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# Liability in Polish law for infringement of the pre-contractual obligation to inform

**Abstract**
In contemporary contract and consumer law, obligations to inform are an example of instruments (protective ones) which imposes on business entities a duty to make a statement of knowledge (a representation), the content of which is determined by regulations and the purpose of which is to aid the consumer in taking a well-informed, rational decision. Appropriate regulations referring to liability for failing to carry out this obligation to inform aim to maintain optimal trust between the contracting parties and, as a result, lead to a balance in the parties' position, at the same time upholding the principle of the freedom of contract.

In accordance with the fundamental assumption in European consumer law, one's liability towards a consumer should meet the criteria of both efficiency and proportionality, which means that one should not strictly consider such liability purely formally, i.e., as maintaining an economic balance between the parties. The sanction the company shall incur is to serve the actual satisfaction of the interests of the consumer, and not only to make a profit. Additionally, the sanctions for neglecting the obligation to inform are expected to encourage companies to comply with them. Neglecting this obligation to inform in the pre-contractual phase may take the form of not providing information which is required and explicitly defined by law or providing incomplete information. A large amount of detail in determining a business's responsibility is presumed

to guarantee the consumer knowledge of his/her rights and to enable him/her to evaluate the risks resulting from entering into a particular transaction. One must not, however, ignore the fact that providing excessive, thus illegible, information must be treated equally to non-disclosure of such information, which may result in infringement of the aforementioned regulations.

Neglecting the obligation to inform may also arise in such a case where the consumer is not provided with a particular piece of information, despite the lack of a definite legal basis in this regard – such as a detailed regulation contained in an act – but such a duty would result from a general loyalty duty between the contracting parties.

In the beginning, it should be noted that the liability for an infringement of the pre-contractual obligation to inform is characterised by system heterogeneity. In particular, it refers to the distinct consumer protection regime. It is very often the case that depending on the contractor's status (professional or non-professional) the legal consequences of failing to inform or improperly informing are framed in different ways. One must bear in mind the difference between solely the failure to inform or to improperly carry out the pre-contractual obligation to inform (pursued within pre-contractual liability, fundamentally according to an *ex delicto* regime) and the consequences arising from the content of the delivered information, i.e., the guarantee of definite elements in the legal relationship of an obligatory nature (assigned to the classic liability in an *ex contractu* regime).

The subject of civil liability for the infringement of duties to inform can be analysed from two perspectives: firstly, from an economic point of view, i.e., whether for the aggrieved party and for the market at large it would be more favourable for the infringement of the duty to inform to be pursued within an *ex contractu* or *ex delicto* regime, and secondly, from the perspective of the theory of law, whether for the system of contract law it would be better for this liability to be pursued within an *ex contractu* or *ex delicto* regime. In response to the second question, the position of academics is that the liability for the violation of trust due to failing to properly inform the consumer should be pursued in an *ex delicto* system in order to maintain the internal cohesion of contract law[1].

[1] S. A. Smith, *The Reliance Interest in Contract Damages and the Morality of Contract Law,* 'Issues in Legal Scholarship' 2001, vol. 1, No. 1, pp. 1–38; P. Mitchell, J. Philips, *The Contractual Nexus*, 'Oxford Journal of Law Studies' 2001, No. 22, p. 114.

## The nature of pre-contractual liability for the infringement of obligations to inform

Regulations establishing pre-contractual obligations for businesses to inform members of the public are aimed at equipping the clients with honest and reliable information which enables them to take a rational decision about whether to be bound by a definite contract. Infringement of this duty may become grounds for liability of the business after fulfilling specified premises.

In the Polish civil law doctrine, the concept of liability is not uniformly understood. In the broader meaning of the word, liability means the inevitability of having to bear the consequences – negatively qualified in a particular legal system – of an event of law, also evaluated negatively by a legal norm[2]. The duty to fulfil the obligation for compensation may be defined by law or may result from a contract.

