EU Case Law

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One Size Fits All? Heterogeneity and the Enforcement of Consumer Rights in the EU after *Faber*

Judgment of the Court (First Chamber) 4 June 2015, *Froukje Faber* v *Autobedrijf Hazet Ochten BV* (C-497/13)

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On those grounds, the Court (First Chamber) hereby rules:

1. 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 must be interpreted as meaning that a national court before which an action relating to a contract which may be covered by that directive has been brought, is required to determine whether the purchaser may be classified as a consumer within the meaning of that directive, even if the purchaser has not relied on that status, as soon as that court has at its disposal the matters of law and of fact that are necessary for that purpose or may have them at its disposal simply by making a request for clarification.

2. Article 5(3) of Directive 1999/44 must be interpreted as meaning that it must be regarded as a provision of equal standing to a national rule which ranks, within the domestic legal system, as a rule of public policy and that the national court must of its own motion apply any provision which transposes it into domestic law.

3. Article 5(2) of Directive 1999/44 must be interpreted as not precluding a national rule which provides that the consumer, in order to benefit from the rights which he derives from that directive, must inform the seller of the lack of conformity in good time, provided that that consumer has a period of not less than two months from the date on which he detected that lack of conformity to give that notification, that the notification to be given relates only to the existence of that lack of conformity and that it is not subject to rules of evidence which

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would make it impossible or excessively difficult for the consumer to exercise his rights.

4. Article 5(3) of Directive 1999/44 must be interpreted as meaning that the rule that the lack of conformity is presumed to have existed at the time of delivery of the goods

- applies if the consumer furnishes evidence that the goods sold are not in conformity with the contract and that the lack of conformity in question became apparent, that is to say, became physically apparent, within six months of delivery of the goods. The consumer is not required to prove the cause of that lack of conformity or to establish that its origin is attributable to the seller;
- may be discounted only if the seller proves to the requisite legal standard that the cause or origin of that lack of conformity lies in circumstances which arose after the delivery of the goods.

I Facts and Legal Background

On 4 June 2015, the CJEU decided a hallmark case concerning the enforcement of consumer contracts in European courts, C-497/13 *Faber*. This case note first briefly presents the facts of the case and the legal background in European consumer protection law before addressing and critiquing the two central tenets of the judgment: the limitation of the principle to produce evidence for consumer litigation, and the far-reaching reversal of the burden of proof regarding lack of conformity in the first six months after delivery of a good. I will argue that the CJEU in both cases, though for different reasons, fails to render a convincing solution to the problems at issue. I will then close with a proposal for an even more radical, but perhaps more appropriate way forward for European consumer law in view of the problems this case has unearthed.

The facts of the case are fairly simple: In May 2008, Ms Farber bought a used car at the Dutch Hazet garage. In September of the same year, the car caught fire and was completely destroyed while she was traveling to a business meeting. The car was scrapped shortly afterwards; this prevented the exact cause of the fire from being determined. Ms Farber sued Hazet garage claiming damages for the destruction of the car and of various personal items that had been inside the car. In the ensuing trial, the Dutch court of first instance did not determine whether Ms Farber had purchased the car in her capacity as a consumer. The court of appeals referred the case to the CJEU.

The judgment tackles two main questions relating to procedural matters that have vast implications for the enforcement of consumer sales contracts in the EU:

the determination of the status of the party as a consumer *ex officio*, and the scope of the reversal of the burden of proof concerning lack of conformity in the first six months post delivery. Both questions are central to the regime of consumer sales contracts in the EU. First of all, the specific provisions of EU consumer law, such as Directive 1999/44/EC, only apply if the buyer concluded the contract in her capacity as a consumer. This being the case, in sales contracts lack of conformity is the pivotal point for all consumer rights. All of them, as provided for by Article 3 of Directive 1999/44/EC, presuppose that the good was not in conformity with the sales contract at the time of delivery. The provision was modeled on and thus parallels the Convention on the International Sale of Goods (CISG).[1] When there is a lack of conformity, the consumer may seek redress, first, by demanding repair or replacement, Article 3(3); second, subject to additional conditions, by a reduction of the price or the rescission of the contract, Article 3(5) and (6). For all of these rights, the key difficulty for the consumer is to prove that a lack of conformity already existed at the time of delivery of the goods, since often problems with (experience) goods will only be revealed over time as the consumer puts them to use. The European legislator reacted to this issue and, deviating from the CISG,[2] introduced Article 5(3) which posits that '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 an exception prevails. Therefore, the European legislation provides for a specific form of consumer protection by a potentially far-reaching reversal of the burden of proof. The judgment at issue elucidates the understanding of both the concept of consumer in civil proceedings and the scope of that reversal of the burden of proof. In both instances, the court provides slightly surprising and highly contentious answers.

II The Principle of Production of Evidence in Consumer Litigation: A Farewell to Venerable Traditions?

First, the CJEU confirms that the principles of equivalence and effectiveness shape the national courts' decision on whether to investigate of its own motion whether

1 M.J. Bonell, 'The CISG, European Contract Law and the Development of a World Contract Law' (2008) 56 *The American Journal of Comparative Law* 1, 7; see also S. Grundmann, 'Verbraucherrecht, Unternehmensrecht, Privatrecht – Warum sind sich UN-Kaufrecht und EU-Kaufrechts-Richtlinie so ähnlich?' (2002) 202 *Archiv für die civilistische Praxis* 40, 45–51.

2 Bonell, n 1 above; Grundmann, n 1 above, 55 with n 52.

a contract was concluded by a consumer when this is in doubt given the facts adduced by the parties. If relevant for the decision, the national court must determine the status of the contractual parties (consumer or seller/trader) in the same way as it determines other legal questions that are prerequisites for causes of action under national law, even if the potential consumer has not availed himself of that status. This follows from the principle of equivalence. If, however, domestic procedural rules prevent the court from undertaking such necessary classification, the principle of effectiveness demands that the court should nevertheless proceed to that classification if the court has the relevant facts at its disposal or can ascertain them by making a simple request for clarification. Otherwise, the consumer would be required to undertake on her own a full legal classification of her situation. According to the CJEU, this would place an excessive burden on consumers, particularly in fields in which they can represent themselves before the court without a lawyer. Furthermore, the court adds that this conclusion is independent of whether the potential consumer was represented by a lawyer in the specific case or not.

The court thus makes two distinct claims: (i) that the status of a party (consumer or not a consumer) must, if conditions warrant, be determined *ex officio* on its own motion by a request for clarification; and (ii) that this rule applies even when the party is represented by a lawyer. I agree with parts of the first and disagree completely with the second claim.

The first claim is perhaps the more far-reaching one. It is tantamount to no less than the partial revocation of the principle that the parties should adduce all relevant evidence before civil courts (the principle of production of evidence). This principle flows from the tenet of party autonomy in civil litigation, which in turn is closely linked to theories of the pursuit of autonomy in private law in general.[3] Since the time of Roman law, it has therefore been a cherished tradition to have the litigating parties select the facts of the action that they bring before a civil court.[4] This principle of '*iudex judicare debet secundum allegata et probata partium*' is generally honored in European civil procedure as well.[5] The parties may freely choose the evidence they would like the judge to rule on, in her capacity as an independent arbiter; by the same token, they are

3 See generally G. Wagner, *Prozeßverträge. Privatautonomie im Verfahrensrecht* (Tübingen: Mohr Siebeck, 1998) particularly 86 *et seq*.

4 See, eg, O. Tellegen-Couperus, *A Short History of Roman Law* (London *et al*: Routledge, 1993) 22–23 on the *apud iudicem* stage of *legis actiones*; cf also K.W. Nörr, *Romanisch-kanonisches Prozessrecht* (Heidelberg *et al*: Springer, 2012) 188.

