

“Sale of consumer goods and guarantees: The obligation on the seller to remove the defective goods and install the replacement goods, even when it is beyond those required in the contract – Comment on joined cases C-65/09 and C-87/09 of European Court of Justice”

1. *The case.* – The consumer buys goods from the seller, installs by himself as instructed and afterwards a defect, not related to the installation, becomes visible.

The defect affects the goods in a way that are no longer suitable for the use for which were intended to and/or their value is notably lowered. Thus the goods happen to be not in conformity and need to be replaced, since repair is not possible.

According to the Directive 1999/44/EC (hereafter “the Directive”), in case of goods not in conformity the consumer should have them restored into conformity by the seller¹, free of charge to the consumer, unless it is impossible or disproportionate. The other secondary remedies are the appropriate reduction made in the price or the contract rescinded with regard to those goods.²

As the central point of the discussion in both cases, C-65/09 and C-87/09, is the liability of the seller for not only replacing the defective goods, but also installing the substitute goods, or bearing those costs, in the case it has been done by the consumer, in good faith, at first place, since the installation by the seller was not part of the contract.

It is also part of the debate the fact that the seller finds his protections as well in the Directive, since the consumer has a specific and limited period of time to ask for having the goods in conformity, and any measure taken by the seller cannot be disproportionate. Furthermore, the seller has the right to redress to

¹ The Article 3 (1) of the Directive (*‘The seller shall be liable to the consumer for any lack of conformity which exists at the time the goods were delivered.’*) is similar to CISG (United Nations Convention on Contracts for the International Sale of Goods; Vienna, 11th April 1980), in the fact that *‘the seller must deliver goods to the consumer which are in conformity with the contract of sale’* (Article 2 (1)). Please see SÁRI, C. *EU Legislation on Consumer Protection, with special regard to the Directive 1999/44/EC (Sale of Consumer Goods and associated Guarantees*, Awarded Paper on the 2005 edition of the Dr. Thomas Marx Award, CONSULEGIS EWIV/EEIG.

² Please see ALPA, G. *Autonomia privata e ‘garanzie’ commerciali*. In: *L’attuazione della Direttiva 99/44/CE in Italia e in Europa: La tutela dell’acquirente di beni di consumo – Atti del Convegno internazionale dedicato alla memoria di Alberto Trabucchi*, CEDAM, 2002, p. 123.

anyone who would be also liable for any defect presented in the goods in the contractual chain.

2. *The principle of conformity of the goods and the options available to the consumer in order to have the goods restored into conformity.* – The principle of the conformity with the contract is one of the central elements of the Directive and it takes place when the seller delivers the goods in conformity, as states the Article 2(1) of the Directive.

It is up to the parties to determine in their contract which qualities the goods in question should have. Additionally, Article 2(2) of the Directive does not present conditions of the conformity of the contract but presumptions of this conformity.

Thus, the Article 3(2) of the Directive states that in case of lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement or, alternatively, as secondary remedies, to have an appropriate reduction made in the price or the contract rescinded with regard to those goods.

The Directive stipulates a precise hierarchy of remedies.³ Note that repair and replacement are remedies that extinguish the defect in a way that provides the consumer with the result expected. If (i) the consumer is entitled to neither repair nor replacement or (ii) the seller has not completed the remedy within a reasonable time or (iii) the seller has not completed the remedy without significant inconvenience to the consumer, the consumer may require the secondary remedies above mentioned (reduction of the price or have the contract rescinded), as per the Article 3(5) of the Directive.

3. *The liability of the seller to the consumer for the conformity of the goods extended to the obligation of installing the substitute goods or bearing its costs if it is beyond those in the contract.* – The other question faced – and according to us the most important – is the liability of the seller to the consumer

³ Please see DE CRISTOFARO, G., *Difetto di conformità al contratto e diritti del consumatore*, CEDAM- Casa Editrice Dott. Antonio Milani, 2000, pp. 193-223 and LEISINGER, B., *Fundamental Breach Considering Non-Conformity of the Goods*, Sellier, 2007.

for the conformity of the goods extended to the obligation of installing the substitute goods if it is beyond those in the contract.

Please see that, in both cases here analyzed, the installation has been done by the consumer. The defects, however, became visible afterwards and had no relation to the installation.