In Polish and European literature, two main civil liability regimes are commonly accepted: the tortious one (*ex delicto*) and the contractual one (*ex contractu*). In line with an *ex delicto* regime, the source of obligation formed between the aggrieved party and the responsible one is constituted by the damage being a standard consequence of a damaging event, the so-called tort, or an unlawful act defined by a legal norm. Within contractual liability, the basis is the damage caused by the failure to inform or to improperly carry out the obligation resulting from the contract. Academics point out that these two regimes of liability are becoming hard to distinguish in practice[3]. What's more, in international trade dealings we can observe a gradual harmonisation of the tortious and contractual liability systems. The traditional distinction between these two types of civil liability is becoming less and less accurate due to the dynamic unification of the general principles by which they were distinguished[4]. One of the reasons for this phenomenon is the steady growth of the risk principle, including its modification based on unlawfulness, bearing in mind the simultaneous and steady

2 *System Prawa Prywatnego*, vol. 1, ed. M. Safjan, Warszawa 2012, p. 45; W. Kocot, *Odpowiedzialność przedkontraktowa*, Warszawa 2013, p. 49; Z. Radwański, A. Olejniczak, *Zobowiązania,* Warszawa 2010, p. 31; A. Stelmachowski, *Zarys teorii prawa cywilnego,* Warsaw 1998, pp. 209–13; M. Kaliński, *Szkoda na mieniu i jej naprawienie,* Warsaw 2011, pp. 7; W. Warkałło, *Odpowiedzialność odszkodowawcza. Funkcje, rodzaje, granice,* Warsaw 1972, p. 13.

3 J. K. Kondek, *Jedność czy wielość reżimów odpowiedzialności odszkodowawczej w prawie polskim – przyczynek do dyskusji de lege ferenda*, 'Studia Iuridica' 2007, vol. 47, p. 167.

4 J. Rajski, *Ewolucja odpowiedzialności cywilnej w prawie niektórych państw obcych* [in:] *Rozprawy z prawa cywilnego. Księga pamiątkowa ku czci Witolda Czachórskiego,* eds. J. Błeszyński, J. Rajski, Warszawa 1985, pp. 220; M. Kaliński, *Szkoda na mieniu…,* p. 31.

decrease of the role of the culpability principle as the traditional premise from which the obligation to redress damages in a civil law system arises.[5]

In Polish law, culpability is still seen as a general rule of tortious liability. According to European model rules, however, on the grounds of Art. VI.-I:101 (1) in connection with Art. VI.-I:103 of the Common Frame of Reference (DCFR), a natural or legal person who suffered important material or non-material damage may demand its redress from the person who caused it not only on purpose or by negligence, but also in cases where a different principle of liability is applicable.

The abovementioned model regulations indicate that *ex delicto* liability is rather based on a far-reaching objectification of the concept of culpability, in particular, on the separation of its objective element, i.e., unlawful practice, as an independent premise of liability[6]. Academics maintain the position that unlawfulness means not only the infringement of commonly accepted rules of conduct, established by the norms of positive law, but also by the principles of justice, good faith, honesty, or fair dealings.

Unlawfulness, originating from the risk principle, enhances the protection of the aggrieved party's interests, in an obvious way, mitigating the duty of evidence on his/her side[7]. To be awarded damages, he/she must establish that the harm is the consequence of the debtor's conduct, contrary to legal regulations, common reason, justice, good faith, honesty, or fair dealings.

Current model regulations on contractual liability, both international and European, are of an openly objective nature. Bearing the European model regulations in mind, one should notice that the abovementioned liability is seen broadly, embracing not only the obligation to redress material loss, but also the obligation to remove any consequences of the inconsistency between the fulfilment of the obligation and the content of the contract. Hence, the damage applies to any damages which are not financial in nature (Art. III.-3:701 Para. 3 DCFR).

Compensatory liability constitutes a special type of civil liability. The compensatory character of civil liability is determined by whether, as a consequence of debtor's behaviour which is contrary to the dealings (actions) resulting from the disposition of a specific norm, there arises some damage to the creditor's assets (property), and the creditor gains the right to redress it, then in terms of damage to property payment of compensation is the usual form.

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5 W. Kocot, *Odpowiedzialność przedkontraktowa …,* p. 51; A. Stelmachowski, *Zarys teorii prawa…,* p. 220; W. Warkałło, *Odpowiedzialność odszkodowawcza. Funkcje …,* p. 28, 203.

6 W. Kocot, *Odpowiedzialność przedkontraktowa…,* p. 52.

7 *System Prawa Prywatnego*, vol. 6, ed. A. Olejniczak, Warszawa 2008, pp. 353, 356.

