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Samesame but different? Consumer Sales Contracts and Burden of Proof Regarding the Damage in EU Member States

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The EU internal market brings companies the possibility to offer goods and services on a market of 28 member states without facing considerable additional costs. Correspondingly, consumers benefit from enhanced competition, which leads to a broader variety of goods, higher quality and lower prices. Against this backdrop, it was also necessary to adjust or harmonize the legal regimes regarding the obligations of producers/companies and the rights of consumers, to avoid different standards in different places in the internal market. One of the instruments aiming at the harmonization of consumer rights was the Consumer Rights Directive 1999/44/EC. However, directives frequently bring along the question, whether the application in 28 member states succeeds to achieve the same standards regarding the aims and legal content of the directive. In 2015, this aspect became subject of a dispute in the Netherlands, making it necessary to request clarification by the Court of Justice of the European Union (CJEU) regarding the reach of Art. 5(3) of Directive 1999/44/EC and thus implicitly comment on the application of this provision in the EU member states. The decision regards a provision shifting the burden of proof in favour of the consumer. The article presents this CJEU-decision and, with a view to a relevant recent decision of the German Bundesgerichtshof (BGH) compares the current legal situations in Germany and Latvia.

Keywords: Consumer protection, sales contract, European Union law, internal market, comparative law, German civil law, Latvian civil law.

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1. Samesame: The EU, Directives, Consumer Sales and the Problem

When shopping on the streets of Bangkok, a tourist asking about the differences of two seemingly identical products with different prices, (s)he frequently receives the friendly answer "samesame but different".[2] Mostly, further inquiries about the actual meaning of this information are not fertile, hence, one may ask, what "samesame but different" may mean. In the context of EU law however, "samesame but different" may make surprisingly much sense when describing the transposition and application of directives in EU member states. Even though the national transposing acts may look different, the content and legal consequences of their application should eventually lead to the same result. When it comes to the correct transposition of directives, consumer protection is one of the fields where frequently questions may appear, if consumers enjoy the rights they should be granted by EU law.

The EU internal market brought companies the possibility to offer goods and services on a market of 28 member states without facing considerable additional costs. Correspondingly, consumers benefit from enhanced competition, which – at least theoretically[3] – leads to a broader variety of goods, higher quality and lower prices. Accordingly, every day millions of contracts with cross-border elements on goods and services are concluded. Against this backdrop, it was also necessary to adjust or harmonize the legal regimes regarding the obligations of producers/companies and the rights of consumers, to avoid different standards in different places in the internal market. One of the instruments aiming at the harmonization of consumer rights was the Consumer Rights Directive 1999/44/EC, which has been transposed by all member states.[4] Notwithstanding their timely transposition, directives frequently bring along the question, if the application in 28 member states succeeds to achieve the same standards regarding the directives' aims and legal content. In 2015, this aspect became subject of a dispute in the Netherlands (II.1.), making it necessary to request clarification by the Court of Justice of the European Union (CJEU) regarding the reach of Art. 5(3) of Directive 1999/44/EC and thus implicitly comment on the 13 year-long application of this provision in the EU member states. The decision regards a provision shifting the burden of proof in favour of the consumer and that may at first glance seem somewhat specific, which however is of uttermost relevance for consumers in daily life as it deals with the following standard situation: A consumer purchases a good and, within six months, the good reveals a material defect. Upon the notice of the defect by the consumer,

[2] This is one of the most common examples for "tinglish", a mix between Thai and English, see, for instance, https://en.wikipedia.org/wiki/Tinglish [last viewed 20.06.2017].

[3] *Benz, M.* Diskriminierung bei Markenprodukten Der «Abfallkübel Europas» begehrt auf. Neue Züricher Zeitung, 01.3.2017. Available at https://www.nzz.ch/wirtschaft/diskriminierung-bei-markenprodukten-der-abfallkuebel-europas-begehrt-auf-ld.148357 [last viewed 20.06.2017]; on 15.04.2016, Inese Vaidere published similar information from a Latvian perspective on her blog at http://www.inese-vaidere.lv/2016/04/produktu-kvalitate-latvija-nedrikst-atskirties-no-rietumeiropa-noperkamajiem/ [last viewed 20.06.2017].

[4] Art. 11 of the Directive 1999/44/EC stipulates 1 January 2002 as the deadline for transposition.

frequently, the seller is tempted to reply that the defect is the result of incorrect use or intentional damage. Consequently, as a precondition before the consumer may invoke respective claims, one needs to clarify, who bears the burden of proof that there actually is/was a defect of the good.