Therefore the liability of the seller extended to the installation of the substitute goods in those cases seems to be the central point of the discussion. Weber and the German,⁴ Belgian and Austrian Governments consider that it must be answered in the negative, so does the Advocate General Jan Mazák that presented his opinion in both cases herein discussed.

According to them, the term ‘replacement’ used in the first subparagraph of Article 3(2) of the Directive could not impose obligations not provided by the contract on the seller. The Article 3(3) and (4) would not intend that such obligations to remove defective goods and to install replacement goods, according to which replacement should take place ‘free of charge’ and ‘without significant inconvenience to the consumer’.

For that reason, those conditions should not be intended to impose obligations on the seller beyond those in the contract, or to protect the consumer from expense and inconvenience resulting from the use he had made, under his own responsibility, of the goods not in conformity.⁵

In contrast, the Polish and Spanish Governments and also the European Commission take the opposite view, with which the Court went along.

According to the European Commission, the parallelism in Article 3(2) and (3) of the Directive of the two methods of bringing defective goods into conformity suggests that replacement, just as repair, relates to goods in the situation in which they are when the lack of conformity becomes apparent. If the goods not in conformity have already been installed in a manner consistent with

⁴ Please see ROTT, P., *German sales law after the implementation of Directive 1999/44/EC*, Europa e Diritto Privato, 1/2004, pp. 861-883.

⁵ Concerning the liability of the seller to deliver goods in conformity, see STAUDENMAYER, D., *The Directive on the Sale of Consumer Goods and Associated Guarantees – a Milestone in the European Consumer and Private Law*, European Review of Private Law, v.8, 2000, pp. 547-564 and CAPILLI, G., *Le garanzie nella vendita di beni di consumo*, In: I Diritti dei consumatori, coordinated by GUIDO ALPA, tomo II, G. Giappichelli Editore, 2009, pp. 531-543.

their nature and purpose, it is in that situation that they should be brought into conformity. **The replacement must therefore be carried out so that the new goods are placed in the same situation as that of the defective goods.** It does not matter if they were installed by the consumer or not.

Besides, the fact that the consumer must keep those goods and cannot use the replacement goods, due to the fact that replacement goods are not installed, definitely represents ‘significant inconvenience to the consumer’ within the meaning of Article 3(3).

The European Court of Justice that states that *‘the seller is obliged either to remove the goods from where they were installed and to install the replacement goods there or else to bear the cost of that removal and installation of the replacement goods’*, in cases where *‘consumer goods not in conformity with the contract which were installed in good faith by the consumer in a manner consistent with their nature and purpose, before the defect becomes apparent, are restored to conformity by the way of replacement’*.

4. *Good faith of the consumer on installing the goods.* – It is important to bear in mind that the consumer here already paid the price and performed his contractual obligations.⁶ Moreover, confident in the conformity of the goods delivered, installed the defective goods, in good faith, in a manner consistent with their nature and purpose, before the defect becomes visible. For that reason, it cannot be held against the consumer as a fault.

5. *The replacement shall be done free of charge and of inconvenience to the consumer.* – The ‘free of charge’ aspect of the seller’s obligation to bring

⁶ Regarding good faith specifically concerning contracts executed by consumer and seller, JUNQUEIRA DE AZEVEDO explains that the contract is a process which extension goes from the pre-contractual phase until after its closing. All the obligations shall be done in accordance with the good faith principle, especially in contracts executed between consumers and sellers (JUNQUEIRA DE AZEVEDO, A., *Responsabilidade pré-contractual no Código de Defesa do Consumidor: estudo comparativo com a responsabilidade pré-contractual no Direito Comum*. In: *Revista de Direito do Consumidor*, n. 18, Editora RT, São Paulo, 1996).

goods into conformity⁷ is an essential element of the protection afforded to consumers by the Directive.⁸

It is true that the costs of removing defective goods and installing replacement goods are not among those specifically laid down in Article 3(4) of the Directive. However, the European Court of Justice has already held that it follows from the use by the European Union legislature of the adverb ‘particularly’ that that list is illustrative, not exhaustive.