5 See the Opinion of R.-J. Collomer, Case C-106/03 P *Vedial SA* v*Office for Harmonisation in the Internal Market*, delivered on 15 July 2004, para 28–29.

responsible for all evidence to be produced and presented to the court. In 1995, the CJEU upheld the 'principle that, in a civil suit, it is for the parties to take the initiative, the court being able to act of its own motion only in exceptional cases where the public interest requires its intervention. That principle reflects conceptions prevailing in most of the Member States as to the relations between the State and the individual.'[6] The judgment under consideration in this note departs from this tradition by stipulating that civil courts are under an obligation to make a limited but nonetheless palpable *ex officio* inquiry into the facts that determine the status of a party that may be a consumer. The argument that the CJEU presents, however, points to the central weakness of the principle of production of evidence. The principle assumes a significant degree of knowledge and rationality of the parties. Only if a consumer is sophisticated enough to know which facts will make her prevail can she effectively bring an action. The court rightly notes that many consumers will not be in a position to make these decisions on their own: they lack legal training, cognitive resources, or both. If the right to represent oneself in court without legal assistance is given its full scope, it seems necessary to critically scrutinize and limit the principle of production of evidence. In such cases of the absence of legal representation, the courts have already often sought to accommodate the shortcomings of said principle.[7] Under § 139 of the German Code of Civil Procedure, for example, the court may use its power to direct the trial to make limited factual inquiries without, however, giving legal advice which might compromise its neutral stance.[8] The CJEU takes these tendencies one step further by requiring, in the case of consumer law, civil courts to determine the status of the party of their own motion if necessary and if easily feasible.

If the assumption of limited legal training or bounded rationality on the side of the potential consumer holds true, the decision provides necessary aid to consumers in the enforcement of their legal rights. If, however, the assumption is refuted, the conclusion is unwarranted, contrary to the holding of the CJEU. There are two potential cases: legal training and close to full rationality of the party. If the very reason for the *ex officio* classification is the fear of an excessive burden on the consumer due to his unfamiliarity with legal proceedings, it seems that the presence of a lawyer undermines that rationale. The lawyer may be a representa-

6 Joined cases C-430/93 and C-431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen* v*Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705 (CJEU), para 21.

7 See, eg, J. Langbein, 'The German Advantage in Civil Procedure' (1985) 52 *The University of Chicago Law Review* 823, 826: 'the [German] court rather than the parties' lawyers takes the main responsibility for gathering and sifting evidence'; see also the reference in the following note.

8 C. Wagner, in *Münchner Kommentar zur ZPO* (4th ed, Munich: Beck, 2013) § 139 para 10.

tive of the party – or the party herself. As the CJEU has just affirmed in *Costea*, a lawyer acts as a consumer whenever concluding a transaction outside of her profession.[9] However, even if a lawyer is enforcing rights flowing from a private contract, it seems obvious that she does not need legal guidance from the court in such basic aspects as to adduce the evidence necessary to show, if relevant, that she acted as a consumer. Here, private autonomy and party sovereignty may rightfully prevail.[10] The second case, full rationality, is less easy to resolve. Imagine a highly sophisticated, almost fully rational party without legal training, for example a professor of mathematics. For her, it would not be impossible to cognitively digest the requirement of adducing facts pertaining to her consumer status. However, without legal training, she might not be aware of this problem in the first place. This may even be true if we imagine a party with experience in commerce, such as an investment banker. Now, one could argue that if they do not know how to run a trial, they should retain a lawyer. However, this always introduces the risk of additional financial and the certainty of additional cognitive costs (of choosing, negotiating etc). The right to universal access to courts is already highly regressive,[11] making it difficult for the less affluent (who may nevertheless be highly rational) to have their voices heard in court. The factual use of this right is facilitated by provisions strengthening the possibility of representing oneself in court. Therefore, even for highly rational individuals, the decision of the CJEU seems correct since *de facto* they might not be able or willing to retain a lawyer.