It was precisely this aspect, which was central to the CJEU decision in 2015[5] (II.1), and of a subsequent decision of the German Supreme Court (Bundesgerichtshof, BGH) in October 2016,[6] causing it to reverse its constant jurisprudence (II.2). Accordingly, the directive non-conform interpretation in various EU-member states raises the curiosity of comparative lawyers, if – different to the Netherlands and Germany – Latvia applied the provision in a manner conforming to EU law (II.3).

2. Corresponding Law and Jurisprudence in Member States Regarding Implementation and Application of Directive 1999/44/EC: Samesame but Different?

The central provision regarding the burden of proof in consumer sales contracts is to be found in Art. 5(3) of Directive 1999/44/EC which stipulates:

> "*Unless proved otherwise, any lack of conformity which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.*"

Accordingly, the national courts must interpret the relevant national norm in the light of the directive and decide accordingly, who bears the burden of proof regarding the 'lack of conformity of the good'.

2.1. Case Faber/Hazet (C-497/13)

As has been indicated, in the case Faber/Hazet (C-497/13), a preliminary ruling procedure, the CJEU had to deal with this aspect. The basic facts regarding this particular problem were, as follows:[7]

Ms Faber had purchased a second-hand vehicle at a garage. After four months, the vehicle caught fire during a journey and was completely destroyed. It was towed to the seller's garage and later, at the request of that garage, to a scrapyard, where it was kept. A technical investigation into the cause of the vehicle fire could not take place, as the vehicle had been scrapped in the meantime.

In the course of events, Ms Faber and the seller disputed about the liability. Having had doubts regarding the correct application regarding secondary EU law, the national court dealing with the matter[8] decided to refer several questions to the CJEU for a preliminary ruling. One of these questions concerned the burden of proof of the existence of the "lack of conformity".

Here one needs to note that the Dutch rule required the consumer to prove that he informed the seller of the lack of conformity in good time and additionally, that

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5 CJEU, Case Faber/Hazet (C-497/13)

6 BGH Urteil vom 12. Oktober 2016, VIII ZR 103/15. Available at http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/list.py?Gericht=bgh&Art=en&sid=c2c649c75f79e82447da3d7e2fac47be [last viewed 20.06.2017].

7 Short version, based on the CJEU press-release on the case, is available at: curia.europa.eu/jcms/jcms/P_159405/en/ [last viewed 20.06.2017].

8 Gerechtshof (Regional Court of Appeal) Arnhem-Leeuwarden, Netherlands.

it was "in principle for the consumer, if there is a challenge by the seller, to furnish evidence that he informed the seller of the lack of conformity of the goods delivered within a period of two months after the discovery of the lack of conformity."[9]

The CJEU ruled, as follows:

> Firstly, "*that the obligation imposed on the consumer is limited to that of informing the seller that a lack of conformity exists. The consumer is not required, at that stage, to furnish evidence that a lack of conformity actually adversely affects the goods that he has purchased or to state the precise cause of that lack of conformity.*"

Secondly, regarding the burden of proof and in particular, which matters it is for the consumer to establish, the Court stated that

> "[...] *if the lack of conformity has become apparent within six months of delivery of the goods, the directive relaxes the burden of proof which is borne by the consumer by providing that the lack of conformity is presumed to have existed at the time of delivery. In order to benefit from that relaxation the consumer must nevertheless furnish evidence of certain facts.*"[10]

The CJEU further explained, what is to be understood hereunder:

> "*Firstly, the consumer must allege and furnish evidence that the goods sold are not in conformity with the contract in so far as, for example, they do not have the qualities agreed on or even are not fit for the purpose which that type of goods is normally expected to have. The consumer is required to prove only that the lack of conformity exists. He is not required to prove the cause of that lack of conformity or to establish that its origin is attributable to the seller.*
>
> *Secondly, the consumer must prove that the lack of conformity in question became apparent, that is to say, became physically apparent, within six months of delivery of the goods.*
>
> *Once he has established those facts, the consumer is relieved of the obligation of establishing that the lack of conformity existed at the time of delivery of the goods. The occurrence of that lack of conformity within the short period of six months makes it possible to assume that, although it became apparent only after the delivery of the goods, it already existed 'in embryonic form' in those goods at the time of delivery.*
>
> *It is therefore for the professional seller to provide, as the case may be, evidence that the lack of conformity did not exist at the time of delivery of the goods, by establishing that the cause or origin of that lack of conformity is to be found in an act or omission which took place after that delivery.*"[11]

In addition, for national courts it is important to note that the Court confirmed that the national court may of its own motion raise Art. 5(3) of Directive 1999/44/EC in the context of an appeal.[12]

With regard to these clarifications, the German Supreme Court, the BGH, later had the opportunity to integrate the findings of the CJEU-Faber decision, when interpreting the relevant German law.

