities for socially deprived people to obtain information for free or under more favourable conditions?**

Not applicable, see C.II.1.

**3. Is there any evidence that cost sharing has a deterring effect?**

Not to the reporters' knowledge.

**4. Do entrepreneurs have to contribute to covering the costs according to the cost-by-cause principle for creating risks or for offense against consumer protection regulations?**

The businesses have to bear their own costs in informing consumers according to law.

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<sup>302</sup> Fee Ordinance (1992:191) § 16 (16 § avgiftsförordningen).

## VIII. Cost-benefit analysis

**1. Are costs for procuring and issuing information taken into account when dealing with the question whether there is a right to information? Are the costs for the general public measured against the interest of the individual?**

Yes, see C.I.1.d.

**2. If there is such a balance of interests: does involving the consumer in covering the costs therefore influence whether there is a right to information at all?**

Yes, in the sense that high costs for asking for information, or higher prices for products due to internalization of information costs, might make consumers to refrain from information or to refrain from buying the more expensive product.

## Part D. : Practical Enforceability

### VI. Enforceability of the right to information

**1. Are there any mechanisms to settle disputes especially for consumer information acts? If no, are there any other mechanisms for settling disputes? Are these mechanisms being used?**

In Sweden there is a national Consumer Complaints Board,<sup>303</sup> which is a state authority handling disputes between businesses and consumers free of charge. The board resembles somewhat of a court. The board is divided into several divisions specialized on different subject matters.<sup>304</sup> Every meeting is presided by a professional lawyer (a judge or other official, as a minor part-time assignment). The other members of the board are selected by consumer and business organisations. The board deals with approximately 10.000 complaints annually. The board's decisions

<sup>303</sup> *Allmänna reklamationsnämnden*. Its activities is regulated in the Instruction for the Consumer Complaints Board Ordinance (2007:1041); *förordningen (2007:1041) med instruktion för Allmänna reklamationsnämnden*.

<sup>304</sup> *Inter alia* the general, bank, insurance, motor, furniture and textiles, and housing divisions.

are only recommendations, and thus not legally binding. However, businesses generally abide by the board's decisions.

**2. If, in your country, entrepreneurs are obliged to inform the consumer (as e.g. in Art. 19 section 1 of the Regulation (EC) Nr. 178/2002): how is made sure that entrepreneurs fulfil this duty?**

The supervising authority is to be notified of hazardous products unless this is obviously unnecessary. The supervising authority may impose injunctions, prohibitions and penalties, PSA §§ 27–31. The sanction system of course helps to prevent compliance failures.

**3. Does the legal system of your country provide possibilities for consumer associations and similar institutions to sue businesses which did not comply with legal requirements concerning consumer information legislation?**

*Notice: Actions for prohibitory injunction, lawsuits due to unfair competition, representative action in concrete disputes between consumer and entrepreneur etc. are to be considered.*

Yes. Consumer associations may bring action against businesses before the Market Court, see e.g. MPA § 47(2)(3) or Consumer Contract Terms Act § 4. This is however very rare. Instead, the Swedish Consumer Agency, a governmental body, serves such a similar purpose. Such a procedure may *inter alia* lead to an injunction compelling the business to issue some information in its marketing or to refrain from the marketing.

## **VII. Procedural particularities**

**1. Are there any procedural opportunities to obtain further information (example: USA- pre-trial discovery)? If there are, what are the conditions? And in how far do industrial and business secrets play a role in these procedures?**

There are no such rights furnished for consumers. There is a general discovery-procedure available to anyone in a civil litigation, and there is a special right for commission agents. A party in a trial may successfully invoke business secrets to fight off a discovery procedure.

**2. On the other hand, can procedural aspects (investigations etc.) lead to the blocking of information or complicate the receipt of information? If yes, under which conditions, and what are the consequences?**

Not to the reporters' knowledge.

## **Part E. Final appreciation, assessment**

**1. What is, in your opinion, the level of consumer information and consumer protection in your country?**

The level of consumer protection in Sweden is high, probably among the highest in Europe. The level of consumer information is also high. The statutory information requirements may not appear as frequent, or to be so demanding, but the Swedish legislator seems to be somewhat skeptical towards quantitative information as opposed to qualitative information requirements, even if there are exceptions that are not based on EC Law.

**2. Do you think the system for consumer information is successful, or what needs to be changed to make consumer protection more effective?**

The reporters think that one should be careful with introducing statutory information requirements on businesses, since such measures bear the risk of becoming counterproductive. Some requirements are successful, such as the Annual Percentage Rate requirement in the Consumer Credit Act, the duty of documentation in the Financial Advice to Consumers Act and the Insurance Act. Also, product safety information in labels and manuals must generally be deemed to be effective. The risk of information overload ought however to be considered thoroughly when contemplating whether, what and how much information a business should be required to give a consumer. Levelling information in stages after the importance could be one method to bring down the quantity of information in some situations and focusing on the most important ones, and to help to increase consumer protection by thus making the information easier accessible. The consumer may be given a summary of the most important facts at stages where consumers in general are less susceptible, and the rest at other stages.

**3. Which negative practical impacts or problems with the norm could be observed so far? Which other impacts do you expect?**

Information overload may cause consumers not to transform the information into useful knowledge. If consumers think of some type of information as a nuisance they will be less apt to respond to it. There is also a risk that the total abundance of information will make consumers getting the habit of disregarding even important information, and thus block the possibility of actual knowledge.

In consumer contracting there is the same concern that one has as to standard form contracts. There is a risk that the transfer of important consumer information will be considered a meaningless routine by the parties, and that the information will be delivered only in writing, together with other documents.

## **Problems that have not been addressed**

Are there any significant problems in the field of consumer information legislation in your country that haven't been addressed in this questionnaire?

Is there anything else you think is worth mentioning in the context of consumer information rights in your country?

## Anlage I:

### List of titles to the Secrecy Act

1 kap. Lagens innehåll

2 kap. Lagens tillämpningsområde

3 kap. Definitioner

4 kap. Allmänna åtgärder för att underlätta sökande efter allmänna handlingar, m.m.

5 kap. Registrering av allmänna handlingar och sekretessmarkering

6 kap. Utlämnande av allmänna handlingar och uppgifter, överklagande, m.m.

7 kap. Grundläggande bestämmelser

8 kap. Vilka sekretessen gäller mot

9 kap. Förbud i annan lagstiftning mot att röja eller utnyttja uppgift

10 kap. Sekretessbrytande bestämmelser och bestämmelser om undantag från sekretess

11 kap. Överföring av sekretess

12 kap. Sekretess i förhållande till den enskilde själv, m.m.

13 kap. Rätten att meddela och offentliggöra uppgifter

14 kap. Ansvar

15 kap. Sekretess till skydd för rikets säkerhet eller dess förhållande till andra stater eller mellanfolkliga organisationer

**Secrecy for the protection of national security or relations to other states or international organizations**

16 kap. Sekretess till skydd för rikets centrala finanspolitik, penningpolitik eller valutapolitik

**Secrecy for the protection of the central finance policy, monetary policy or currency policy**

17 kap. Sekretess till skydd för myndigheters verksamhet för inspektion, kontroll eller annan tillsyn

**Secrecy for the protection of public authorities conducting inspections, control or other supervisory measures**

18 kap. Sekretess till skydd främst för intresset av att förebygga eller beivra brott

**Secrecy for the protection foremost of the interest of the prevention and punishment of crime**

19 kap. Sekretess till skydd för det allmännas ekonomiska intresse

**Secrecy for the protection of the economic interests of the public**

20 kap. Sekretess till skydd för intresset av att bevara djur- eller växtart

**Secrecy for the protection of the interest of preserving species of animals and plants**

21 kap. Sekretess till skydd för uppgift om enskilds personliga förhållanden oavsett i vilket sammanhang uppgiften förekommer

**Secrecy for the protection of data about individuals' personal circumstances irrespective of in which context the data appears**

22 kap. Sekretess till skydd för enskild vid folkbokföring, delgivning, m.m.

**Secrecy for the protection of individuals in national registration, serving of documents, etc.**

23 kap. Sekretess till skydd för enskild i utbildningsverksamhet, m.m.

**Secrecy for the protection of individuals in education, etc.**

24 kap. Sekretess till skydd för enskild inom forskning och statistik

**Secrecy for the protection of individuals in research and statistics**

25 kap. Sekretess till skydd för enskild i verksamhet som avser hälso- och sjukvård, m.m.

**Secrecy for the protection of individuals in health and medical care, etc.**

26 kap. Sekretess till skydd för enskild inom socialtjänst, vid kommunal bostadsförmedling, adoption, m.m.

**Secrecy for the protection of individuals in social service, municipal housing agency, adoption, etc.**

27 kap. Sekretess till skydd för enskild inom verksamhet som rör skatt, tull, m.m.

**Secrecy for the protection of individuals in taxation, customs examination, etc.**

28 kap. Sekretess till skydd för enskild när det gäller socialförsäkringar, studiestöd, arbetsmarknad, m.m.

**Secrecy for the protection of individuals in social security, educational support, employment market, etc.**

29 kap. Sekretess till skydd för enskild i verksamhet som rör transporter och andra former av kommunikation

**Secrecy for the protection of individuals in transport and other forms of communication**

30 kap. Sekretess till skydd för enskild i verksamhet som avser tillsyn m.m. i fråga om näringslivet

**Secrecy for the protection of individuals in supervision etc. in the case of business life**

31 kap. Sekretess till skydd för enskild i annan verksamhet med anknytning till näringslivet

**Secrecy for the protection of individuals in the conducting of other functions with connection to business life**

32 kap. Sekretess till skydd för enskild i verksamhet som rör annan tillsyn, granskning, övervakning, m.m.

**Secrecy for the protection of individuals in concerning other supervision, auditing, monitoring, etc.**

33 kap. Sekretess till skydd för enskild hos Diskrimineringsombudsmannen, Barnombudsmannen och Konsumentombudsmannen, m.m.

**Secrecy for the protection of individuals at the Equality Ombudsman, the Children's Ombudsman and the Consumer Ombudsman, etc.**

34 kap. Sekretess till skydd för enskild vid utsökning och indrivning, skuldsanering, m.m.

**Secrecy for the protection of individuals in enforcement, recovery and rescheduling of debts, etc.**

35 kap. Sekretess till skydd för enskild i verksamhet som syftar till att förebygga eller beivra brott, m.m.

**Secrecy for the protection of individuals in prevention and punishment of crime, etc.**

36 kap. Sekretess till skydd för enskild i vissa mål och ärenden hos domstol, vid medling i arbetstvisiter, i ärenden om rättshjälp, m.m.

**Secrecy for the protection of individuals in certain cases before court, in labour mediation, in matters of legal aid, etc.**

37 kap. Sekretess till skydd för enskild vid utlänningskontroll, i Schengensamarbetet, m.m.

**Secrecy for the protection of individuals in the control of foreigners, in the Schengen cooperation, etc.**

38 kap. Sekretess till skydd för enskild i verksamhet som rör totalförsvar, krisberedskap, m.m.

**Secrecy for the protection of individuals in defence, crisis preparedness, etc.**

39 kap. Sekretess till skydd för enskild i personaladministrativ verksamhet

**Secrecy for the protection of individuals in personel administration**

40 kap. Sekretess till skydd för enskild hos övriga myndigheter och i övriga verksamheter

**Secrecy for the protection of individuals in other authorities and in other matters**

41 kap. Riksdagen och regeringen

42 kap. Riksdagens ombudsmän, Justitiekanslern, Säkerhets- och integritetsskyddsmyndigheten och undersökningskommissioner, m.m. Beträffande rubriken, se

43 kap. Domstolar m.m.

44 kap. Tystnadsplikt som följer av andra författningar och som inskränker rätten att meddela och offentliggöra uppgifter

## **Anhang 7:**

# **Länderbericht der Vereinigten Staaten von Amerika**

### **Part A. *General Principles***

#### **I. Structure of the consumer information law**

**1. What is the function of consumer information within the system of consumer protection in your country? Which role does it play with regard to consumer protection by means of preventive control or admission restrictions (e.g. health standards or import standards)?**

A. In the United States, as in other developed countries, consumers continuously make personal, family and business decisions about the purchase or use of products, commodities and services.