It would have been more compelling therefore if the CJEU had let the principles of domestic procedural law, including the principle to adduce evidence, prevail in the presence of a lawyer. In this case, if the facts necessary to determine the validity of a cause of action are at the court's disposal, it may proceed to the classification. If they are missing, the court must reject the claim. If the potential consumer was represented by a lawyer, she consequently has to sue the lawyer for professional malpractice. A reversal of long-established principles of domestic proceedings – the responsibility of the plaintiff to adduce all relevant facts –

9 See P. Hacker and M. Starke, 'European Union Litigation', in this issue, p 152–153.

10 This solution finds a limited analogy in the German doctrine on § 139 of the German Code of Civil Procedure mentioned above. While the German court must give advice on the necessity of further presentation of facts, even in the presence of lawyerly representation, this does not hold true if a conscientious and knowledgeable observer of the proceedings should have been aware of the necessity to present some particular facts (BGH, Judgment of 5 June 2003 – I ZR 234/00, *Neue Juristische Wochenschrift* 2003, 3626, 3628), as one may argue to be the case for the status of consumer in consumer litigations.

11 O. Ben-Shahar, 'The Uneasy Case for Equal Access Law' *University of Chicago Institute for Law & Economics Olin Research Paper* No 628 (2013), available at http://ssrn.com/abstract=2197013.

under the banner of the principle of effectiveness does not seem warranted in cases in which the consumer is not, by virtue of his lawyerly representation, a legally naïve party.

III Burden of Proof regarding Lack of Conformity: Forced or Individual Insurance?

Next, the court addresses the second key question of the case: the exact scope of the reversal of the burden of proof contained in Article 5(3) of Directive 1999/44. An interpretation of the CJEU had been awaited by lawyers and scholars with baited breath since manifold theories had been proliferating to determine that scope. If lack of conformity becomes apparent within six months of delivery of the goods, Article 5(3) states that, notwithstanding some exceptions, the lack of conformity is presumed to have existed at the moment of delivery. Chiefly, it was unclear whether the consumer only had to adduce evidence that, as a result of some unknown cause, the good has entered a state of non-conformity (eg, burned down), or whether she had to establish that the cause of that state of non-conformity (eg, a motor defect) is attributable to the seller.[12] Quite obviously, the first interpretation entails a much more encompassing reversal of the burden of proof than the second. The German High Court for Private Law (*Bundesgerichtshof*) chose the second alternative as early as 2004 in a case with a fact pattern similar to *Faber*.[13] The CJEU in *Faber*, however, unequivocally opted for the first interpretation by stating that the 'consumer is required to prove only that the lack of conformity exists', being 'not required to prove the cause of that lack of conformity or to establish that its origin is attributable to the seller' (para 70). Furthermore, according to the CJEU, the consumer must prove that the lack of conformity became physically apparent within six months of delivery of the goods. The court argues that the appearance of a lack of conformity within six months makes it probable that the defect already existed 'in embryonic form' at the time of delivery (para 72). As a consequence, the burden shifts to the seller to prove that the cause of the lack of conformity can be found in an act or omission which took place after delivery.

12 See P. Rott, 'Improving consumers' enforcement of their rights under EU consumer sales law: Froukje Faber' (2016) 53 *Common Market Law Review* 509; S. Lorenz, in *Münchner Kommentar zum BGB* (6th ed, Munich: Beck, 2012) § 476 para 4.

13 Bundesgerichtshof, Judgment of 2 June 2004, VIII ZR 329/03, *Neue Juristische Wochenschrift* 2004, 2299.

The very case pattern the court had before it perfectly illustrates the consequences of the ruling. On the one hand, the consumer is insured against the impossibility (or economic unreasonableness) of determining the true cause of the lack of conformity. At first glance, this might be welcomed since it will sometimes be difficult for the consumer to ascertain this cause (think of malfunctioning electronic gadgets), which in turn may deter some consumers from seeking justice in the courts in the first place. The prevention of such deterrence is a manifest objective of Directive 1999/44 in the interpretation of the court (see, eg, para 45 and 64 of *Faber*). On the other hand, it is clear that, as with every expansion of consumer protection in specific cases, the cost is likely to be borne by all consumers (at least in competitive markets) as businesses adjust their prices accordingly to cover the risk of being sued in cases of indeterminable cause of lack of conformity.[14] While such cross-subsidization between consumers is not per se illegitimate,[15] it is at least questionable whether the specific case addressed by the court was contemplated by the directive.