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[9] Cited after CJEU press release, supra note, CJEU, C-497/13, para. 11, 12.
[10] CJEU, C-497/13, para. 68, 69.
[11] CJEU, C-497/13, para. 7073.
[12] CJEU, C-497/13, para. 15.

2.2. Corresponding Case Decided by BGH in Germany

The facts of the case the BGH had to rule on were, as follows: The complainant had bought a used car for 16.200 €. After five months, a defect manifested itself, which involved improper functioning of the automatic gear box, causing the motor to stall. Subsequently, the parties, among other things, disputed, who had to bear the burden of proof, given that the seller claimed that the defect was caused by the buyer (consumer) through undue use.

Eventually, in the last instance, the BGH had to rule on the matter, applying the relevant German norm transposing Art. 5(3) of Directive 1999/44/EC, Section 476 BGB, which stipulates:

> "*If, within six months after the date of the passing of the risk, a material defect manifests itself, it is presumed that the thing was already defective when risk passed, unless this presumption is incompatible with the nature of the thing or of the defect*."

Firstly, the BGH expressively referred to the CJEU decision Faber and the interpretation of Art. 5(3) of Directive 1999/44/EC. It explained that it subsequently would adopt the directive-conform interpretation regarding the reversal of the burden of proof in favour of the consumer. In the following, the BGH expressively clarified, that this constituted an adjustment of its previous jurisprudence regarding the interpretation of this norm. Explicitly, the BGH recurred to the findings of the CJEU quoted above that, "*The consumer is not required, at that stage, to furnish evidence that a lack of conformity actually adversely affects the goods that he has purchased or to state the precise cause of that lack of conformity.*"[13]

Furthermore, it referred to the six-month period, in which the defect manifested itself, for which the consumer neither needed to proof the cause of the defect, nor that it falls within the responsibility of the seller. The BGH also stated that a directive-conform interpretation brought along the assumption that a defect, which manifests within this six months period, had in some form already existed when risk passed. Again, the BGH expressively highlighted that this constituted a reversal of its own previous jurisprudence.[14]

Summarizing this new line of jurisprudence, the BGH explained that it thus was the duty of the seller to prove that a defect had not been immanent to the good when risk was passed, and that the defect was caused by an activity or omission of the consumer. In addition, the seller may invoke the last sentence of Section 476 BGB that "[...] this presumption is incompatible with the nature of the thing or of the defect."

2.3. Situation in Latvian Consumer Law

Having acceded to the EU in 2004, also Latvia transposed Art. 5(3) of Directive 1999/44/EC into national law, namely, with Article 13(3) of the Consumer Rights Protection Law.[15] This norm, which amended a previous formulation and entered into force on 1 January 2016, stipulates :

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[13] BGH Urteil vom 12. Oktober 2016, VIII ZR 103/15, para. 36, also in a) (Leitsatz).

[14] BGH Urteil vom 12. Oktober 2016, VIII ZR 103/15, para. 56.

[15] Patērētāju tiesību aizsardzības likums, 13(3): "Ja preces neatbilstība līguma noteikumiem atklājas sešu mēnešu laikā pēc preces iegādes, uzskatāms, ka tā eksistēja preces iegādes dienā, izņemot gadījumu, kad šāds pieņēmums ir pretrunā ar preces raksturu vai neatbilstības veidu."

> "*If non-conformity of goods with the provisions of a contract is discovered within six months after the purchase of goods, it shall be considered that it existed on the day when the goods were purchased, except the case when such assumption is in contradiction with the nature of goods or type of non-conformity.*"

The provision thus resembles the German provision, mainly with the exception that the former refers to "the passing of risk" and the Latvian to "the purchase of goods". Given that this norm has only recently taken effect, so far, there are no relevant decisions.

Previously, Article 13(3) of the Consumer Rights Protection Law[16] was formulated, as follows:

> *"If non-conformity of goods […] with the provisions of a contract is discovered within six months after the purchase of goods, it shall be considered that it existed on the day when the goods were purchased, except for the cases when the producer, seller or service provider himself, in according to law, with assistance of official expertise proves the contrary."*

Hence, the previous wording of the norm explicitly provided that it was to the producer, seller or provider of service, to prove that the good was in a condition conform to the consumer sale. Accordingly, courts usually[17] followed the clear stipulation of the former Article 13(3) of the Consumer Rights Protection Law ruling that, if the producer or seller could not provide the evidence, the consumer would win the case.[18] Furthermore, there are several cases, where the consumer provided evidence and won the case.[19] With regard to the wording of the norm, in principle, these proofs would have been unnecessary, even without referring to the CJEU-jurisprudence.