B.

1. Products and commodities -- some technologically complex or dangerous-  
- include food, beverages, tobacco, medicines, medical devices, retail merchandise, pesticides and poisons, animals.
2. Services include financial and commercial services, such as banking, investment, credit, real estate, home improvement, transportation, recreation and internet services.

C. The function of consumer information in the United States when buying or using products and commodities or when making use of services is to protect the health, safety and investments of consumers and to achieve a fair and efficient marketplace.

1. Primarily:

- a. Consumer access to information can help facilitate informed consumer decision-making.
- b. Consumer access to information can help increase consumer bargaining power.
- c. Consumer access to information can deter unfair trade practices, misrepresentation and fraud by large and small businesses.
- d. Consumer access to information can empower consumer groups to advance the interests of consumers in better and safer products.

2. Secondly:

- a. Consumer access to information can help reduce the number and severity of accidental illnesses and injuries.
- b. Consumer access to information can help lower the costs of health care.
- c. Consumer access to information can help lower the costs of government social welfare ("entitlement") programs such as Social Security and Medicaid, which provide benefits for low income and catastrophically ill, injured and disabled persons.

D. As a matter of public policy and national philosophy, the current legal framework in the US assumes high levels of personal autonomy and, correlatively, high levels of personal responsibility for health, safety and the adverse outcomes of marketplace decisions.

- 1. Yet major consumer protection roles for federal, state and local government are widely accepted and implemented.

2. Government steps in on behalf of consumers to reduce information costs, correct for barriers to information, and to subsidize, encourage or coerce safe and efficient decisions.
  
3. On the one hand, individuals are presumed responsible for their own health and safety. They are free to make good or bad consumer decisions without undue government interference and paternalism. Many Americans reject what is sometimes condemned as the “nanny” state.
  - See, for example, David Harsany, Nanny State: How Food Fascists, Teetotaling Do-Gooders, Priggish Moralists, and other Boneheaded Bureaucrats are Turning America into a Nation of Children (2007), a journalist’s condemnation of paternalistic consumer protectionism.
  
  - For a best-selling, but scholarly discussion reflecting an ideological rejection of state paternalism in the US see, Richard H. Thaler and Cass R. Sunstein, Nudge: Improving Decisions About Health, Wealth and Happiness (2008).
  
4. On the other hand, certain products and services are so risky and certain common consumer mistakes are so costly to individuals and the public that government has a proper role in insuring that all consumers have access information and warnings about those products and services. Government has a role in protecting consumers both from the effects of their own rational limitations and from others’ superior bargaining power, fraud, deception, and race or gender discrimination.
  - In the US the name “Ralph Nader” more than any other is associated with aggressive consumer protection and government accountability for it. See The Ralph Nader Reader (edited by Ralph Nader, with a

Foreword by Barbara Ehrenreich) (2000), a volume collecting some of Nader's most influential consumer rights writings.

- Recently legal scholars and economists have debated the implications of empirical research that shows irrationality and cognitive biases affecting and informing choices. Scholars are increasingly confronting the apparent fact of human "irrationality" and debating consumer protection policies in light of behavioral realities. It may be that providing consumers with additional information about products and services is not enough if, as some studies suggest, there are cognitive barriers to making good use of it. See Dan Ariely, Predictably Irrational: The Hidden Forces That Shape Our Decisions (New York: HarperCollins, 2008). For a skeptical analysis of the impact on consumer protection of the confluence of the law and economics movement in legal scholarship, rational choice theory in legal scholarship and the practical politics of deregulation in Congress after the consumer rights boom of the 1960s and 1970s, see Alan M. White, "Behavior and Contract," 27 Law and Inequality: A Journal of Theory and Practice 135 (Winter 2009).
- Studies by Ian Ayres and others suggest that products and services may not be available to all consumers on a fair and equal basis. Race and gender prejudices on the part of sellers and service providers can affect price, willingness to contract, and contract terms. See Ian Ayres & Peter Siegelman, "Race and Gender Discrimination in Bargaining for a New Car," 85 Am. Econ. Rev. 304, 312-314, 319 (1995) (survey data suggests that automobile dealers systematically offer higher initial prices to member of racial minority groups shopping for cars). Cf. Cecil J. Hunt, II In "The Racial Crosshairs: Reconsidering Racially Targeted Predatory Lending Under A New Theory Of Economic Hate Crime," 35 U. Tol. L. Rev. 211 (2003).

- E. In the United States the function of furthering consumer access to health and safety information is decentralized. No single national law spells out a comprehensive set of consumer rights.
1. See David Adam Friedman, Reinventing Consumer Protection, 57 DePaul L. Rev. 45, 46 (2007) (in which consumer protection law is described as decentralized and reactive).
  2. Friedman argues that: “Currently, U.S. agencies approach consumer protection from three perspectives: (1) the perpetrator perspective via direct enforcement of consumer protection and fraud laws and the combat of specific schemes; (2) the individual consumer perspective through the provision of tools for self-protection and consumer education; and (3) the perspective of a definable consumer group. ...[T]he third approach--defining a protected consumer group--is significantly different [from the other two]. Instead of racing to beat the next big scam and attempting to solve the fraud problem for the entire population, it carves out a category of consumers and provides that group with heightened protection.”
- F. To the extent that there are equivalents in the US of rights recognized in other countries ( e.g., a right to health and safety protections, a right to economic interests protection, a the right to redress wrongs and to be heard, and a right to receive information and education), it is the result of authority and enactments that widely disperse responsibilities for providing information to consumers. Law-making authority, rule-making authority and law enforcement authority is highly dispersed throughout several federal and numerous state and local agencies and regulatory regimes.
- G. The fifty US states have enacted consumer protection laws; but Congress has created several federal departments, regulatory agencies and commissions with broad national consumer protection-related rule-making authority (identified below, under section I). Congress has also enacted numerous sectoral statutes,

implemented and enforced, by one or more of these departments, agencies or commissions.

H. State and local governments regulate consumer goods and services, although the federal government's national regulation of consumer health and safety "preempts" (supersedes) some actual and potential state and local measures. (Product labeling and packaging requirements are almost exclusively federal matters.) Federal measures typically preempt weaker state and local laws that offer less consumer protection, while in many instances allowing for state and local laws that offer more consumer protection.

1. One notable type of local regulation giving rise to consumer information rights [about which interest was expressed at the Heidelberg conference in October] has been in the area of restaurant hygiene.
2. A number of California counties and municipalities, including Los Angeles County, have adopted public notification measures pursuant to the California Health and Safety Code to create incentives for food service cleanliness. Los Angeles gives restaurants grades based on the number of infractions of public health and hygiene requirements (freedom from insect and rat infestations). Grades are posted on color coded placards. For a breakdown of the scoring system see Revised Retail Food Inspection Guide <http://publichealth.lacounty.gov/rating/>



- 3.
4. In Los Angeles the grades are posted and consumers have a right to examine health inspection reports from restaurants and public health author-

ities. Wholesale food facilities are subject to inspection and notices of violations can be posted at the facility. In 2004, Mr. Terrance Powell, who headed the Los Angeles inspection and restaurant grading program, told the Los Angeles Business Journal that prior to the grading system 5.7% of inspected facilities had to be shut down, but after the program went into effect .4% had to be shut down.

5. New York City has plans to adopt a restaurant hygiene grading system using letter A, B, C letter grades. Washington DC and Philadelphia have considered plans like Los Angeles' which is believed to have reduced public health infractions and food borne illnesses.
- I. Federal law creates both (i) legal duties for manufacturers, sellers, and service providers to inform the public by means of labeling, packaging, advertising, and other public and private notice, and (ii) negative sanctions (fines, penalties, injunctions, bans on advertising or sales) for non-compliance with those duties.
    1. The US requires manufacturers or sellers to place health and safety warnings and product content information on virtually all products, including medicines and medical devices, packaged food, automobiles, toys, electrical appliances, electronics, bedding, toothpaste and tobacco products.
    2. Federal law dictates that pharmaceuticals be sold with warnings. However, under a state tort law doctrine called the "learned intermediary" doctrine, the duty to warn consumers of medical risks can be met by adequately warning prescribing physicians. In re Zyprexa Products Liability Litigation,  
Slip Copy, 2009 WL 3596982, E.D.N.Y., October 20, 2009 ("The "learned intermediary" doctrine requires that manufacturers of prescription drugs and medical devices discharge their duty of care to patients by providing adequate warnings to the prescribing physicians.") The duty to warn consumers directly may still apply where manufacturers advertise products directly to consumers.

Some states, e.g., West Virginia, do not subscribe to the learned intermediary doctrine at all.

3. Nutrition labeling is required of packaged food products. In 1990, Congress passed the Nutrition Labeling and Education Act (“NLEA”). Pub.L. No. 101-535, 104 Stat. 2353 (1990) (codified at 21 U.S.C. § 343 et seq.), which requires nutrition labeling on nearly all food products under the jurisdiction of the FDA. In Holk v. Snapple Beverage Corp., 575 F.3d 329 C.A.3 (N.J.), 2009, a federal court considered a claim against the maker of Snapple –brand beverages which claimed its products were “all natural” despite being sweetened with high fructose corn syrup.
4. Cancer or other health warnings are required for tobacco products and tobacco advertisements.
5. Many bottled alcohol products (wine, beer, etc.) must display warnings respecting the use of alcohol during pregnancy.
6. Medical products (drugs) and medical devices undergo a complex federal approval process; prescription medicines must carry warning labels and include “package inserts” aimed at physicians and patients. Certain consumer goods, including products sold for infants and children, must bear prescribed safety and warning labels.
7. Potentially dangerous consumer goods, such as heating pads, lawn mowers and electric saws, sold without reasonable warning labels or safety instruction may be deemed defective if the absence of such warning labels or safety instructions causes accidental injury. Product manufacturers, retailers and distributors are all subject to tort liability as well as contract liability for breach of warranty.
8. Pesticides and poisons require special, federally dictated labeling standards, and farm workers have a right to be warned about the use of pesticides in agricultural areas.
9. In the case of products such as vaccines whose availability in the market has broad, favorable public health consequences the federal government works closely with industry to inform the public about product use, risks and benefits and to compensate victims of accident.

J. In the US consumer rights are not grounded in constitutional principles. Consumer rights are for the most part the correlatives of government agency, manufacturer, seller, and service provider duties to comply with federal and state statutes and agency rules requiring specific disclosures, warnings and notices. However, non-compliance with federal duties can sometimes (though not automatically) form the basis of a private civil action brought by a consumer or group of consumers against a manufacturer, seller or service provider.

1. In contract law, consumers may recover for breach of warranty.
2. In negligence (tort) law, injured consumers potentially recover medical expenses, loss wages, pain and suffering damages, loss of consortium damages, and punitive damages. In the case of death, families of injured persons may recover in tort for wrongful death.
3. In product-liability (tort) law, a product or a product sold without adequate safety warnings is defective and unreasonably dangerous. The manufacturer of a defective, dangerous product is liable in tort to consumers. Consumers injured as a result of product defects can sue for monetary damages, including, in egregious cases, punitive damages. Some US lawyers believe that private tort litigation in the products liability field is as or more responsible for consumer protection than direct government regulation of product safety. See Mark P. Robinson Jr., Kevin F. Calcagnie, ("Product Liability: A Catalyst for Safety," Trial (November 2009), p. 32 (arguing that "Americans Can Thank Products Liability Litigation for Helping to Make Their Cars, Drugs, and Other Products Safer Than Ever. But There Is Still Work to Be Done").

K. Several bodies of rules and statutes enable consumers to obtain information.

These include:

1. Rules that require companies to provide specific categories of information to consumers, such as information about with whom a firm shares customers' personal data.
2. Labeling laws that require that products be sold with labels or pamphlets revealing content, quantity, nutrients, production methods or risks.
3. Notice laws that require information about rights and risks, such as privacy rights, contract cancellation rights or interest rates.
4. Public health notices about the results of health and safety inspections.
5. Rules that require companies to report information beneficial to consumers directly to government regulators.
6. Rules that penalize companies for dispensing false or misleading information and thereby incentivize providing consumers with truthful information.
7. Freedom of information (FOIA) and "sunshine law" statutes that create mechanisms for consumers to request information held by government.
8. Rules of civil and criminal procedure that require discovery and compliance with subpoenas or court orders.
9. Respecting 4 and 5, consumer advocates have sometimes used Freedom of Information Acts and civil discovery as ways of obtaining consumer information. Consumers do not have a general right to obtain information directly from business entities, other than in the context of litigation. See L (2), below.