The compensatory function of liability for damages undoubtedly influenced the extension of the borders of civil indemnification to the pre-contractual phase. The creation of trust between the parties, which constitutes a reference point to evaluate the appropriateness of their behaviour, shall be treated as a circumstance determining claims arising from pre-contractual liability.

Until recently, the commonly presented view, e.g., in Anglo-Saxon legal culture, has been one where the freedom of contract principle does not allow the imposition on the parties of any kind of obligations in the pre-contractual phase, and where the parties shall be able to decide autonomously under which conditions they want to negotiate a contract. At present, this approach is acceptable to a lesser extent because of a rising number of behaviours standing contrary to the principles of fair dealing and justice (honesty).

An appropriately defined scope of pre-contractual liability is meant to prevent a state of contractual imbalance arising as a consequence of a behaviour contrary to the law or to fair dealings. Bearing in mind the criterion of the origin of pre-contractual liability, it should be stressed that it divides into either the one which beginning marks violation of the good faith principle, established in the act or resulting from fair dealings, in the pre-contractual phase, or the other, classic contractual liability, which arises as a result of behaviour which is contrary to a pre-contractual agreement[8].

In the literature a view is presented where pre-contractual liability has the characteristics of both an *ex delicto* and an *ex contractu* regime[9]. On the one hand, this type of liability is a consequence of the violation of a general duty not to harm (*alterum non laedere*), which makes it similar to *ex delicto* liability. On the other hand, liability for compensation, which is a consequence of violating the loyalty principle and trust, because of their relative character *(inter partes*), brings it closer to *ex contractu* liability because an obligation relationship arises *ab initio* between individual parties; that is, from the beginning there is no doubt who is burdened with the consequences of the violation of loyalty and trust.

In Polish doctrine there is little controversy over the fact that pre-contractual liability has the characteristics of compensatory liability, in particular, in terms of the obligation understood from the side of negative consequences (compensatory sanction) stemming from improper dealings of the party not obliged to conclude a contract[10]. In light of the dogmatics of Polish civil law, some doubts in the doctrine arise as to the fact of comprising with compensatory

8 W. Kocot, *Odpowiedzialność przedkontraktowa …,* p. 54.

9 Ibid., p. 66.

10 Cf. P. Machnikowski, *Odpowiedzialność przedkontraktowa – jej podstawy, przesłanki i funkcje* [in:] *Europeizacja prawa prywatnego,*vol. 1., eds. M. Pazdan, W. Popiołek, E. Rott–Pietrzyk, M. Szpunar, Warszawa 2008, pp. 700. He suggests the division because of the function criterion compensatory liability performs in trading: the regulations which refer to the obliga-

liability every case of pre-contractual liability, especially in terms of the regulations referring to the obligation to form a contract whose actual purpose is not as much redressing the damage but executing a specific behaviour based on the principle of the real performance of obligations[11].

## Liability in Polish law for improperly carrying out an obligation to inform: selected legal grounds

Bearing in mind the problems considered in the essay below it is worth stressing that in respect to legal qualifications of pre-contractual compensatory liability, the greatest controversy in literature is provoked by – more and more commonly applied by the legislature, and not guaranteed by any sanction – the pre-contractual obligation of the business to inform, especially towards the consumer.

In case of infringement of the statutory obligation to inform, a typical pre-contractual relationship is protected from the moment a consumer's trust is abused by a business regarding the contents of a signed contract, at which moment he/she gains the right to seek compensation to redress the damage (the moment of arising the trust is not decisive here)[12]. It is a dissimilarity in relation to traditional regimes of compensatory liability because, e.g., the traditional premise of compensatory liability in an *ex delicto* regime is constituted by the harmful behaviour of one party, being in its nature an unlawful act, and within an *ex contractu* liability it is the failure to properly carry out an obligation. The company's duty to provide information to the consumer prior to concluding the contract is unilateral because even if the consumer cooperates with the reception of the information provided to him/her, this cooperation is his/her right, not an obligation. *De lege lata,* the origin of the business's obligation is constituted by its actions, not by the implied will of the parties[13].

In case of infringement of the obligation originating from a statute, the element of unlawfulness – which constitutes the main premise of liability in an *ex delicto* system in the context of obligatory consumer information – shall be connected with the obligatory contents of this information. A particular difficulty

tion to enter into a contract with a definite party, and the other ones which shape the compensatory sanctions for a definite behaviour of a party.