In fact, the allocation of the burden of proof concerning lack of conformity to either the seller or the consumer each leads to one type of judicial error. If the burden is on the consumer, an error occurs if a lack of conformity was present at the time of delivery and it is impossible for the consumer to prove it retrospectively (Type I error). If the burden is on the seller, a Type II error occurs if lack of conformity occurs after delivery, but the seller cannot prove this. Let us consider the example of the consumer buying a bike; imagine the chain is torn apart during normal use five months after delivery. This can be attributable to a product defect present at the time of delivery, or to specific use of the bike by the consumer after delivery (eg, repeatedly hitting stones with the chain while riding off-track). The solution of the CJEU minimizes Type I error; however, it maximizes Type II error. There are two reasons why this strategy is flawed.

First, the seller does not have access to the goods after delivery, in contrast to the consumer. Thus, Type II errors are likely to abound since the seller cannot observe consumer behavior. In fact, the judgment creates moral hazard for consumers since it will often be close to impossible for the seller to establish that a certain kind of nonconformity was caused by post delivery consumer behavior

14 See generally R. Craswell, 'Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships' (1991) 43 *Stanford Law Review* 361, and, with respect to the situation at issue, the illuminating analysis by R. Podszun, 'Procedural autonomy and effective consumer protection in sale of goods liability: Easing the burden for consumers (even if they aren't consumers)' (2015) 4 *Journal of European Consumer and Market Law* 149, 152.

15 It must be underpinned by a robust normative theory, however, see P. Hacker, *Verhaltensökonomik und Normativität* (forthcoming).

unknown to him. Under the inverse rule, consumers would at least have the possibility of observing product quality (and lack of conformity) at the time of delivery or, alternatively, to have this quality inferred by experts retrospectively. Thus, the problem of Type I errors seems to be smaller than that of Type II errors.

However, does not Directive 1999/44/EC implicitly contain the minimization of Type I errors as a normative aim? After all, the need for expert advice on the cause of lack of conformity may have a deterrent effect on the enforcement of consumer rights in a number of instances and may be inefficient if the value of the good is low. Article 5(3) of the Directive thus aims to relieve the consumer of the necessity for such expert assessments. However, this objective is not without limits. Recital 8 suggests that the reversal of the burden of proof should cover 'the most common situations'. Type I errors thus do not have to be minimized under all circumstances. Importantly, it may be doubted that the impossibility of determining the cause of a defect really belongs to the category of the 'most common situations'; if at all, this seems to be only the case for complex electronic products. Furthermore, the probabilistic speculation of the court that defects surfacing within six months after delivery were likely to have been present at the delivery in an 'embryonic form' lacks any empirical validation. In fact, the statement at this level of generality seems highly implausible, given the wide range of possible misuses of products by consumers. If cases where it is impossible to determine the true cause of a lack of conformity are indeed rare rather than common, individual warranties or insurances covering such incidents, to be purchased by individual buyers who would like to protect themselves against that specific risk, seem to be preferable to the forced spread of risk amongst all consumers in these concrete case settings. This alternative obviously hinges on the effective and efficient functioning of the market for warranties covering such risks. Yet a whole industry of selling warranties alongside goods exists in many contexts of consumer sales. However, the sale of warranties has been fraught with accusations of exploitation of biased consumer perceptions concerning the likelihood of adverse events or the valuation of the product.[16] These concerns should not be brushed aside; but they are better addressed by regulation directly tackling consumer misperceptions in warranties markets rather than by the generic forced

16 See, eg, R. Chark and A.V. Muthukrishnan, 'The effect of physical possession on preference for product warranty' (2013) 30 *International Journal of Research in Marketing* 424 (discussing the endowment effect); P. Jindal, 'Risk Preferences and Demand Drivers of Extended Warranties' (2015) 34 *Marketing Science* 39 (discussing loss aversion); C. Michel, 'Contractual Structures and Consumer Misperceptions – The Case of Product Warranties' Working Paper, available at http://webmeets.com/files/papers/EARIE/2014/394/ContractualStructures_CMichel.pdf.

insurance instituted by the CJEU, rendering individual warranty regimes indeed superfluous in the case at issue.