L. Major federal departments, agencies and commissions have been delegated by Congress with primary responsibilities for providing consumers with access to information about health, safety and investments. The Department of Agriculture, the Food and Drug Administration, the Consumer Products Safety Commission, the Federal Trade Commission, the Environmental Protection Agency, the Securities and Exchange Commission and the Federal Deposit Insurance Corporation play key roles.

1. Department of Agriculture (USDA). Established in the 1880's, the US Department of Agriculture is a department of the federal government, headed by a Secretary of Agriculture, nominated by the President of the United States and confirmed by Congress to sit on the President's inner cabinet of advisors. The USDA seeks to provide leadership on food, agriculture, farm animals, natural resources, weather, and related issues based on sound public policies and sound science. USDA currently seeks to expand and diversify markets for US agricultural products and support international economic development. The agency provides financial assistance to farmers, and seeks to enhance job opportunities and improve housing, utilities and infrastructure in rural regions of the US. The USDA seeks to enhance food safety by taking steps to help reduce the prevalence of food-borne hazards from farm products (such as inspecting meat intended for human consumption); and to improve nutrition and health by providing food for low income populations and nutrition education. Finally, the Department seeks to protect public and private lands working cooperatively with landowners and state and local government. The USDA maintains a website with information for consumers. <http://www.usda.gov/wps/portal/usdahome>

2. Food and Drug Administration (FDA). The Food and Drug Administration ("FDA") is a major agency of the United States Government under the umbrella of the larger Department of Health and Human Services. It is arguably the oldest consumer protection agency in the US, tracing its

roots back to the 1840s. The FDA administers the process of government preapproval of medications and medical devices sold to consumers in the US. The FDA also issues rules and guidelines on food and drug labeling, both human and animal. Along with the FTC, the FDA has responsibility for administering the requirements of the Fair Packaging and Labeling Act of 1967. The FDA is also responsible for administering the Bioterrorism Act, which has required domestic and foreign facilities that manufacture, process, pack, or hold food for human or animal consumption in the U.S. to register with the FDA. Domestic food facilities are required to register with the FDA whether or not food from the facility is sold or transported in interstate commerce. The FDA governs the labeling of cigarettes and other tobacco products. It has authority of the safety of the vaccine supply and such procedures as animal cloning. The FDA requires the placement of detailed nutrition and health information on packaged foods including canned goods, baked goods and meats. The number of calories, the amount of fat and cholesterol, the amount of sugar and dietary fiber are some of the items that must be included in an adequate label. The FDA also requires that medications be sold with information labels describing proper dosing and hazards; in the case of medications available only by prescription, very detailed package inserts describing product chemistry, the results of efficacy studies, warnings, indications and contraindications are required.

- a. It should be noted that most medications Americans take for common conditions such as migraine headache, high blood pressure or birth control, are available from licensed pharmacists only and only with a written prescription from a licensed physician or nurse practitioner.
- b. Conventional foods. Labeling is required for most prepared foods, such as breads, cereals, canned and frozen foods, snacks, desserts, drinks, etc. pursuant to the federal Food, Drug and Cosmet-

ic Act, administered by the FDA. Nutrition labeling for fruits, vegetables and fish is voluntary.

- c. Drug Products. Pursuant to the federal Food, Drug and Cosmetic Act, administered by the FDA, prescription Drugs and Over-the-Counter-Drug require warning labels and package inserts for doctors, patients and consumers. Prescription drugs normally undergo a rigorous scientific testing and approval process before marketing to consumer is permitted.
  - d. Dietary supplements. Labeling is required for food supplements, such as vitamins. The manufacturers of dietary supplements do not normally have to get their products tested or registered with the FDA. However manufacturers are responsible for making product label information is truthful and not misleading. The FDA monitors the safety of marketed dietary supplements and regulates the advertising of dietary supplements, pursuant to the Dietary Supplement Health and Education Act of 1994.
3. Consumer Product Safety Commission (CPSC). An era of heightened awareness of consumer rights emerged in the United States in the 1960s and 1970s, leading to the establishment of national non-governmental organizations and non-profit groups established to promote responsible consumerism and to encourage consumer protection measures by government. The CPSC is a product of this popular movement. Created by the U.S. Congress in 1972, the CPSC Commission is a major independent federal regulatory agency with broad responsibility for consumer product safety. The agency is headed by three commissioners, who are nominated by the President and confirmed by the Senate for staggered seven-year terms. The President designates one Commissioner as Chair. The CPSC is tasked to promote public safety by reducing the risk of injuries and deaths associated with consumer products. In collaboration with industries, the CPSC develops voluntary standards. The agency is au-

thorized to issue and enforce mandatory standards, and can ban unsafe consumer products. The agency frequently recalls products, such as baby cribs, toys and automobiles, that have been sold in a dangerous condition once dangers are uncovered, and helps secure repairs. The agency conducts research on potential product hazards. The agency informs and educates consumers through the media, state and local governments, private organizations, and by responding to consumer requests for information. The CPSC maintains a website where consumers can find current information on product safety information and initiatives. <http://www.cpsc.gov/> In 2008 Congress enacted the Consumer Product Safety Improvement Act (CPSIA) in reaction to spate of product recalls involving children's toys and products for children containing lead paint and other dangerous toxins. CPSIA limits the amount of toxins like lead and phthalates used in children's toys and products and requires the impartial pre-market testing of children's products. The statute requires that children's products bear „tracking labels“ enable the purchaser to ascertain the manufacturer or private labeler, the location and date of production of the product and cohort information. The statutes set standards of testing and safety for „all terrain vehicles“intended for use by children. The amended consumer protection law increased the maximum penalty for individual violations from \$8,000 to \$100,000, and the ceiling on civil penalties for a related series of violations has been raised from \$1.825 million to \$15 million. Directors, officers and agents of consumer product businesses are subject to criminal prosecution for knowingly or willfully violating the act.

4. Federal Trade Commission (FTC). The Federal Trade Commission is a major independent federal agency of the United States Government, created in 1914 to combat unfair trade practices and business competition and expanded to include consumer protection functions. The FTC is headquartered in Washington D.C. and has several regional offices in other cities. The “Chairman” (head) of the agency is nominated by the President of the United States and approved by Congress. The FTC is

governed by the Chairman and four “Commissioners,” who are full-time presidentially appointed federal employees. The FTC includes a Bureau of Consumer Protection. The core activity of the FTC is to address “unfair and deceptive trade practices,” such as providing false and misleading information to consumers or using unfair commercial tactics to obtain information from consumers or sell or market good and services. The FTC maintains a website where consumers can go to find useful information about: (1) computers and the internet; (2) credit and loans; (3) education and job placements; (5) health; (6) energy; (7) identify-theft privacy and security; (8) shopping for products and services; (9) business and investment opportunities and (10) telemarketing and telephone services. The agency has the authorized by Congress to make consumer protection rules in designated areas. The agency has the additional authority to enforce its rules through lawsuits (“enforcement actions”) against businesses brought by the federal government through its Department of Justice. The FTC can impose expensive fines and compel specific actions to remedy rule violations. Enforcement actions commonly end in settlements under which companies agree to pay significant fines and other remedies. Recently the FTC has been active in bringing enforcement actions against companies that permit consumer financial data to fall into the hand of unauthorized person (“data breaches”) and against website operators which extract personal information from children under 13 in violation of the Children’s Online Privacy Protection Act.

5. Environmental Protection Agency (EPA): Founded in 1970, the Environmental Protection Agency is a federal agency whose mission is to protect human health and the environment by making and enforcing rules that implement environmental laws enacted by Congress. The EPA is headed by a presidentially appointed and Congressionally confirmed Administrator. The EPA makes grants to state environmental programs, non-profits, educational institutions, and other entities. This money for projects as varied as scientific research to community cleanups. The EPA studies envi-

ronmental problems, works local government and business on approaches to, for example, air quality, conserving water and energy, reducing greenhouse gases, re-cycling solid wastes, and reducing pesticide risk. The EPA seeks to educate the public through its programs, off-line publications and website, providing consumers with information about auto emissions. <http://www.epa.gov/OMS/consumer.htm> Some environmental protection laws are not enforced by the EPA. These include the Endangered Species Act, which is the responsibility of the US Fish and Wildlife department. Nuclear waste issues are within the purview of the Department of Energy's Office of Civilian Radioactive Waste Management. The EPA sets labeling standards for certain toxins and pesticides used by consumers and in business and industry. It also requires and sets standards for warning signs that must be posted to warn agricultural workers about pesticide applications.

6. The Securities and Exchange Commission (SEC): The US securities laws require that publicly traded companies disclose material risks to their investors. The Securities and Exchange Commission is a major federal agency which, since the 1930s, has been responsible for enforcing requirements that firms routinely provide accurate and relevant information to the investing public. During the Great Depression Congress passed the Securities Act of 1933 and the Securities Exchange Act of 1934, which created the SEC. These statutes were designed to restore investor confidence in US capital markets, chiefly by requiring that (1) "Companies publicly offering securities for investment dollars must tell the public the truth about their businesses, the securities they are selling, and the risks involved in investing" and that (2) "People who sell and trade securities – brokers, dealers, and exchanges – must treat investors fairly and honestly, putting investors' interests first."

<http://www.sec.gov/about/whatwedo.shtml>

7. Federal Deposit Insurance Corporation (FDIC). The FDIC is an independent federal agency created in 1933 in response to massive bank

failures in the 1920s and early 1930s, the era of The Great Depression. The agency insures bank deposits up to \$250,000 per depositor. It monitors and addressing risks to the deposit insurance funds, and it acts to protect the economy when a bank or thrift institution fails. The FDIC examines banks to insure compliance with the Community Reinvestment Act and various consumer protection laws, including the Fair Credit Billing Act, the Fair Credit Reporting Act, the Truth-In-Lending Act, and the Fair Debt Collection Practices Act.

M. Business is accountable to government and consumer. Access to information by consumers helps to insure that manufacturers, retailers and service providers are accountable.

1. While the business sector appreciates the financial and reputational advantages of voluntary investment in high levels of safety, accountability achieved through well-enforced consumer information requirements imposed by courts, legislatures, and government agencies creates incentives for the business sector to assume the costs of producing reasonably safe and effective products. Sound economic policy suggests that businesses internalize the costs (harm-avoidance) of their enterprises and products, by rationally pricing products and spreading risks through insurance.
2. In the context of litigation seeking damages or equitable relief, plaintiff consumers or consumer advocates may use “discovery” procedures permitted under the rules of evidence and civil procedure to request information from companies about their products and services. Consumer plaintiffs are presumed entitled to all documents pertinent to establishing their claims of wrong-doing, including information about production processes, safety testing, and consumer complaints. Discovery documents may be protected by the courts if they disclose irrelevant trade secrets, or intimate facts about employees, or privileged attorney/client communications.

3. The internet and World Wide Web have made it easier for industry to inform the public about the risks and benefits of products and services.

N. Government is accountable to consumers.

1. The Federal Freedom of Information Act (FOIA) requires federal departments, agencies and commissions to provide consumers, the media and others broad access to government records. As stated in Presidential Executive Order 13,392, *Improving Agency Disclosure of Information*, "The effective functioning of our constitutional democracy depends upon the participation in public life of a citizenry that is well informed. For nearly four decades, the Freedom of Information Act (FOIA) has provided an important means through which the public can obtain information regarding the activities of Federal agencies. Under the FOIA, the public can obtain records from any Federal agency, subject to the exemptions enacted by the Congress to protect information that must be held in confidence for the Government to function effectively or for other purposes."

Individual consumers and consumers groups have used FOIA to (a) seek information useful to consumers, such as product safety information gathered by government and (b) to assess the diligence and efficacy of government oversight. Responsibility for FOIA disclosures is decentralized: each agency is competent to receive requests for information disclosures and to make decisions about whether to grant the requests. Agencies may decline requests if one of nine exceptions applies.