11 W. Kocot, *Odpowiedzialnośćprzedkontraktowa…,* p. 56.

12 R. Szostak, *Odpowiedzialność cywilnoprawna za uchylenie się od obowiązku przedkontraktowej informacji konsumenckiej* [in:] *Czyny niedozwolone w prawie polskim i prawie porównawczym. Materiały IV ogólnopolskiego zjazdu cywilistów – Toruń 24–25 czerwca 2011*, ed. M. Nestorowicz, Warszawa 2012, p. 539.

13 W. Czachórski, A. Brzozowskiego, M. Safjan, E. Skowrońskiej–Bocian, *Zobowiązania – zarys wykładu,* Warszawa 2009, p. 127.

for the consumer, bearing in mind *ex delicto* liability, is constituted by the need to prove culpability, and the consequence of such a construct as the lack of a claim (the possibility to demand) for providing him/her reliable information at a point before the damage occurs. Requiring information on the grounds of demanding compliance with the act shall not be identified with the above[14]. Considering the abovementioned incidents to be under compensatory liability causes specific legal consequences, such as the admissibility of general provisions referring to a causal relationship, the method and scope of damage restitution (Art. 361 CC), contributing of the harmed party (Art. 362 CC), and the moment when the amount of compensation shall be established (Art. 363 CC).

In the literature it is widely accepted that compensatory liability for improperly carrying out the pre-contractual obligation to inform in an *ex contractu* regime is connected with the concept of the protection of the legitimate parties' expectations[15]. The principle of the protection of the legitimate parties' expectations results from legal tradition or from the theory of the rule of law. This construct, formulated on the grounds of German doctrine and judicature, is based on the principle of the protection of trust, treated as the foundation of the rule of law. In light of its assumptions, while interpreting a declaration of will or of knowledge (a representation), one should take into account not only the actual intentions of the person making this declaration but also the cognitive abilities of typical addressees so that legitimate expectations as to the potential consequences of the declaration may be considered[16]. The actions of both parties to the contract shall fulfil the requirement of predictability, and the parties may trust that their proceedings in line with the law shall enjoy legal protection.

The tortious character of liability is connected with the concept of the protection of the parties' trust, including the institutions of private law serving as tools which – with the help of the legal system – supports the trust of one party towards another, which is necessary to take a decision to be bound by the contract. In an *ex delicto* regime of liability, repairing (redressing) the damage becomes an original performance of the obligee, and the creditor does not have to have any kind of obligation relationship with the debtor before causing damage[17].

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14 This concept is based on treating in the same way a tort (a wrongful behaviour) and an infringement of a previously-created relationship in a statute (act), based on the duty not to do harm to the other party (in this case a positive duty, such as the duty to provide information). Cf. W. Warkałło, *Odpowiedzialność odszkodowawcza. Funkcje…*, p. 240.

15 A. R. Macsim, *The New Consumer Right Directive: A Comparative Law and Economics Analysis of the Maximum Harmonisation Effects on Consumer and Business*, Aarhus 2012, p. 41–57.

16 A. Bierć, *Zarys Prawa Prywatnego. Część ogólna,* Warszawa 2015, p. 537.

17 *System Prawa Prywatnego*, vol. 6, ed. A. Olejniczak, Warszawa 2014, p. 26.

Standing on the position that infringement of a pre-contractual obligation to inform should be pursued within an *ex delicto* regime of liability, it follows that the consumer does not have so much the right to demand reliable information from the business, as the right to demand that it respects the statutory obligation to inform which is imposed on it.

In line with the present Polish regulations there are no grounds to derive an obligatory pre-contractual bond between the parties. Moreover, in the literature there is a view that the rule is a lack of information – there are advisory duties in the pre-contractual phase, and each party is obliged to guard their interests independently, in particular when it comes to any knowledge indispensable to evaluating the possible benefits and risks connected with a particular transaction[18]. Undoubtedly, the duty to provide the other party with reliable and straightforward information at his/her request results from the principle of fair dealings, and any violation shall be sanctioned with the liability for misrepresentation (providing false data). There is, however, a lack of an unambiguous meter to set limits to the obligation to inform resulting from good faith.