All in all, more empirical rigor and scrutiny would have been necessary to align the judgment with the professed goals of the Directive. In line with Recital 8, the court should have differentiated between products for which the inscrutability of the true cause is indeed common (eg, electronic products) and those where it is rare, restricting its holding to the former category. Finally more weight should have been given to an *ex ante* perspective by evaluating the consequences of the case for all consumers, and for sellers, rather than simply proclaiming *ex post* what may seem reasonable in a single case. Nevertheless, the CJEU has held otherwise, and the law will stand as it is.

IV Towards Personalized Consumer Law

Beyond this, the case highlights one of the key problems of contemporary consumer law in the EU and beyond: the problem of heterogeneity.[17] Rigid categories, such as the dichotomies of 'consumer – seller' or 'consumer – trader', are in deep tension with the great variety of expertise and sophistication present within each of these legal black boxes. It is therefore time to critically scrutinize these supercategories the law has erected in the past decades in the pursuit of consumer protection.[18] While fraught with problems of its own,[19] personalized law may represent a way forward to mitigate these tensions. By using the power of Big Data, legal norms can be tailored to the individual characteristics of consumers (and non-consumers).[20] For example, regarding the first question addressed by the judgment that is the subject of this note, the principle that the parties should produce the evidence should prevail not only where there is legal representation but also if the data shows that a consumer is highly rational, has business experience and is affluent enough to hire a lawyer. Under these conditions, it seems unnecessary to deviate from the principle of party autonomy and party responsibility. Furthermore, concerning the reversal of the burden of proof, risks may be socialized (along the lines of the ruling of the CJEU) if the data shows that

17 See A. Schwartz, 'Regulating for Rationality' (2015) 67 *Stanford Law Review* 1373, 1393–1395.

18 Contra Rott, n 12 above, 518.

19 P. Hacker, 'Personalized Law', Working Paper (on file with author).

20 See O. Ben-Shahar and A. Porat, 'Personalizing Negligence Law' *New York University Law Review* (forthcoming); A. Porat and L.J. Strahilevitz, 'Personalizing Default Rules and Disclosure with Big Data' (2014) 112 *Michigan Law Review* 1417; P. Hacker, 'Nudge 2.0' (2016) 24 *European Review of Private Law* 297, 321–322.

a specific consumer is prone to act in a boundedly rational way. In this case, it may be assumed that she will not pick the right warranty even if she wanted to (behavioral market failure). Thus, cross-subsidization would be limited to rational vis-à-vis boundedly rational consumers who are unable to help themselves. There are important normative reasons, which hark back to our society's foundation on mutual respect, inclusion, and fairness,[21] which may legitimize such a limited, personalized rule of forced insurance. The ruling of the CJEU, in all its incompleteness, should serve as a pointer to remind the legal community of the urgent need to re-theorize EU consumer law in the light of relevant evidence from the social and computer sciences with a view towards tailoring its categories better to individual needs and preferences.

21 P. Hacker, 'Overcoming the Knowledge Problem in Behavioral Law and Economics: Uncertainty, Decision Theory, and Autonomy', Working Paper, available at http://ssrn.com/abstract=2632022; Hacker, n 15 above, part 1; specifically on fairness, see W. Fikentscher, P. Hacker and R. Podszun, *Fair Economy. Crises, Culture, Competition and the Role of Law* (Heidelberg *et al*: Springer, 2013).