FOIA includes exceptions, 5 U.S.C. 552(b), for private medical and personnel information, law enforcement data, national security information, sensitive proprietary information and trade secrets. This is a list of the exemptions named in the statute, see

<http://www.osec.doc.gov/omo/FOIA/exemptions.htm>:

(b)(1) EXEMPTION 1 Classified secret matters or national defense or foreign policy.

(b)(2) EXEMPTION 2 Internal Personnel Rules and Practices.

(b)(3) EXEMPTION 3 Information Specifically Exempted by Other Statutes.

(b)(4) EXEMPTION 4 Trade Secrets, Commercial or Financial Information.

(b)(5) EXEMPTION 5 Privileged Interagency or Intra-Agency Memoranda or Letters.

(b)(6) EXEMPTION 6 Personal Information Affecting an Individual's Privacy.

(b)(7) EXEMPTION 7 Investigatory Records Compiled for Law Enforcement Purposes.

(b) (7) EXEMPTION 7(A) Records or Information that Could Reasonably be Expected to Interfere with Enforcement Proceedings.

(b) (7) EXEMPTION 7(B) Disclosure Which Would Deprive a Person of a Fair Trial or an Impartial Adjudication.

(b) (7) EXEMPTION 7(C) Personal Information in Law Enforcement Records.

(b)(7) EXEMPTION 7 (D) Identity of a Confidential Source.

(b) (7) EXEMPTION 7(E) Circumvention of the Law.

(b)(7) EXEMPTION 7(F) Physical Safety to Protect a wide Range of Individuals.

(b)(7) EXEMPTION 8 Records of Financial Institutions.

(b)(7) EXEMPTION 9 Geographical and Geophysical Information Concerning Wells.

The FOIA does not specifically exclude drafts and working files. If there are documents that are exempt from the FOIA under one of its exclusions, those documents are withheld from disclosure. However, the fact that they are drafts or working files does not, in itself, exempt them from disclosure. If a draft or working paper were circulated within an agency it would be subject to disclosure unless it met a specific exemption.

Information requesters can appeal agency decisions to the agency and then, if unsatisfied, seek judicial review in federal court. Although federal courts traditionally defer to agencies that do not abuse their discretion, FOIA appeals cases are given de novo review, meaning the court will not automatically defer to the agency. In National security (Exemption 1) FOIA cases there has been more deference to agencies.

O. These are some of the major FOIA cases decided by the Supreme Court, including products and safety information related cases, as compiled by a major media group, Reporters Committee for Freedom of the Press.

<http://www.rcfp.org/fogg/index.php?i=cases>:

1. Administrator, Federal Aviation Administration v. Robertson, 422 U.S. 255 (1975) The FAA was permitted to withhold analyses of performance of commercial airlines under a statute which gave the administrator the authority to withhold such information when he felt disclosure was not in the public interest. (Subsequent to this decision, Congress amended Exemption 3 requiring specific language requiring confidentiality.)

2. Baldrige v. Shapiro, 455 U.S. 345 (1982). Two sections of the Census Bureau Act (13 U.S.C. §§ 8(b) and 9(a)) qualify as Exemption 3 statutes and prevent the bureau from releasing information collected from respondents, including the addresses used by the bureau to conduct the census.
  
3. Chrysler Corporation v. Brown, 441 U.S. 281 (1979). Businesses that submit documents to the government may sue under the Administrative Procedures Act to challenge an agency's decision to release documents related to them when such documents are requested under FOIA.
  
4. Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102 (1980). The Consumer Product Safety Act requires the CPSC to ensure the accuracy of information about consumer products, if the manufacturer can be identified, prior to releasing any information pursuant to a FOIA request. The CPSC accomplishes this by notifying the manufacturer and giving it an opportunity to correct or challenge any of the requested information.
  
5. Department of the Air Force v. Rose, 425 U.S. 352 (1976). Exemption 2 applies only to information in which there is little or no public interest and thus could not protect information about Ethics Code violations at the Air Force Academy. Furthermore, Exemption 6 requires an agency to balance the possible invasion of privacy against the public's interest in disclosure, and in this case the Court ordered disclosure of the information in a form which would not lead to any cadet being individually identified.

6. Department of the Interior v. Klamath Water Users Protective Association, 532 U.S. 1 (2001). The federal government may not use Exemption 5 to withhold documents created as a result of communications with an outside consultant, when the consultant's relationship with the government has been predicated on the consultant's own interests, rather than the government's interests.
  
7. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989). In balancing the public's interest in disclosure against the intrusion on personal privacy that would occur from disclosure, an agency can only consider the public's interest in knowing what the government is "up to." If records are not informative on the operations and activities of government, there is no public interest in their release. In applying the balancing test under Exemption 7(C), agencies may "categorically" weigh public interest and privacy. Since criminal history rap sheets reveal nothing about the government, they may be withheld.
  
8. Department of Justice v. Tax Analysts, 492 U.S. 136 (1989). A two-pronged test determines whether material constitutes agency "records": An agency must create or obtain the records and must have them in its possession because of the legitimate conduct of agency business.
  
9. Department of State v. Ray, 502 U.S. 164 (1991). The privacy interest of Haitian deportees in their names and addresses outweighs any public interest that might be served by disclosure to an attorney who hoped to learn if the Haitian government mistreated them on their return. The court refused to decide whether "derivative" uses of names and addresses — later uses for other purposes — could ever serve the public's interest.

10. Department of State v. Washington Post, 456 U.S. 595 (1982). The “similar files” provision of Exemption 6 extends to any information of a “personal” nature, such as one’s citizenship.
  
11. Environmental Protection Agency v. Mink, 410 U.S. 73 (1973). An agency has no obligation to segregate and disclose non-classified portions of otherwise classified documents, and the court is not required to view the documents in camera whenever there is an allegation that pre-decisional materials contain factual information. (Subsequent to this case, FOIA was amended to require agencies to segregate non-exempt material from that which can be protected under an exemption.)
  
12. Federal Bureau of Investigation v. Abramson, 456 U.S. 615 (1982). Records compiled for law enforcement purposes do not lose their exempt status when they are incorporated into records compiled for purposes other than law enforcement.
  
13. Federal Open Market Committee v. Merrill, 443 U.S. 340 (1979). Exemption 5 incorporates a privilege for commercially sensitive documents that are generated by the government. This privilege is similar to the protection provided by Exemption 4 for the commercial information submitted by those outside the government.

14. Forsham v. Harris, 445 U.S. 169 (1980) Records in the possession of federal grantees or contractors are not accessible under FOIA, even if the documents relate to the grantee's contract with a federal agency.
  
15. Federal Trade Commission v. Grolier, 462 U.S. 19 (1983). Exemption 5 is not limited to information that would actually be privileged in any particular litigation, but rather extends to any information which would "routinely" or "normally" not be available to a party in litigation.
  
16. Grumman Aircraft Engineering Corporation v. Renegotiation Board, 421 U.S. 168 (1975). The executive privilege, incorporated through Exemption 5, can protect from disclosure reports prepared by the Renegotiation Board's Regional Board since they are not "final reports" but rather inter- or intra-agency memos. This ruling is based on the Court's finding that only the full Board has authority to issue final orders, and these Regional reports are simply used by the full Board to make that decision.
  
17. GTE Sylvania v. Consumers Union, 445 U.S. 375 (1980). GTE Sylvania sued the Consumer Product Safety Commission to stop its release of accident reports to Consumers Union. The district court issued an order restraining release of the information pending the court's ruling on the disclosability of the information. Meanwhile CU sued in a different court to compel disclosure. The Supreme Court ruled that while information is under a court order prohibiting disclosure, the agency has no authority to release it, and a requestor may not maintain a lawsuit to compel its disclosure.
18. Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980). FOIA does not provide a means by which private citizens can sue

to force public officials to return records that they have wrongfully removed from the agency.

19. National Archives and Records Administration v. Favish, 541 U.S. 157 (2003) Exemption 7(C) encompasses the personal privacy rights of a deceased individual as well as the related privacy rights of his or her surviving family members. When the public interest in a FOIA request reflects an attempt to show that government officials acted improperly in performing their duties, the requester must produce evidence of such impropriety sufficient to convince a reasonable person in order to overcome the personal privacy rights cited.
  
20. National Labor Relations Board v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978) Exemption 7(A), allowing agencies to withhold investigatory records compiled for law enforcement purposes if disclosure would interfere with enforcement proceedings, does not require the agency to make a specific showing within the context of a particular case. Instead, the agency may demonstrate that disclosure of certain classes of documents (in this case witness statements filed as part of unfair labor practices complaints) would have the effect of interfering with agency enforcement.
  
21. National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132 (1975) Exemption 5 can never apply to the final opinion of an agency, but the exemption does incorporate the attorney work product privilege protecting memos prepared by a government attorney in contemplation of litigation and setting strategy for the case.

22. Sims v. Central Intelligence Agency, 471 U.S. 159 (1985). The Director of the CIA has exclusive authority to designate intelligence sources and methods that can be protected from public disclosure under the National Security Act.
  
  23. Taylor v. Sturgell, 128 S.Ct. 2161 (2008). Two parties with similar, but not legally related, interests in obtaining information (here, re aircraft specifications and design) can separately litigate the same claim without resulting in “virtual representation” of one party by the other.
  
  24. United States v. Weber Aircraft Corp., 465 U.S. 792 (1984). Exemption 5 incorporates a privilege protecting witness statements given to military personnel in the course of military air crash safety investigations
- P. The federal E-Government Act of 2002, Public Law No: 107-347 was designed “To enhance the management and promotion of electronic Government services and processes by establishing a Federal Chief Information Officer within the Office of Management and Budget, and by establishing a broad framework of measures that require using Internet-based information technology to enhance citizen access to Government information and services, and for other purposes.” Its specific goals include this one, “To provide enhanced access to Government information and services in a manner consistent with laws regarding protection of personal privacy, national security, records retention, access for persons with disabilities, and other relevant laws.”
- Q. All US government departments, agencies and commissions make extensive voluntary use of the internet/web to provide consumers with useful information.

- R. A number of US federal statutes require that consumers be provided on an individual basis with information about (1) their bank accounts (the Right to Financial Privacy Act), (2) their credit ratings (the Fair Credit Reporting Act); and (3) firms' data sharing practices and policies (The Financial Modernization Act, Title V ("Gramm-Leach-Bliley" and related regulations).
1. Enacted in the last decade, the Gramm-Leach-Bliley Act requires that banks and credit card companies send annual notices of their privacy and data-sharing policies by mail to their customers' home addresses.
  2. Dating back to the 1970s, the Fair Credit Reporting Act requires consumer credit reports be disclosed to consumers upon request and at certain other times, such as when a credit application has been denied based on information contained in a credit report.
  3. At least 45 of 50 states require companies to notify customers or take other consumer protection measures following a "data breach" resulting in possible disclosure of confidential consumer information. See, e.g., Cal. Civ. Code 1798.82 and 1798.29.
  4. The federal banking laws, 15 USCA Section 1693c(a), provide that the terms and conditions of electronic funds transfers involving consumer accounts must be disclosed at the time of contract for transfer.
- S. Supported by the Obama Administration, on July 8, 2009 a proposed Consumer Financial Protection Agency Act of 2009 was introduced into Congress by Congressman Barney Frank, (D-MASS). The Act would establish an independent executive agency, the Consumer Financial Protection Agency, to regulate the provision of consumer financial products or services, in-

cluding mortgage lending. The Act would place the administration of new and many existing laws under the authority of the newly created agency, including the Electronic Funds Transfer Act, the Equal Credit Opportunity Act, part of the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, the Home Mortgage Disclosure Act, the Real Estate Settlement Procedures Act, the Truth in Lending Act, and the Truth in Savings Act. The Act would transfer authority concerning consumer financial protection currently in the hands of the Federal Reserve System, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the Federal Trade Commission (FTC), and the National Credit Union Administration. The new agency would be authorized to enact rules designed to prevent unfair, deceptive, or abusive practices in connection with any transaction with a consumer for a financial product or service and to require disclosures or communication to consumers of the costs, benefits, rates and risks of financial products or services. The act would modify the authority of the FTC in the area of financial products and services and amend the Federal Trade Commission Act to require the FTC to work in tandem with the new agency on unfair trade and deception investigations.