Bearing in mind the functionality of the legal system, an *ex contractu* regime of liability is more effective for the harmed party since it is possible to individualise the information within an obligation relationship. Additionally, the company's standard of diligence (as a liability debtor) is maintained on a higher level, and the harmed party is not burdened with the obligation to prove culpability.

At the end of the considerations presented above, it is worth stressing that in some cases, e.g., in financial services, which are characterised by a high level of complexity and specialisation, the liability of the company for an infringement of the pre-contractual obligation to inform may be greater than with conventional services. Such services are provided by financial institutions – commonly, although not exclusively, banks – which are recognised in jurisdiction and in academic circles as institutions of public trust[19].

Recognising banks as institutions of public trust may on a deontological level become the grounds to burden them with an additional, contractual obligation to inform. The legal system, undoubtedly, in a decidedly more detailed way than in the case of some other entrepreneurs, creates and maintains the image

18 P. Machnikowski, *Prawne instrumenty ochrony zaufania przy zawieraniu umowy*, Wrocław 2010, p. 194; T. Sójka, *Cywilnoprawna ochrona inwestorów korzystających z usług maklerskich na rynku kapitałowym*, Warszawa 2016, p. 118.

19 *Prawo bankowe. Komentarz,* Vol. 1–2, ed. F. Zoll, Warszawa 2005, p. 118; Z. Ofiarski, *Prawo bankowe. Komentarz*, Warsaw 2013, p. 27; A. Janiak, *Bank jako instytucja zaufania publicznego*. 'Glosa – Przegląd Prawa Gospodarczego' 2003, No. 2, p. 17. A different opinion is represented by: A. Chłopecki, *Bank jako instytucja zaufania publicznego w wymiarze cywilnoprawnym* [in:] *Oblicza prawa cywilnego. Księga Jubileuszowa dedykowana Profesorowi Janowi Błeszyńskiemu,* ed. K. Szczepkowska–Kozłowska, Warszawa 2013, p. 66.

of banks as institutions of an exceptional character, under special supervision of the state. It does not seem to provoke much controversy in the doctrine that the specifics and complexity of financial services and the position of banks as institutions of public trust translates into higher requirements in terms of the diligence of the services provided by them.

Bearing in mind the specifics of the obligation to inform while providing financial services, it must also be mentioned that there is a connection between the loyalty duty to provide information in obligation relationships and the general requirements regarding the due performance of obligations, set out by the principles of social coexistence since any behaviour contrary to deontological principles – i.e., incorrectly providing the consumer (client) with information or failing to provide it at all – is contrary to the principles of social coexistence, such as the principle of honesty, the principle of trust, and the due diligence principle.

The purpose of the regulations establishing a pre-contractual obligation to inform – and in the case of financial services, to warn – is the protection of the property interests of the consumer. Infringement of the above-mentioned regulations may become grounds for compensatory liability of entrepreneur business, and in the case of financial services, the financial institution may become liable under Art. 415 CC if all the conditions of this liability are fulfilled.

In case of infringement of a company's obligation to inform, as a rule, in line with Art. 6 CC, the consumer is burdened with the obligation to prove it. Unfortunately, in practice this is met with a lot of difficulties, in particular with the need to prove a negative fact, i.e., the non-occurrence of a particular behaviour. In the literature it is pointed out that under such circumstances, ease of evidence shall be applied in the matter, e.g., in terms of *prima facie* proof[20].

Further, in cases where the harmed party is the client of a financial institution, he/she is burdened with proving the adequate cause-and-effect relationship between the infringement of the pre-contractual obligation to inform and the harmful transaction conducted by the institution. In practice, the client is obliged to prove that if the financial institution had performed its obligation to inform correctly, his/her decision to sign the contract in question would have been different. Bearing in mind the non-individualised and rather general character of the obligation to inform, particularly in terms of the regulations referring to financial services, it may become complicated for the harmed party to prove a cause-and-effect relationship.

20 P. Tereszkiewicz, *Obowiązki informacyjne w umowach o usługi finansowe,* Warszawa 2015, p. 662. It must be stressed that within the *prima facie* proof it would be enough to prove the circumstances during which it came to the creation of a financial institution's obligation to inform clients in order to recognise the infringement of the above-mentioned duties as probable.