Therefore, whether by repair or replacement, it is intended to protect consumers from the risk of financial burdens which might dissuade them from asserting their rights in the absence of the protection desired by the Directive. The consumer should bear only the price of the goods when bought from the seller and, in that case, is not unjustly enriched. He merely receives, belatedly, goods in conformity with the specifications of the contract, which he should have received at the outset.

Furthermore, the goods must be restored into conformity without any significant inconvenience to the consumer, as states the Article 3(4) of the Directive.

6. *The protections of the seller: time limit, proportionality and right to redress.* – It is important to remark that, despite all the protection rendered to the consumer, the financial interests of the seller are protected by the Directive as well.

First of all, the seller’s protection is due to the two-year time limit as from delivery of the goods, as laid down in Article 5(1) of the Directive.⁹

Additionally, the seller may also refuse to repair or replace the goods where that remedy would be impossible or disproportionate in that it would impose unreasonable costs on him, according to the Article 3(3) of the Directive.

⁷ Please see DE CRISTOFARO, G., *Difetto di conformità al contratto e diritti del consumatore*, CEDAM- Casa Editrice Dott. Antonio Milani, 2000, pp. 193-223 and LEISINGER, B., *Fundamental Breach Considering Non-Conformity of the Goods*, Sellier, 2007.

⁸ DE CRISTOFARO points out that ‘free of charge’ aspect is essential to the applicability of the Directive. Please see DE CRISTOFARO, G., *Difetto di conformità al contratto e diritti del consumatore*, CEDAM- Casa Editrice Dott. Antonio Milani, 2000, pp. 193-223.

⁹ Please see ALPA, G. *Autonomia privata e ‘garanzie’ commerciali*. In: L’attuazione della Direttiva 99/44/CE in Italia e in Europa: La tutela dell’acquirente di beni di consumo – Atti del Convegno internazionale dedicato alla memoria di Alberto Trabucchi, CEDAM, 2002, p. 123 and IURILLI, C., *Autonomia contrattuale e garanzie nella vendita di beni di consumo*, Dott. A. Giuffrè Editore, 2004, p. 28.

Still, the impossibility of bringing the goods into conformity shall not be presumed. It must be shown always in an objective way, not according to a subjective aspect. It means that if the seller is not capable to bring the goods to conformity but a third party may perform that action that would not be a case of impossibility. In that hypothesis, the seller shall be responsible for delegating the obligation to the third party in order to be in compliance with the contract.

Also seller may enforce its right to redress, since he may pursue remedies against the producer, a previous seller in the same chain of contracts, or any other intermediary, depending on the applicable rules of national legislation, according to Article 4 of the Directive.

7. *The precedent: the Quelle case.* – The European Court of Justice has had occasion to note some aspects related to the commented judgment in the precedent *Quelle* case¹⁰ (ECJ, C-404/06, 17.04.2008).

The consumer right to have the goods in conformity is the main subject in those cases.¹¹ For instance, in the referred joined cases C-65/09 and C- 87/09, the Court itself recognizes that the costs of removing goods not in conformity and installing replacement goods are not among those ‘free of charge’ to the consumer specifically laid down in Article 3(4) of the Directive.

But the interpretation of the definition of the expenses that should be entitled to the seller, not to the consumer, must be done as illustrative, not exhaustive, since it has been already held in the *Quelle* case that it follows from the use by the European Union legislature that the adverb ‘particularly’ is simply illustrative.

The understanding of the European Court of Justice in the *Quelle* case related to the fact that the remedy shall be provided within a reasonable time and without significant inconvenience to the consumer is also taken as a precedent to the present case.

¹⁰ Regarding the *Quelle* case, please see CAPILLI, G., *Quelle case: The Directive on the Sale of Consumer Goods at the European Court of Justice*, European Business Law Review, v. 21, issue 1, 2010, pp. 81-88.

¹¹ CAPILLI explains that delivering goods in conformity is a distinct and autonomous obligation in respect of simply delivering goods. Please see CAPILLI, G., *Le garanzie nella vendita di beni di consumo*, In: I Diritti dei consumatori, coordinated by GUIDO ALPA, tomo II, G. Giappichelli Editore, 2009, p. 531.

The *Quelle* case is mentioned as well in the question of the good faith of the consumer that paid the selling price and therefore correctly performed his contractual obligations, and installed the goods in a manner consistent with their nature and purpose.

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