- T. The federal Lanham Trade-Mark Lanham Act Section 43(a), 15 USCA Section 1125 (a), prohibits anti-competitive actions that confuse consumers by passing off one product for another or that constitute false or misleading claims in advertising. See Coca-Cola Co. v. Procter & Gamble Co., 822 F.2d 28, 31, 3 U.S.P.Q.2d (BNA) 1364, 1367 (6th Cir. 1987); W.L. Gore & Associates, Inc. v. Totes Inc., 788 F. Supp. 800, 23 U.S.P.Q.2d (BNA) 1091 (D. Del. 1992)
- U. The United States requires that products imported from abroad meet prescribed safety standards. Imported products are typically required to bear the same product content and safety labeling as products produced in-country.

**2. What are the bases of claim for consumers to obtain information about production processes or health hazards of products, services or work performances?**

A. Numerous sectoral federal and state statutes require that consumers be provided information in notices or on product packaging and labeling.

1. Questionnaire 1: Fair Packaging and Labeling Act of 1966, 15 U.S.C. §§ 1451-1461.
2. Questionnaire 2: Federal Food, Drug and Cosmetic Act, 21 U.S.C. 301 et seq.
3. Questionnaire 3: Federal Hazardous Substances Labeling Act, 15 U.S.C 1261 et seq.
4. Questionnaire 4: Public Health Security and Bioterrorism Preparedness Act of 2002, Public Law 107-188, June 12, 2002.
5. Questionnaire 5: Dietary Supplement Health and Education Act of 1994 (DSHEA)
6. Questionnaire 13: Consumer Product Safety Improvement Act (CPSIA)

B. Federal and state open record laws can provide a vehicle for consumers or consumer groups to obtain information about consumer products when such information is held by government agencies.

1. Questionnaire 6: The Freedom of Information Act of 1974, 5 U.S.C. § 552, As Amended By Public Law No. 104-231, 110 Stat. 3048.

C. Numerous sectoral federal statutes require that disclosures be made to consumers contemplating financial transaction and contracts.

1. Questionnaire 7: Financial Modernization Act, Title V (Gramm-Leach-Bliley Act)
2. Questionnaire 8: Magnuson-Moss Warranty Federal Trade Commission Improvement Act, 15 USCA § (45)m 57a, 57b
3. Questionnaire 9 UCC (Uniform Commercial Code)
4. Questionnaire 10: Federal Trade Commission Act

5. Questionnaire 11: Lanham Act 15 U.S.C.A. Sec 45

6. Questionnaire 12 SEC Securities and Exchange Commission Act

**3. Are these rules mandatory or is the consumer allowed to abandon information rights in general?**

In general consumers cannot waive or bargain away their rights to nutrition, content and safety labels or warnings on food or products.

Rules that grant consumers access to information can be mandatory. So, for example financial service providers covered by the federal Gramm-Leach-Bliley Financial Modernization Act must send annual privacy notices to consumers informing them of data sharing practices and providing them of an opportunity to “opt out” of certain data sharing. Consumers may not waive their right to receive such notices. Consumers are, however, free to treat legally mandated information notices sent to them through the mail as “junk mail” and throw notices away without reading it.

**4. Are information rights in general or in particular developed by case law? If so, have they been codified in the meantime?**

Mostly in the area of food products and financial products information rights and obligations have been created by statutes and agencies regulations.

However, to an extent they have also been developed through tort and contract case law, as described below.

Tort law: US case law (tort law) includes a body of products liability law based on negligence and “strict” liability. Courts have held that the failure to provide adequate information about risks and hazards may constitute negligence-- breach of duties of care owed consumers. Private persons injured may sue alleging negligence. Courts have held that selling products in a defective condition may be a basis for what has been referred to as “strict” product liability for manufacturers, distributors and retailers. A product can be defective either because of (1) a dangerous flaw in a specific unit of the product was overlooked by the maker or seller, (2) because of a danger-

ous product design affecting all units of the product; or (3) because of an absent or dangerously inadequate warning or label.

Contract law: A hundred years ago US contract case law was a basis of limiting liability for defective products to persons in “privity of contract” with the seller. Contract law is no longer such a limitation. A consumer does not have to be a purchaser of a product in order to recover for injuries caused by a defective product. Moreover failure to provide information needed for safe use of a product has been deemed a violation of implied warranties of “fitness” and “merchantability” recognized in common law and in positive commercial codes. Injured persons commonly bring tort and contract claims in suits against manufacturers and retailers.

**5. Is the relation of the claims to information mentioned in questions A.I.2. and A.I.4. subsidiary or is there a concurrence between the different bases of claim? Are they (currently) in any way coordinated, maybe even integrated in a single code?**

There is no single code.

Federal rules and statutes tend to preempt state and local rules and statutes.

Tort and contract remedies work in tandem with federal regulations. State courts treat violations of consumer safety standards as evidence or proof of negligence.

Some consumer protection statutes cannot be enforced through private actions, some can.

Some consumer statutes create criminal penalties as well as, or instead of, civil remedies.

**6. If there are legal regulations on consumer information in your country: Can they primarily be assigned to private law, public law or criminal law? Why has this option of regulation been chosen?**

As outlined above, there are ample regulations requiring that consumer be given information.

Consumer information is regulated through private and public law.

With the complexity of modern consumer goods and technologies, protecting consumers from non obvious dangers has become a function of what it sometime referred to as “the regulatory state”.

Because of the inefficiencies and arbitrariness of the system of private tort and contract remedies, the US federal government, along with the states has enacted statutes and rules enforced primarily through regulatory agencies that require that consumers be provided specific information about products and services.

Injuries to consumers denied information may constitute criminal fraud or give rise to significant monetary fines and penalties being imposed on businesses. Normally only intentional or highly reckless wrongs constitute crimes.

**7. In case the provisions can be assigned to private law, are they primarily contract law or tort law provisions?**

Yes. Tort law (both negligence law and products liability law) provides opportunities to recover monetary damages when a consumer is injured by an unreasonably dangerous product. A product sold without warnings is defective product. Additional, contract law remedies are available to private parties whose consumer products fail to meet consumers’ expectations of safety and usability, whether or not the consumer is injured by the product. (See 4. Above for additional points.)

**8. What possibilities, besides the rights to information mentioned in questions A.I.2 and A.I.4 do consumers have in order to obtain information on the quality of products, work performances and services as well as on infringements, production processes or health hazards from authorities or private persons?**

Right to Information from federal and state government: The Freedom of Information Act of 1974, 5 U.S.C. § 552, (FOIA) is an open government statute aimed at maximally transparent government. (See Part 1 (M), above for a detailed description.) Using FOIA, the media, public interest groups and the general public can keep track of what the federal government is up to. The statute allows consumers to seek information held by government related to consumer products. The FOIA statute could be used, for example, by a consumer who wanted access to agency records that might reveal whether the safety of food, drugs or consumer goods was being adequately pursued by federal authorities. Both the federal Privacy Act and nine FOIA exemptions (for personnel medical and similar files, national security), limit disclosures under the Act. The Privacy Act of 1974, 5 U.S.C. § 552a (2000), which has been in effect since September 27, 1975, can generally be characterized as an omnibus "code of fair information practices" that attempts to regulate the collection, maintenance, use, and dissemination of personal information by federal executive branch agencies. The Privacy Act regulates the manner in which a federal agency may disclose private information about an individual to the general public. Importantly, it also regulates interagency information sharing. Federal agencies are separately responsible for meeting their own FOIA responsibilities. Requests for records must be addressed the appropriate agency for processing. Persons who believe they have been improperly denied a FOIA request and have exhausted their administrative remedies may sue in federal district court. The 50 states generally have their own open record laws, granting consumers rights to see and copy records held by state agencies, with exceptions for privacy and law enforcement.

Right to Information from Private Parties. As described above, the answer is generally, no. Inside the litigation content, consumers and their litigating advocates have

wide access to data from businesses believed guilty of or responsible for consumer injuries.

**9. Do the authorities or persons mentioned in question A.I.8 receive general funding by the state or a remuneration/reimbursement from the state for specific actions relating to informing consumers?**

No. Consumers generally have to pay for the costs of making copies of government records or documents obtained in discovery.

**10. Are the authorities mentioned in question A.I.8 or the issued information controlled by the state (through random samples)?**

N/A

## **II. Historical development**

**1. When, in what context and for what reasons were the rights to information and the consumer information institutions mentioned in A.I.2. to A.I.10. established?**

*See generally Dee Pridgen and Richard M. Alderman, Consumer Protection and the Law (Thomson West, 2008-2009).*

From agrarian society to industrial society. Prior to the twentieth century US buyers and sellers were presumed competent to judge the quality of products and services. A rule of *caveat emptor* applied in the law: buyer beware and suffer the consequences of inadequate inspection. If a consumer bought a product that was defective or dangerous, it was the consumer's own fault for not carefully inspecting the item before purchase. The law declined to second guess buyer/seller contracts, even if those contracts were the result of unequal bargaining power and deception.

The era of corporate manufacturing and mass produced goods. With the dawn of the 20th century consumer products became more complex and the processes that produced them more complex as well. It became it more and more difficult for consumers to judge safety and quality. The rise of powerful corporate manufacturers exacerbated the problems of unequal bargaining power and introduced additional barriers to meaningful bargaining.

The New Deal. The Era of Antitrust. A collective sense that government should play a larger role in promoting public welfare eventually flourished in the first third of the 20th century. In the 1930's federal agencies were called on to address the problem of consumers being treated unfairly by businesses.

Consumer Rights Movement. In the 1950s, to boost the post World War II economy, Americans were encouraged to freely purchase from an ever widening array of consumer goods—cars, radios, washing machines, televisions, vaccum cleaners, lawn movers and so on. In the 1960s professional lawyers and consumer advocates, including famous consumer rights advocate Ralph Nader, led a fight for consumer protection laws.

Concumer Rights Laws, first major wave: In the 1970s Congress gave the FTC enhanced powers to fight unfair and deceptive trade practices. Congress also created the Consumer Product Safety Commission. The Fair Credit Reporting Act was enacted, along with the Magnuson-Moss Warranty Act.

State Activity: In the 1980s state legislatures began to enact consumer protection laws of their own, including laws relating to the purchase of new and used automobiles. In the 1990s, states undertook to regulate tobacco products and advertising. State and federal agencies took on tasks of environmental protection increasingly after the 1980s. In the 1980s mediation and arbitration, alternative dispute resolution modalities, emerged as a popular approach to resolving consumer complaints; some businesses placed binding arbitration clauses in consumer contactts.

Information Age. In the opening decade of the 21st century the US began protecting consumer interests related to the use of telephone and cable services, financial services and the internet/web. Increasingly government came to require information disclosures related to the use of financial goods and services, and data breaches.

Deregulation: Some US observers believe that government deregulation of industry which began in the Reagan era and continued through the Bush era, rolled back 20th century consumer protections in key areas of investment, real estate and lending, with negative effects on the welfare of consumers. Ideologies of rational choice and antipaternalism dominated Washington policymaking.

Reregulation: The Obama administration has backed the creation of a new consumer protection agency to protect consumers of financial and credit products. Consumers are understood by the administration as complex market actors whose with predictable cognitive biases that impair sound choices, and vulnerabilities to aggressive, self-interested firms. In October 2009 the House Financial Services Committee approved The Consumer Financial Protection Agency Act of 2009 (H.R. 3126), which includes the creation of a new federal agency central to President Obama's financial regulatory reform agenda.

**2. Can certain waves in the establishment of information rights be distinguished in your country? Were they released within a mutual context (in terms of time and subject matter)?**

Certain temporal and subject matter waves are possible to identify, as suggested in II (1), just above.