Having considered the amount of damage resulting from a financial institution's infringement of its obligation to inform, as a rule it may differ, depending on the type of financial service. Nevertheless, in practice, it occurs most often together with providing investment services. The damages in such a case constitute the difference between the value of the financial instruments actually acquired and the hypothetical value of the consumer's investment if the financial institution had performed the obligatory obligation to inform correctly[21]. The value of the client's investment is the amount of money invested by him/her in the financial instruments that caused damage – with the assumption that if the financial institution had performed the obligation to inform correctly, then the client would not have gone through with the transaction in question – or the value of other instruments that would not have caused such damage to the client and in which the investor would have invested had the financial institution properly carried out the obligation to inform them.

In line with Art. 361 § 1 CC, when calculating the amount of damage caused to the investor such a difference in the value of the investment shall only be allowed if it results from non-performance of an obligation to inform and, moreover, if it constitutes an adequate consequence of the infringement of the obligation to inform; that is, the difference between the value of the investment with the obligation to inform correctly performed by the entrepreneur and the value of the investment with an infringement of said duties[22]. That calculation constitutes the consequence of the function of the adequate cause-and-effect relationship as a factor which limits the amount of damage that shall be compensated. Hence, it is not possible to compensate, among others, the consumer's loss in property caused by a reduction in the value of the financial instruments resulting from any circumstances other than incorrectly informing or failing to inform at all. Only the damage resulting from the client taking a poor investment decision as a result of an infringement of the obligation to inform shall be compensated for. The loss in property is constituted by the difference between the surplus of the amount paid as a consequence of acquiring the financial instruments in relation to their current market value, not the whole value of the acquired financial instruments[23].

In the literature it is a commonly accepted view that, as a rule, the consumer's damages in financial services, such as lost benefits, shall be compensated for as well[24]. It is indicated that the investor is in such circumstances obliged to prove

21 Ibid., p. 652.
22 T. Sójka, *Cywilnoprawna ochrona inwestorów …*, p. 109.
23 Ibid., p. 110.
24 Ibid., p. 111.

high probability of achieving them[25]. The burden of proof lies with the investor to prove if the company had correctly performed the obligation to inform him/her, it is highly probable he would have invested in different financial instruments that would have guaranteed him/her a definite profit on the investment, e.g., interest on a bank deposit[26]. The interest not earned from the missed investment opportunity would have been damage (loss) such as lost benefits. The investor would have to prove the circumstances that his intention was to purchase a financial service that would guarantee him/her a definite profit, but as a result of an infringement of the obligation to inform he purchased a different service.

## Conclusions

The Polish regime of consumer protection shows many weaknesses, especially within the regulations regarding the liability for a company's infringement of their pre-contractual obligation to inform. In particular, in Polish law there is a visible lack of defined general legal consequences of failing to provide obligatory information or providing it in an incomplete, unclear way, while not intending to mislead the other party. The existence of trust between the contracting parties shall be treated as a premise which decides claims for compensatory pre-contractual liability. This results from the rising importance of the compensating function of compensatory liability, which has brought about the extension of the limits of civil indemnification to the pre-contract stage. This extension was accompanied by a process of moving away from the classic causative individual liability in favour of guarantee – distributive liability, which has led to the supremacy of the previous principle of culpability. This questioning of the premise of culpability coincided in time with the increased risk principle in compensatory relations in an *ex delicto* regime.

In light of the dominant views presented in the doctrine – both Polish and foreign, in particular the French and German ones – one should agree with the position about the independence of the claims arisen before concluding the contract, which results from the tortious (*ex delicto*), or possibly autonomous nature of pre-contractual liability on the grounds of the construct of *culpae in contrahendo*. The above-mentioned liability results directly from a statute or indirectly from the principles of private law, such as the principles of good faith, honesty, or fairness (justice). Its basis is constituted by the state of legitimate expectations of the party whose trust has been violated by dishonest, disloyal proceedings (dealings) of his/her negotiating partner. A properly framed scope of pre-contractual

25 *System Prawa Prywatnego*, vol. 6, ed. A. Olejniczak, Warszawa 2014, pp. 138.
26 T. Sójka, *Cywilnoprawna ochrona inwestorów…*, p. 111.

liability aims to prevent the forming of a contractual imbalance as a consequence of the actions of one party standing contrary to law or fair dealings.

