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JUDGMENT OF THE COURT (First Chamber)

17 April 2008 (*)

(Consumer protection – Directive 1999/44/EC – Sale of consumer goods and associated guarantees – Right of the seller, where goods not in conformity are replaced, to require the consumer to pay compensation for the use of those goods – No charge for the use of the goods not in conformity)

In Case C-404/06,

REFERENCE for a preliminary ruling under Article 234 EC, by the Bundesgerichtshof (Germany), made by decision of 16 August 2006, received at the Court on 28 September 2006, in the proceedings

Quelle AG

v

Bundesverband der Verbraucherzentralen und Verbraucherverbände,

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, A. Tizzano, A. Borg Barthet, M. Ilešic and E. Levits, Judges,

Advocate General: V. Trstenjak,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 4 October 2007,

after considering the observations submitted on behalf of:

– Quelle AG, by A. Piekenbrock, Rechtsanwalt,

– the Bundesverband der Verbraucherzentralen und Verbraucherverbände, by P. Wassermann and J. Kummer, Rechtsanwälte,

– the German Government, by M. Lumma and J. Kemper, acting as Agents,

– the Spanish Government, by N. Díaz Abad, acting as Agent,

– the Austrian Government, by C. Pesendorfer, acting as Agent,

– the Commission of the European Communities, by A. Aresu and B. Schima, and by I. Kaufmann-Bühler, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 November 2007,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Article 3 of 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 (OJ 1999 L 171, p. 12; 'the Directive').

2 The reference has been made in the course of proceedings between Quelle AG ('Quelle'), a mail-order company, and the Bundesverband der Verbraucherzentralen und Verbraucherverbände ('the Bundesverband'), an authorised consumers' association acting on behalf of Ms Brüning, one of Quelle's customers.

Legal context

Community legislation

3 The Directive was adopted on the basis of Article 95 EC. The first recital in the preamble thereto states that, in accordance with Article 153(1) and (3) EC, the European Community must contribute to the achievement of a high level of consumer protection by the measures it adopts pursuant to Article 95 EC.

4 Article 3 of the Directive, entitled 'Rights of the consumer', provides:

'1. The seller shall be liable to the consumer for any lack of conformity which exists at the time the goods were delivered.

2. In the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement, in accordance with paragraph 3, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods, in accordance with paragraphs 5 and 6.

3. In the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate.

A remedy shall be deemed to be disproportionate if it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable, … .

Any repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods.

4. The terms "free of charge" in paragraphs 2 and 3 refer to the necessary costs incurred to bring the goods into conformity, particularly the cost of postage, labour and materials.

5. The consumer may require an appropriate reduction of the price or have the contract rescinded:

– if the consumer is entitled to neither repair nor replacement, or

– if the seller has not completed the remedy within a reasonable time, or

– if the seller has not completed the remedy without significant inconvenience to the consumer.

…'

5 The 15th recital in the preamble to the Directive states that 'Member States may provide that any reimbursement to the consumer may be reduced to take account of the use the consumer has had of the goods since they were delivered to him; … the detailed arrangements whereby rescission of the contract is effected may be laid down in national law'.

6 Under the first sentence of Article 5(1) of the Directive (that article being entitled 'Time limits'):

'The seller shall be held liable under Article 3 where the lack of conformity becomes apparent within

two years as from delivery of the goods.'

7 Article 8(2) of the Directive (that article being entitled 'National law and minimum protection'), provides:

'Member States may adopt or maintain in force more stringent provisions, compatible with the Treaty in the field covered by this Directive, to ensure a higher level of consumer protection.'

National legislation

8 Paragraphs 439 and 346 are among the provisions of the German Civil Code (Bürgerliches Gesetzbuch; 'the BGB') adopted in order to transpose the Directive into German domestic law.

9 Paragraph 439(4) of the BGB, entitled 'Subsequent performance', states:

'Where a seller delivers goods free from defects for the purposes of subsequent performance, he may require the purchaser to return the defective goods pursuant to Paragraphs 346 to 348.'

10 Paragraph 346(1) to (3) of the BGB, entitled 'Effects of termination of the contract', states as follows:

'1. If one party to a contract has reserved the right to terminate the contract or if he has a statutory right of termination, then, if termination occurs, any performance received shall be returned, and the benefits derived from such performance shall be surrendered.

2. The debtor shall pay compensation for value, in lieu of restitution or surrender, where:

(1) restitution or surrender is excluded by virtue of the nature of what has been obtained;

(2) he has used up, transferred, encumbered, processed or transformed the object received;

(3) the object received has deteriorated or has been destroyed, any deterioration resulting from the proper use of the object for its intended purposes being disregarded.

If the contract specifies a counter-performance, such counter-performance shall be taken as a basis for calculation of the compensation for value; if compensation is to be paid for the benefit deriving from a loan, it shall be sufficient to show that the value of such benefit was lower.