Consumers have been accorded rights to information about:

- the content and nutrition of food and drug products;
- automobiles and other mechanical products and vehicles;

- credit, housing and financial products and services;
- pesticide use and other environmental toxins used in households and in farm and industrial work;
- alcohol and tobacco use;
- internet and web use
- electronic data breaches
- telephone, cable and other communications

**3. Have there been phases of counteracting or correction? Has the extent of the rights to information or the involved group of people at some point been highly extended, restricted, modified or defined?**

An example of extended rights: In the context of food products, the information rights moved beyond mere content information (i.e. beef vs. pork; all meat, vs. meat and carbohydrate fillers), to nutrition information (calories, fat, sugar, cholesterol, fiber and vitamin and mineral content); and to mode of production (organic versus non-organic; natural vs. non-natural)

An example of restriction: Recently, the FDA decided to regulate tobacco as a drug. The US Supreme Court held that the constitutional commercial speech rights of the tobacco industry, restricted FDA control over the content of tobacco advertising. See FDA V. Brown & Williamson Tobacco Corp, 529 U.S. 120 (2000) See generally [http://www.firstamendmentcenter.org/speech/advertising/topic.aspx?topic=tobacco\\_alcohol](http://www.firstamendmentcenter.org/speech/advertising/topic.aspx?topic=tobacco_alcohol)

Ten years ago, federal legislators attempted to highly regulate access to adult content on the internet to protect children, passing a law called the Children's Online Protection Act (COPA, not to be confused with COPPA, the Children's Online Privacy Protection Act, which has raised no constitutional objections). The federal courts held that COPA was unconstitutional.

#### **4. What were the reasons for a legislative action?**

An apparent desire to better protect consumers, a responsibility of government.

### **III. Private sources of information**

**1. What is the role of voluntary product information given by businesses within the consumer information system in your country? What percentages of businesses provide this kind of product information or participate in voluntary control systems? What are (possible) reasons for low participation? Are there voluntary agreements of businesses to provide certain information?**

It is impossible to say what percentages of businesses provide information voluntarily, but it is highly apparent that most US major businesses offer consumers some degree of information about how to safely use their products and services. Much of this is driven by actual legal requirements and fear of lawsuits or regulatory penalties.

One example of “voluntary” consumer information provision is the “product recall” phenomenon.

The manufacturers of products often mount voluntary recalls of dangerous or defective products, in consultation with the Food and Drug Administration. These recalls involve providing information (notice) to consumers and offering repairs, replacements or reimbursement for unsafe products returned to the manufacturer.

For example, in December 2009 McNeil Consumer Healthcare, Division of McNEIL-PPC voluntarily recalled “**all Lots of Tylenol® Arthritis Pain 100 Count With Ez-Open Cap**“. See <http://www.fda.gov/Safety/Recalls/ucm195690.htm>.

**The company press release explained that:**

... [L]ots of this product were recalled due to consumer reports of an unusual moldy, musty, or mildew-like odor that was associated with nausea, stomach pain, vomiting and diarrhea. . . . The uncharacteristic smell is caused by the presence of trace amounts of a chemical called 2,4,6-tribromoanisole. The source of 2,4,6-tribromoanisole is believed to be the breakdown of a chemical

used to treat wooden pallets that transport and store packaging materials. The health effects of this compound have not been well studied, and to date all of the observed events reported to McNeil were temporary and non-serious. Consumers who purchased TYLENOL® Arthritis Pain Caplet 100 count bottles with the distinctive red EZ-OPEN CAP from the lots included in this recall should stop using the product and contact McNeil for instructions on a refund or replacement.

<http://www.fda.gov/Safety/Recalls/ucm195690.htm>

Most major companies that manufacture, distribute or sell products to consumers regard it as a good competitive business practice to make detailed product information short of trade secrets available to consumers. Such information is often packaged with products and/ or made available online through the company's website.

Some academics argue that since the lack of information has been the major justification for consumer protection laws, the case for such laws has been weakened by the dramatic increase in recent years of the availability of consumer information on the Internet. For businesses, placing information on the internet is an inexpensive way to protect consumers. The question, though, is whether consumers are always willing and able to make use of the information on the web.

The web is also the source of financial and other product literacy tools, to help train consumers to make better choices about product quality and safety.

**2. If there are voluntary agreements in your country to provide information, as mentioned in question A.III.2: In what ways are these kinds of information provided to the consumer? Does the state review the accuracy of the information (with random samples)?**

Federal Trade Commission, a federal agency with broad consumer protection powers, does not wait for consumers to bring complaints to it. Nor does the Consumer Protection Agency. They seek out examples of non-compliance with consumer pro-

tection laws and are authorized to bring enforcement actions against companies that violate the law. The FTC will sometimes examine the accuracy of information provided to consumers as part of an unfair or deceptive trade practice investigation.

## **Part B. General view of the consumer information regulations**

### **I. Questions going beyond individual bases of claims**

#### **1. General considerations N/A**

*a. In case your country does possess consumer specific information provisions:  
To what subject of matter do they apply?*

As described in detail in Part I, above, they apply to nearly all consumer goods, including, food, drugs, farm products, autos, tobacco, alcohol, bedding, clothing, toys, baby furniture, car seats for children, and certain financial products and services.

*If Regulation (EC) 178/2002 applies in your country: Does the specific information law for consumers regard areas other than food law?*

N/A

*b. Does a rule state an information duty in your country, in case a person is offered products, services or work performances, which do not fulfill the particular security requirements?*

N/A

*c. Is there a term for maturity of information (information must/should not be handed on regarding to the age of the data)? If so, what is the time limit after which information are regarded as too old?*

N/A

*d. Concerning the question, whether there is a right to information: is the interest of the consumer measured against the interests of the general public or other involved parties, e.g. regarding costs? For which bases for claim?*

N/A

## **2. Dealing with (supposedly) incorrect or incomplete information**

*Notice: Please answer all questions here as far as a coherent answer is possible. If the issues are more differentiated in terms of the respective basis of claim, please answer the question on the „Questionnaire Bases for Claims“ under item 6.a.*

*a. What constitutes a breach of the duty to inform? How is a breach determined? Which problems occur in practice? Are there any proposals for solutions? Who bears the burden of proof that the information issued is incorrect?*

Interpreted as a question about the US tort system, of negligence and products liability, I can answer this question here.

A breach of the duty to warn (a kind of duty to inform) is often measured by whether the costs of information disclosure ought to have been assumed in light of the severity and likelihood of injury. It can also be measured by reference to whether the utility of a product sold with consumer information about its risks having been disclosed outweighs the risks of non-disclosure. Those complaining of injury (plaintiffs) bear the burden of proof by “the preponderance of the evidence” in a negligence case. In a products liability cases alleging warning defects, the plaintiff bears the burden of proof.

*b. If the breach of the duty to inform entitles to claim for damages: Is this claim dependent on negligence? Which other requirements and objections are decisive?*

It can be based on negligence or on “strict” products liability. Commentators commonly point out that since “strict” products liability requires proof that a product is unreasonably dangerous, there is little difference between negligence and products

liability law in design and warning defect cases. The American Law Institute has dropped the language of “strict” liability in its most recent (Third) Restatement of Torts-- Products Liability.

*(How) Can the authority/the company free itself from liability? How is the situation handled if information turns out to be wrong later on, but seemed correct according to the state of knowledge when the information was given?*

Manufacturers can defend on the ground that the consumer misused or altered a product; in some states they can also defend on the ground that the product design and warnings reflected the “state of the art” at the time the product was sold.

*c. How is the damage calculated?*

*Are moral damages compensated in case of violation of the duty to inform? If yes: Under which conditions?*

*Are punitive damages (or similar) granted in case of violation of the duty to inform?*

There are no “moral damages” as such in the US.

Damages available in a products liability or negligence case in the US are damages for 1. lost wages, 2. medical expenses, 3. pain and suffering, and, if the defendant’s tortuous behavior was egregious, 4. punitive damages. Some states place a “cap” on pain and suffering damages and punitive damages, or require that they not greatly exceed the victim’s economic damages. Some states require judges to reduce damage awards if the plaintiff’s wrongful behavior contributed to the injury, under principles of “comparative fault” or “equitable apportionment.” Most state courts will discount damage awards to present value so that plaintiffs, presumed to be rational investors, are not overcompensated. A “wrongful death” action may be brought by the surviving spouse and/or dependent children of a consumer killed due to the failure to provide an adequate warning (information).

In a recent case, *Green v. N.B.S., Inc.*, 2009 WL 2151367 (Md.), the Maryland Supreme Court held that its state damages „cap“ on non-economic damages applies to the consumer protection claims authorized by a state consumer protection act.

*d. When exactly commences the limitation period for claims based on the breach of the duty to inform? What is the statutory limitation period?*

This is a matter of individual state law. Generally 1 to 6 years from the time of injury is the limitations on bringing a tort claim for the injury of an adult.

*e. Does the business have the possibility/right to correct or comment (incorrect) information issued by authorities in public (right to a counterstatement)? And is it published (automatically) by the authority, if the situation in the respective company improves? N/A*

## **II. The right to receive information from authorities**

### **1. Provision, processing and control of information by authorities**

*a. Is the authority obliged to check whether information that is to be released is correct?*

In the context of FOIA, no. The government does not have an obligation to perform research or analysis of data. The government is obligated to insure that a disclosure would not violate privacy rights, trade secret rights etc.

*If there is no such obligation: Is it at least obliged to communicate doubts it is aware of with regard to the correctness of the information?*

No.

*b. Is the authority obliged to ensure that information is comprehensible (e.g. for assessing technical measurements, or scientific doubts in risk assessment)? If yes, what is the scope of its obligation to process information?*

- There is an expectation that when government provides consumer information for the benefit of consumers, such as drug approval information, the information is of a high quality.
- Consumers do not have a private right of action in every instance against the government for providing misinformation.
- There is no obligation in the FOIA to make sure data is comprehensible (for example, is provided in a language the consumer reads and writes or on an educational level suitable to the individual FOIA requester).

*c. Is the consumer entitled to claim a more rapid collection of information (in cases of delay)?*

- Consumers can go to court to complain of groundless and unjustifiable delay in the filling of a FOIA request.

*d. In how far is the flux of information between authorities guaranteed? Is there a joint database?*

- There are “data matching programs” among US federal agencies that permit data comparisons and sharing. The Privacy Act regulates data matching programs.

*e. How is provision and dissemination of information ensured in less densely populated areas or for particular population groups (senior citizens, handicapped people, migrants)?*

Some federal government documents are provided in languages other than English (usually, Spanish). Electronic digitization of records and data makes it more avail-

able to persons unable to leave home due to age or infirmity or who live in remote locations but who have access to information using home, library or school computers.

*f. Does the State carry out quality controls in certain areas regularly?*

US State variation makes this question difficult to answer.

## **2. Organisation of authorities**

*a. Is a central authority (maybe especially designed for these purposes) responsible for handling the requests for information?*

No.

*Or is the respective authority responsible for the requests that possesses the information or is able to examine the matter?*

Agency by agency.

*How can the consumer find the competent authority? Are there (on the internet/in a telephone exchange) joint contact points or contact persons?*

*What happens with requests directed at the wrong authority?*

They may find that their request for information is rejected when it is made to the wrong authority or using the wrong procedures. See, for example, *Maxwell v. Snow*, 409 F 3d 354 (DC Cir 2005) (taxpayers must use FOIA when seeking information concerning their own liability).

There is no statutory obligation to tell the applicant which agency is the right one, but it is also possible that the employee receiving the request does not know what agency is the right one and will not want to risk an error. The burden is on the consumer.

Moreover, if a consumer or other FOIA requester asks an agency for information and does not follow the procedures of FOIA, the agency may reject the request, even if the agency knows exactly the files sought and how to have them easily copied and sent. In *Maxwell v. Snow*, 409 F 3d 354 (2005), a federal court held the individuals seeking information about their tax liability from the Internal Revenue Service could not simply write and ask for the information under provisions of the tax code giving tax payers a right to information, they had to do so following the procedures of the FOIA. (In this unusual case the individuals seeking information were an annoying “fringe” group who believe Texas is a separate country and that they shouldn’t have to pay US taxes! Since the agency and the court thought the request was based on silly beliefs, I believe, they didn’t cut the tax protestors any slack.)

*b. Are there any time limits for handling requests?*

YES

*If yes: What are the time limits? Are they usually abided by?*

YES

*How is ensured that similar or parallel requests do not cause too much administrative work?*

There is no assurance, but agencies must make a good faith effort to comply with requests for information sought under FOIA.