The above-mentioned approach is in line with the solutions presented in European model law, particularly in respect to the compensatory liability for failing to properly inform which the business shall bear regardless of whether the contract was eventually signed. On the grounds of model solutions, in case the harmed party seeks redress (compensation) for damages resulting from an improperly conducted contract, the scope of the damages may also include the damage suffered in the pre-contract stage because of improperly fulfilling the obligation to inform (Art. II.-3:109 Para. 3 DCFR).

*De lege ferenda*, some modifications should be introduced to the system of *ex delicto* liability for the infringement of an obligation to inform in the pre-contractual phase so that it is more favourable to the harmed party. This liability shall be detached from the need to prove the culpability premise or reversing the burden of proof should at least be considered, as with the regime of *ex contractu* liability. In European judicature, there has been a very noticeable tendency, for a long time, to move away from the culpability premise while proving liability for damages occurring in the pre-contractual stage. In particular, what is meant here is the damage resulting from any violations (infringements) before concluding the contract in the context of a tender relationship. Nevertheless, *de lege ferenda*, such a concept should be considered in relations between a business and a consumer. One possible solution would be to extend the autonomous grounds of liability, based on the protection of trust as in Art. 72 § 2 CC, which shall be framed as a general liability for damages arising in the pre-contractual phase in an *ex delicto* regime. It would be important to detach it from only the negotiated mode of contract negotiation and to replace the concept of 'fair dealings' with the more objective concept of 'good faith,' better known in European, continental legal systems. Bearing in mind the requirement of making the protection of the harmed party more real, one should support the need to objectivise this liability, at least in relation to the consumer, towards abolishing the culpability premise and basing it on the risk principle. A modified version of liability could comprise at least consumer relations. Liability on the grounds of the culpability principle constitutes a great difficulty for the harmed party as well, to which the low number of verdicts in this matter testify. Making the protection of the weaker party to the transaction more substantial and basing this new liability on the risk principle would undoubtedly be a more efficient sanction in line with the requirements of European lawmakers.

As to the scope of the compensation for infringement of pre-contractual duties, it seems right to limit the extent of compensation to the limits of negative contractual interests, taking into account that this is how the regular predictability for damages in the pre-contractual phase is framed. On the other hand, it is

not possible to fully reject the view in accordance with which the concept of full compensation would better implement (realise) the idea of efficient liability for infringement of the obligation to inform which is promoted by European lawmakers. Moreover, it would undoubtedly mobilising companies more to encourage them to honestly inform their consumers about any risks connected with the contract, in particular, that it may often happen that the actual damages being in a casual relationship with the informative infringement exceeds the limit of negative contractual interests and the conditions of real satisfaction of the interests of the harmed party do not allow to cover it. It should be stressed that the tendency in European model law – e.g., PECL – is not to place limits on compensation for damages suffered in the pre-contractual phase (Art. 2:301 PECL).

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## SUMMARY

In contemporary contract and consumer law, obligations to inform are an example of instruments (protective ones) which imposes on business entities a duty to make a statement of knowledge (a representation), the content of which is determined by regulations and the purpose of which is to aid the consumer in taking a well-informed, rational decision. Appropriate regulations referring to liability for failing to carry out this obligation to inform aim to maintain optimal trust between the contracting parties and, as a result, lead to a balance in the parties' position, at the same time upholding the principle of the freedom of contract.

In line with the general assumption accompanying European consumer law, liability towards the consumer should meet the criteria of both efficiency and proportionality, which means that one should not solely consider the liability purely formally, i.e., as maintaining the economic balance of the two parties. The sanction companies shall incur should serve the actual satisfaction of the interests of the client, and not only to make his/her financial accounts positive. Additionally, the sanctions for infringement of the obligation to inform are designed to encourage businesses to comply with them.

The Polish model of consumer protection through information is characterised by several weaknesses, in particular, in the scope of pre-contractual liability for a company's infringement of the obligation to inform. It is especially problematic that Polish law does not define general, legal consequences of failing to provide obligatory information, or providing it in an incomplete, unclear manner while not intending to mislead the other party.



**Keywords**

pre-contractual liability, compensatory liability, obligation to inform, pre-contractual obligation to inform, damages, trust, infringement of pre-contractual obligation to inform