In conclusion, it is to be noted that the Latvian transposition of Art. 5(3) of Directive 1999/44/EC generated a generally directive-conform application. Latvian court practice thereby differed from the constant jurisprudence in Germany. With regard to the recent amendment to Article 13(3) of the Consumer Rights Protection Law, which removed the precise obligation that "[...] *except for the cases when the producer, seller or service provider himself, in according to law, with assistance of official expertise proves the contrary*", it remains to be seen, whether the future decisions in Latvia will continue applying this jurisprudence. Given the less clear wording of the amendment, it seems worthwhile to inform courts, sellers and, particularly, consumers of the CJEU decision in the Faber case.

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[16] Patērētāju tiesību aizsardzības likums, 13(3): Ja preces vai pakalpojuma neatbilstība līguma noteikumiem atklājas sešu mēnešu laikā pēc preces iegādes vai pakalpojuma sniegšanas, uzskatāms, ka tā eksistēja preces iegādes vai pakalpojuma sniegšanas dienā, izņemot gadījumu, kad ražotājs, pārdevējs vai pakalpojuma sniedzējs normatīvajos aktos noteiktajā kārtībā organizētā ekspertīzē pierāda pretējo.

[17] Notwithstanding, there are also cases where a judge made a reference to the Article 93 of Civil Procedure Law which states that each party has to provide evidences for their own statements (equality of arms article) and did not pay attention to the Article 13(3) of the Consumer Rights Protection Law, judgment of the Riga City Vidzeme District Court of March 31 2016, case No. C30546615.

[18] See, for instance, judgment of the Riga City Vidzeme District Court of 26 September 2011, case No. C30647110.

[19] Expert-examination judgment of the Riga City Vidzeme District Court of December 14 2015, case No. C30403913, judgment of the Riga City Vidzeme District Court of March 31 2016, case No. C30546615, judgment of Cēsu Regional Court of December 9 2013, case No. C11117112.

Conclusions

Reiterating the analogy drawn in the introduction to Thai street vendors, one may conclude that in 2017 in German and Latvian court practice regarding the application of Art. 5(3) of Directive 1999/44/EC is overall identical in the sense of "samesame", albeit being regulated in slightly different forms.[20] Notwithstanding this conclusion, the comparison of German and Latvian jurisprudence prior to October 2016 provide interesting insights, given that it reveals a differing level of consumer protection. Even though one might have expected that in 2015 a directive regarding important matters in an area with a high number of legal disputes, such as consumer protection, should have been sufficiently clarified, the cases presented show that this is not always the case. For national lawyers, these examples illustrate that legal creativity may also require to consult the relevant secondary law forming the basis of a national legal act, potentially in different languages. Furthermore, the cases show that directives generally are efficient instruments to achieving similar standards in the law of member states in the areas vital for the internal market. Still, the comparison between German and Latvian law highlights, that indeed the practice of national judges regarding precisely these matters may considerably diverge, creating weaker and stronger positions for consumers, depending on where they are located. With a view to the stipulation in Art. 26 TFEU to "[…] ensuring the functioning of the internal market…" this aspect requires constant monitoring and reassessment, which may also signify that national courts in case of doubt make use of the preliminary ruling procedure. Finally, as a minor detail, Latvians will be happy to note, that Latvia, only being a EU member state since 2004, has managed to act in conformity with EU law which both the Netherlands and Germany as founding members have failed to achieve.

This contribution does not strive to comment on the effect of the Faber decision on businesses. This aspect – whether consumers are over-protected and businesses are unduly burdened, significantly depends on the subjective point of view and consequently, the reader is invited to consult the comments on the CJEU's decision.[21]

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[20] In Germany, in the course of a reform of the law of obligations, the legislator incorporated the directive in the civil law code, BGB, whereas in Latvian law, the provisions are laid down in a separate legislative act.
However, in Latvian court practice it appears to be somewhat problematic that both parties – seller and consumer – provide evidence in so-called expert-examinations. In this case, the court usually evaluates both expert opinions, however, the practice raises concerns, whether the experts appointed by the parties are objective and independent.

[21] Regarding the CJEU judgement case No. C-497/13 see for instance: *Fellert, M.* Die Beweislastumkehr des §476 BGB im Lichte der aktuellen Rechtsprechung des EuGH, JA 2015, p. 818; Besprechungen von Gsell, Beweislastumkehr zugunsten des Verbraucher-Käufers auch bei nur potenziellem Grundmangel, VuR 2015, 446; sowie *Rott, P.* EuZW 2015, S. 556(560); Podzun, Procedural autonomy and effective consumer protection in sale of goods liability: Easing the burden of consumers (even if they are not consumers); EuCML 2015, p. 149.

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