### **3. Public Databases**

*a. Which kind of information is available via databases (e.g. on the internet)?*

*Does the access to or use of these data depend on additional criteria (age of the consumer, potential interest in receiving the information required)?*

A vast amount of consumer information is available on the web, some directly through federal and state agencies, and some through public libraries. The Children’s Online Privacy Protection Act (COPPA) limits the ability of website operators to collect personal information from children under 13 without parental consent.

*b. Are results of official quality or safety controls automatically made accessible online free of charge? Does the state compile and publish on the internet rankings concerning the performance of businesses with regard to the results of the control?*

Such information is not always available or automatically made available. It may be available by request, using FOIA, for example.

#### **4. Warning notices**

**Under which conditions are authorities entitled or obliged to issue product, services or work performance warnings? How certain must the correctness of the information be?**

Normally the authorities require manufactures or producers of consumer goods to issue warnings based on good and accurate evidence. For example, The FDA can compel drug companies to issue “black box” warnings concerning products found after approval to have dangerous side effects. Here is an actual “black box” for the product Zyprexa, an antidepressant manufactured by Eli Lilly.

##### Suicidality and Antidepressant Drugs

Antidepressants increased the risk compared to placebo of suicidal thinking and behavior (suicidality) in children, adolescents, and young adults in short-term studies of major depressive disorder (MDD) and other psychiatric disorders. Anyone considering the use of fluoxetine or any other antidepressant in a child, adolescent, or young adult must balance this risk with the clinical need. Short-term studies did not show an increase in the risk of suicidality with antidepressants compared to placebo in adults beyond age 24; there was a reduction in risk with antidepressants compared to placebo in adults aged 65 and older. Depression and certain other psychiatric disorders are themselves associated with increases in the risk of suicide. Patients of all ages who are started on antidepressant therapy should be monitored appropriately and observed closely for clinical worsening, suicidality, or unusual changes in behavior. Families and caregivers should be advised of the need for close observation and communication with the prescriber. Olanzapine and olanzapine + fluoxetine combination are not approved for use in children and adolescents.

### III. Guaranteeing the protection of companies and data

#### 1. Industrial and business secrets

*a. Are there specific rules for cases in which consumer information rights collide with business law, especially provisions concerning competition rules or trade and business secrets? If so, please name these rules.*

Yes. Consumers are not entitled to information in the hands of business or government that constitutes a “trade secret.” A company may seek to enjoin disclosure of information on the ground that it is a trade secret.

*b. If industrial and business secrets are exempt from the obligation to release information in your country:*

*What is the definition of industrial and business secrets in your country?*

The operative term in the US would be “trade secret,” which has somewhat vague common law definitions. I will answer this question by quoting two authorities concerning the definition of “trade secret.”

(a) AMJUR MONOPOLIES § 1072 . Nature of trade secrets

“The concept of a trade secret is a nebulous one that has been variously described by courts and textwriters.[] Under the majority view, based upon the Uniform Trade Secrets Act, the term "trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process that derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use,[] and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[]”

“**Definition:** "Readily ascertainable" means information that is available in trade journals, reference books, or published materials, or is susceptible of copying as soon as it is available on the market.[]”

Under the minority view, based upon the Restatement First, Torts, there is a four-point test for a trade secret. The information must: (1) not be generally known or ascertainable;[] (2) provide a competitive advantage;[] (3) have been developed at the plaintiff's expense;[] and (4) be intended by the plaintiff to be confidential.[] “

(b) What is "trade secret" so as to render actionable...., 59 A.L.R.4th 641

„The crucial issue to be determined in cases involving alleged trade secrets is whether the information sought to be protected is, in fact and in law, confidential or secret; and the result in each case depends on the conduct of the parties and the nature of the information.[] Courts have recognized the difficulty of determining whether a device, process, or other compilation of information should be classified as a trade secret or a matter of general knowledge, and have concluded that examples may be more helpful than definition or redefinition.[] Although no general and invariable rule can be laid down,[] two views adopted by courts as to what constitutes a trade secret are contained in the Uniform Trade Secrets Act () and in the Restatement of Torts (). Both views are attempts to provide a uniform guideline for determining protectable trade secret status and they contain similar provisions; for instance, under both views the secrets must be information, must be valuable, must be generally unknown, and must be the subject of reasonable security measures designed to maintain confidentiality. By the very nature of characteristics such as "valuable," "generally unknown," and "reasonable security measures," a determination of protectable trade secret status in any form of information is a widely subjective endeavor, and often requires the consideration of several factors concerning the nature of the information and the conduct of the parties. The various factors to be employed, and the weight to be attached to each factor will vary depending on the facts of a particular case.[]“

*Who decides whether specific information constitutes an industrial or business secret or not?*

The courts, ultimately.

*If businesses are deciding the previous question: Is there a negative list indicating which kind of information needs in no way be protected as industrial or business secrets or as other privileged information?*

*c. Can an authority inform a business if it releases information on the latter, or does it have to? If the company is informed, does this happen before, at the same time or after the release of the information? Can the business object to the release?*

An agency may inform, but does not have to inform in every case. If there is reason to think proprietary business information is at stake businesses are given an opportunity to object. See Chrysler Corporation v. Brown, 441 U.S. 281 (1979), which held that a business which submit documents to the government may sue under the Administrative Procedures Act to challenge an agency's decision to release documents related to them requested under FOIA.

*d. Does your country have any experience with an opposing party's right to adopt a transaction for themselves in the way that the entitlement to receive information on a company from an authority must be denied if the business agrees to provide the information itself?*

I am not certain. What is certain is that under FOIA, a person has a right to receive information from government even if that information may be available from the company itself. This is because government accountability, as well as access to information per se, is the goal of FOIA.

## 2. Data protection

*a. What is the role of data protection in the framework of releasing information and how is data protection ensured?*

The release of information is made subject to the limitations of the country's data protection laws.

An important Supreme Court case on this point is: U.S. Dep't of Justice v. Reporters Committee for Freedom of Press (1989). In this case the media sought information about a criminal suspect that was compiled by the federal government from public records. The Supreme Court held that the privacy rights of the criminal suspect bared disclosure of his criminal „rap“ sheets to the media.

Congress has enacted patchwork of numerous federal data protection statutes in the US, many with state counterparts. Notwithstanding these statutes, information can be released to the public pursuant to FOIA and for a variety of reasons relating to public health and safety and national security and law enforcement. Federal data protection statutes include:

**1970.** The Fair Credit Reporting Act (1970), regulating confidential credit reports.

1974. The Privacy Act (1974), regulating access to federal records.

1974. Freedom of Information Act (FOIA), privacy exemptions to the federal open records law.

1974. The Family Educational Rights and Privacy Act (FERPA), regulating access to school records.

1978. The Right to Financial Privacy Act (1978), regulating access to banking records.

1980. The Privacy Protection Act (1980), regulating the search and seizure of work products protected by the First Amendment.

1988. The Video Privacy Protection Act (1988), regulating access to video rental records.

1988. The Employee Polygraph Protection Act (1988), prohibiting employee lie-detection testing.

1991. The Telephone Consumer Protection Act (1991), regulating access to consumer data and amended to create the National Do-Not-Call Registry.

1994. The Driver's Privacy Protection Act (1994), regulating access to motor vehicle records).

1996. The Health Insurance Portability and Accountability Act (HIPAA), regulating the privacy and security of medical information.

1996. The Telecommunications Act (1996), limiting disclosure of telecommunications consumers' personal information;

1998. The Children's Online Privacy Protection Act (COPPA), limiting website operators' access to children's personal information;

1999. Title V of the Gramm-Leach-Bliley Financial Services Modernization Act (1999), regulating disclosures of financial information.

2003. The CAN-SPAM Act (2003), prohibiting certain forms of unsolicited email

**Also:**

**1968. Title III of the Omnibus Crime Control and Safe Streets Act, a major statute governing wiretap and other surveillance of telephone calls.**

**1978. The Foreign Intelligence Surveillance Act (FISA), setting the ground rules for top-secret government intelligence gathering.**

**1986. The Electronic Communications Privacy Act (1986), amending Title III to broadly regulating access to wire, oral and electronic communications.**

1994. The Communications Assistance for Law Enforcement Act (CALEA), facilitating official surveillance of electronic communications

1998. The Identity Theft and Assumption Deterrence Act (1998), providing remedies for victims of identity theft.

2001. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT ACT), extensively amending and supplementing federal information laws to facilitate investigations of terrorism.

*b. May authorities pass on the name and address of persons having made a request to receive information on a company to its entrepreneurs?*

Yes.

*c. Which are the limits of providing information in your legal system?*

Privacy, confidentiality, national security, law enforcement, and, to a degree, cost.

#### **IV. Specific aspects of (pre-) contractual rights to information**

Notice for reports from EU member states: *The mere implementation of the EU directive 2001/95/EC should not be mentioned because the directive is known. Therefore, only overshooting implementation or other specific aspects in implementing the directive are relevant.*

##### **1. Minimum information**

**Is it the entrepreneur's legal duty or is he obliged to inform the consumer about certain facts before the conclusion of a contract?**

Certain contracts require disclosure of material information.

**If yes: Is there a specific form requirement as to how the information has to be given?**

##### **2. Legal consequences**

**Do consumers have any rights in case they have not received the necessary information (cancellation of contract, compensation for damage)?**

Yes

**If yes: Is this right subject to a time limit and what is the time limit?**

This varies with the consumer protection regime.

### **3. Other functionally equivalent rules**

Does your country's legal system provide other rules intended to protect consumers from concluding a contract without having all necessary information?

## **V. Practical effects of the rules**

### **1. Which are the most important norms for consumer information?**

When it comes to consumer product information, accuracy and completeness are the most important norms. Commercial free speech is also an important norm, one that can conflict with consumer information claims for accuracy and completeness. See Rebecca Tushnet, "It Depends On What The Meaning Of "False" Is: Falsity And Misleadingness In Commercial Speech Doctrine," 41 Loyola of Los Angeles Law Review Rev. 227 Fall 2007

### **2. If your country possesses data on this question: Which bases for claims/causes of action are most often used by consumers, which by consumer associations?**

N/A

There are so very many consumer protection regimes and rules in the US, that it is not possible to answer the questions in Section V in a helpful way.

### **3. Why are these bases for claims/causes of actions the ones most frequently used?**

-

**4. If there are any statistic data on this issue: How often are requests made, on which basis and on which subject matter?**

**What were the main reasons for the information to be denied? Inability of the requester to meet formal requirements, or the fact that the information required was not available or that the information requested was protected as industrial or business secrets or for other considerations?**

**5. Did individual (consumer) rights to information or different norms in their interaction lead to undesired side-effects in practice?**

**If yes: In how far, and what was the reason? Change in the behaviour of the addressees of the norm, or unintended interaction of several provisions that were originally intended for other purposes?**

**6. Did individual rules concerning information lead to unexpected positive developments, for example the development of new products or mechanisms for quality control?**

**7. Were there other economic or social impacts?**

**8. How long does it take, on average, to handle a request for information? Are there any maximum time limits by law and are they abided by?**

**9. If repeated offenses against product standards (precisely: food safety standards) in a specific product category (precisely: meat) occurred in your country: Who would react to this information, how quickly and on which basis? From whom does the consumer receive the information first, and for which reason? In case of public warnings: Are the entrepreneurs or the product mentioned (notwithstanding the impacts on the whole industry or a specific producer)?**

## **VI. Product labelling and quality control**

### **1. Is there a mandatory system for product labelling in your country, e.g. obligation to label goods or services that are harmful to health?**

YES. See, for example:

1. Department of Agriculture food label programs.  
[http://www.fsis.usda.gov/about/labeling\\_&\\_consumer\\_protection/index.asp](http://www.fsis.usda.gov/about/labeling_&_consumer_protection/index.asp)
2. Food and Drug administration food, medication, cosmetics and food supplement labelling programs  
<http://www.fda.gov/Food/LabelingNutrition/FoodLabelingGuidanceRegulatoryInformation/default.htm>
3. Federal Trade Commission textile, wool and fur clothing labelling programs. <http://www.ftc.gov/os/statutes/textilejump.shtm>
4. Consumer Product Safety Commission programs, hazardous substances, such as poisons, chemicals, paints, and for a host of other consumer product categories  
[http://www.access.gpo.gov/nara/cfr/waisidx\\_04/16cfrv2\\_04.html](http://www.access.gpo.gov/nara/cfr/waisidx_04/16cfrv2_04.html)

### **2. If there is an obligation to label products/services in your country, please describe the labelling system. See the discussion of the labelling required by the various agencies described earlier in my responses to this questionnaire.**

The labelling systems are varied and numerous depending upon the category of product. I described them in a general way in Part I, above.

### **3. The following questions are of great interest to us:**

*a. Where and how are the results published?*

N/A

*b. Is the entrepreneur entitled to make a counterstatement or statement?*

No

c. *If the entrepreneur is obliged to publish product information or results of control measures himself on the product or in the company: in which form, at which place and in which time limit does he have to publish this information?*

d. *Which sanctions might a company face in case of lacking or outdated information? Are there fines/administrative fines for entrepreneurs who deliberately and falsely advertise their products/services with positive control outcomes or labels?*

Fines, product recalls, criminal penalties and tort liability.

e. *For how long are entrepreneurs entitled to advertise their products/services with positive control outcomes or labels?*

Varies by product category.

f. *Who carries out the quality and/or safety controls necessary for product labelling, how often and what are the criteria applied?*

Varies by Product category. Companies bear costs for clinical trials of new drugs and medical devices. Government bears cost of, for example, meat inspection

*for which areas? And do citizens or the entrepreneurs controlled have an influence on intervals between controls or individual dates for controls? Who bears the costs for controls that are conducted upon request by someone?*

b. *In case of controls carried out by authorities: in which way are the controls structured?*

Varies by product category.

*Is there a standard authority for control and labelling, e.g. in a ministry (for these purposes) or are the inspectors subordinate to municipalities?*

No national standard authority for all product categories.

*c. Does the system cause higher costs, most importantly due to the fact that more staff is required?*

Yes. The high cost of medical drug products is attributed to the cost of safety testing presupposed by product labelling.

**4. If there is no product labelling system in your country: Were there considerations to introduce such a labelling system? If yes, why wasn't it introduced?**

The United States has a product labelling system and therefore this question is inapplicable.

## **Part C. Cost burdens for the parties involved**

### **I. Efforts for obtaining and issuing information**

**1. Which factual actions are necessary to fulfil the requirements of the respective rights to information?**

In the United States any right to information about (a) product content and (b) product safety is a right of positive law.

The recognition of such a right would be valid to the extent that claims are based on either (a) principles and doctrines of U.S. state common law available to private parties injured as a result of an inadequately labelled products or state or federal statutes implemented and enforced through state and federal agencies, keeping in mind that federal statutes generally pre-empt weaker state statutes.

**2. If there are estimates or calculations for costs caused by the procurement and issuing of information in your country: What are the total costs?**

Uncertain. However, reportedly, the cost of FOIA litigation has ranged in the hundreds of thousands of dollars. Fees collected from the public for satisfying FOIA requests generally amounts to less than half of litigation expenses. The Office of Government Information Services (OGIS) was created in 2007 under the Open Government Act to help more effectively resolve disputes over access to information held by government.

*Which actions are most expensive and/or time-consuming (obtaining information, release/publication, storing information, handling requests, examinations in and communication with companies, if necessary: processing and verifying information)? Are the costs for procuring and issuing information estimated or reported on a regular basis? If yes, in which way have they developed?*

Uncertain.

**3. If there was a cost estimate for bureaucracy costs when the right to information was enacted:**

*Which amount was estimated? In how far has this estimate proven true in practice?*

*In case of significant divergence – what are the reasons?*

**4. Were new purchases made or staff hired due to the right to information?**

## **II. Bearing the costs**

### **1. Do consumers have to contribute to covering the costs for procuring and issuing information?**

Sometimes.

*Does this contribution cover the costs?*

Sometimes.

*In which way are consumers involved in covering the costs: by fees (independent of time and effort), or by compensation for the actual efforts made?*

Here is an example of the (waivable) agency costs imposed on consumers. The United States Postal Service FOIA charges: „Duplication costs are 15 cents per page. Search and review time is \$32 per hour. Direct costs are assessed for information that must be retrieved by computer. If the assessable cost is \$10.00 or less, we do not charge a fee. If the fee exceeds \$25 and you did not indicate willingness to accept all costs, the Postal Service will notify you of the estimated fee and ask for your written agreement to accept liability. If the estimated fee is over \$250, our regulations allow us to collect an amount up to the full estimated cost before processing the request.“ <http://www.usps.com/foia/faq.htm#H5>

*Is there a fix lump sum or are the costs calculated on an individual basis?*

### **2. Are there any opportunities for socially deprived people to obtain information for free or under more favourable conditions?**

Yes under FOIA there can be fee waivers.

And generally, tort actions are financed on a contingent fee basis under which consumers pay lawyers a percentage of the sums recover if lawyers prevail. In some instances statutes provide rights to recover reasonable attorney's fees.

**3. Is there any evidence that cost sharing has a deterring effect?**

**4. Do entrepreneurs have to contribute to covering the costs according to the cost-by-cause principle for creating risks or for offense against consumer protection regulations?**

### **III. Cost-benefit analysis**

**1. Are costs for procuring and issuing information taken into account when dealing with the question whether there is a right to information? Are the costs for the general public measured against the interest of the individual?**

a. Yes, with the federal FOIA in mind.

b. Yes in products liability tort law. Here product manufacturers can sometimes use a “state of the art” defense, asserting at the time the product entered the stream of commerce later-acquired safety information was not available or could not have been discovered with a reasonable investment.

**2. If there is such a balance of interests: does involving the consumer in covering the costs therefore influence whether there is a right to information at all?**

Agencies may assess fees for complying with FOIA requests, e.g., photocopying fees. But notice that the FOIA statute provides a mechanism by which fees can be waived. 5 USC Sec. 552 (4) (A), suggesting that costs do not determine whether there is a right at all.

“(ii) Such agency regulations shall provide that--

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section--

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo, provided that the court's review of the matter shall be limited to the record before the agency. “

## **Part D. Practical Enforceability**

### **I. Enforceability of the right to information**

**1. Are there any mechanisms to settle disputes especially for consumer information acts? If no, are there any other mechanisms for settling disputes? Are these mechanisms being used?**

a. Litigation

b. Ombudsman

In 2009 President Obama appointed an ombudsman within the new Office of Government Information Services. As announced in a press release, <http://www.archives.gov/press/press-releases/2009/nr09-93.html>, „the OGIS is responsible for reviewing policies and procedures of administrative agencies under the Freedom of Information Act (FOIA); reviewing compliance with FOIA by administrative agencies; and recommending policy changes to Congress and the President to improve the administration of FOIA. The Director also is responsible for offering mediation services to resolve disputes between persons making FOIA requests and administrative agencies, and may issue advisory opinions if mediation has not resolved the dispute.“

**2. If, in your country, entrepreneurs are obliged to inform the consumer (as e.g. in Art. 19 section 1 of the Regulation (EC) Nr. 178/2002): how is made sure that entrepreneurs fulfil this duty?**

N/A

**3. Does the legal system of your country provide possibilities for consumer associations and similar institutions to sue businesses which did not comply with legal requirements concerning consumer information legislation?**

Consumer groups can seek information from government under the Freedom of Information Act. Consumer groups can and have tried to bring suits alleging that businesses defrauded the government by failing to disclose information about product safety. The Alcohol Foundation, ABMRF/The Foundation for Alcohol Research, “the largest, independent, nonprofit foundation in North America devoted solely to supporting research on the effects of alcohol on health and behavior and on the prevention of alcohol-related problems,” bought an unsuccessful qui tam suit against alcohol industry defendants.

*Notice: Actions for prohibitory injunction, lawsuits due to unfair competition, representative action in concrete disputes between consumer and entrepreneur etc. are to be considered.*

## **II. Procedural particularities**

**1. Are there any procedural opportunities to obtain further information (example: USA- pre-trial discovery)? If there are, what are the conditions? An in how far do industrial and business secrets play a role in these procedures?**

Pre-trial discovery and the use of subpoenas are routine litigation procedures through which consumers and consumer group have a right to obtain information directly from businesses. Discovery privileges are wide. Sensitive business proprietary information can be protected by court-ordered sealing of litigation records.

**2. On the other hand, can procedural aspects (investigations etc.) lead to the blocking of information or complicate the receipt of information? If yes, under which conditions, and what are the consequences?**

Under the Freedom of Information Act, firms may be notified before disclosures of corporate information and are able to block or slow down disclosures. As illustrated by *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979)), so-called Reverse Freedom of Information Act lawsuits come about when a person requests information contained in the records of a government agency which the firm which submitted the information does not want released. Reverse FOIA suits have been filed by corporations seeking to block release of information regarding their businesses. The Supreme Court held in *Chrysler* that FOIA does not specifically authorize reverse FOIA suits, but that a remedy could be available under the Administrative Procedure Act, 5 U.S.C. § 702 *et seq.* (1976).

## **Part E. Final appreciation, assessment**

**1. What is, in your opinion, the level of consumer information and consumer protection in your country?**

Despite consumer debt and credit woes blamed on the deregulation and under regulation of its financial and housing markets, the United States has a high level of consumer information when compared to countries such as Spain and Greece

which lack robust national Freedom of Information laws and limited state paternalism in areas such as tobacco advertising. The US has strong requirements of food and drug labelling, and a system of private tort liability that incentives communicating information about risks, health and safety.

Consumer groups and advocates have helped keep consumer protection on the public agenda. Numerous websites provide consumer information. See e.g., <http://www.consumerworld.org/>. US legal professionals can keep abreast of consumer law via, for example, the Journal of Consumer and Commercial Law and the Consumer Finance Law Quarterly Report. The Center for Consumer Law has published the "Consumer News Alert" since 2006. The general public can go to a variety of websites to learn where to find consumer information about various businesses and industries. See e.g., <http://www.fairfaxcounty.gov/LIBRARY/INTERNET/consumer.htm>

Many educated Americans would not think of making a major consumer purchase without first checking out its rating in Consumer Reports magazine or website. See <http://press-room.lawyers.com/Small-Businesses-and-Consumers-Use-Online-Ratings.html> (many small businesses and consumers use web based ratings to help make decisions).

Consumer Reports is a non-profit organization supported by subscriptions to its magazine and website. The premise of the respected and influential organization is that objective information empowers consumers to make the best purchasing decisions. Consumer Reports, on behalf of the general public, reports the results of its own scientific tests and ratings of thousands of products. Consumer Reports states that it "employs more than 100 experts working in 7 major areas: Appliances, Cars, Baby & Kids, Electronics, Foods, Health & Family; Recreation & Home Improvement. If a consumer wished to purchase a car, and were undecided between a particular Toyota model and a particular Volvo model, she could read a detailed assessment and rating of each model in an effort to make up his or her mind.

**2. Do you think the system for consumer information is successful, or what needs to be changed to make consumer protection more effective?**

Although it works pretty well, in my opinion, the system is not really a “system.” Yet attempting to unify and reconcile all of US consumer protection law, even on the federal level is a daunting concept.

There is room for tinkering: Ideally it would be possible to obtain truthful, accurate information without undertaking the expense of FOIA suits and tort litigation.

There is room for modernization: Internet sales (on eBay) for example forced courts to think differently about consumer protection and relative duties of buyers, sellers and online intermediaries to effect satisfactory transactions. See Nigro v. Lee, 63 A.D.3d 1490 (N.Y. App. Div. 2009) (rejecting claim by plaintiff who failed to take available self help remedies pre-sale but claimed fraud against seller whose ebay ad claimed the Mercedes offered for sale was „gorgeous“.

And there is a need for overhaul: it took a financial crisis to generate serious interest in 2009 in Congress in the creation of a new agency – the Consumer Financial Protection Agency--to centralize and regulate consumer protection in the credit and housing sectors.

**3. Which negative practical impacts or problems with the norm could be observed so far? Which other impacts do you expect?**

### **Problems that have not been addressed**

**Are there any significant problems in the field of consumer information legislation in your country that haven't been addressed in this questionnaire?**

**Is there anything else you think is worth mentioning in the context of consumer information rights in your country?**

I believe such rights are essential in a country whose economy relies heavily on active consumerism and the consumption of products manufactured and designed by others using sophisticated technologies and materials.

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