3. No obligation to pay compensation for value shall arise:

(1) if the defect which gives the right to termination became apparent only during the processing or transformation of the object;

(2) in so far as the creditor is responsible for the deterioration or destruction, or in so far as the damage would also have occurred in his hands;

(3) if, in the case of a statutory right of termination, the deterioration or destruction has occurred in the hands of the person entitled, even though he has taken the care that he customarily exercises in relation to his own affairs.

Any remaining enrichment must be surrendered.'

11 Paragraph 100 of the BGB, headed 'Benefits', provides that:

'Benefits are the fruits of a thing or of a right, including the benefits arising from use of the thing or exercise of the right'.

The dispute in the main proceedings and the question referred for a preliminary ruling

12 In August 2002, Quelle delivered a 'stove-set' to Ms Brüning for her private use. In early 2004, Ms Brüning noticed that the appliance was not in conformity. Since repair was not possible, Ms Brüning returned the appliance to Quelle, who replaced it with a new appliance. However, Quelle required

Ms Brüning to pay EUR 69.97 by way of compensation for the benefit which she had obtained from use of the appliance initially delivered.

13 The Bundesverband, acting as Ms Brüning's authorised representative, demanded reimbursement to her of that amount. In addition, it applied for an order prohibiting Quelle, in cases where goods not in conformity with the contract of sale ('not in conformity') are replaced, from invoicing consumers for the use of those goods.

14 The court hearing the case at first instance granted the application for reimbursement, but dismissed the arguments seeking an order directing Quelle not to invoice customers for the use of goods not in conformity. The appeals brought against that judgment – both by Quelle and by the Bundesverband – were dismissed. The Bundesgerichtshof, before which appeal proceedings have been brought on a point of law, notes that, under Paragraph 439(4) of the BGB, read in conjunction with Paragraph 346(1) and (2)(1) thereof, the seller is entitled, in cases where goods not in conformity are replaced, to payment by way of compensation for the benefits derived by the purchaser from the use of those goods until their replacement with new goods.

15 While expressing doubts regarding the unilateral burden thus placed on the purchaser, the Bundesgerichtshof states that it sees no way of correcting the national legislation by means of interpretation. An interpretation to the effect that the seller could not claim payment from the purchaser for use of the replaced goods would be at odds with the wording of the relevant provisions of the BGB and the clear intention of the legislature, and is prohibited by Paragraph 20 (3) of the Basic Law (Grundgesetz), according to which judicial authority is bound by legislation and by the law.

16 Being unsure, however, whether the provisions of the BGB are in compliance with Community legislation, the Bundesgerichtshof decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Are the provisions of Article 3(2) of [the Directive], read in conjunction with the first subparagraph of Article 3(3) and Article 3(4) thereof, or of the third subparagraph of Article 3(3) of [the Directive] … to be interpreted as precluding national legislation which provides that, where consumer goods are brought into conformity with the contract by means of delivery of replacement goods, the seller may require compensation from the consumer for use of the goods originally delivered, which were not in conformity with the contract?'

The question referred

17 By its question, the national court essentially asks whether Article 3 of the Directive is to be interpreted as precluding national legislation under which a seller who has sold consumer goods which are not in conformity may require the consumer to pay compensation for the use of those defective goods until their replacement with new goods.

Admissibility

18 At the hearing, Quelle argued that the question referred for a preliminary ruling is not admissible, given that the national court has stated that the provisions of national law implementing the Directive are open to only one interpretation and that German constitutional law prohibits the national court from espousing an interpretation *contra legem*. In consequence, if the Court of Justice were to place a different construction on Article 3 of the Directive, the national court would not be able to take account of the Court's answer.

19 In that regard, it must be recalled that, in proceedings under Article 234 EC, which are based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, and which must determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling (see, inter alia, Case C-419/04 *Conseil général de la Vienne* [2006] ECR I-5645, paragraph 19, and Case C-119/05 *Lucchini* [2007] ECR I-0000, paragraph 43).

20 The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, *Conseil général de la Vienne*, paragraph 20, and *Lucchini*, paragraph 44).

21 That is not the position in the present case.

22 The uncertainty as to whether the national court – following an answer given by the Court of Justice to a question referred for a preliminary ruling relating to interpretation of a directive – may, in compliance with the principles laid down by the Court (see, to that effect, Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraphs 113 to 116, and Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraphs 110 to 112), interpret national law in the light of that answer cannot affect the Court's obligation to rule on that question. Any other approach would be incompatible with the very aim of the powers given to the Court by Article 234 EC, which are intended, in essence, to ensure the uniform application of Community law by the national courts (Case C-461/03 *Gaston Schul Douane-expediteur* [2005] ECR I-10513, paragraph 21, and Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 27).

23 It follows that the reference for a preliminary ruling is admissible.

Substance

24 According to the Bundesverband, the Spanish and Austrian Governments and the Commission of the European Communities, Article 3(3) of the Directive clearly establishes that it is not only the repair of goods not in conformity that must be carried out for the consumer free of charge by the seller, but also – where appropriate – their replacement with goods which are in conformity. In all the situations covered by that provision, the 'free of charge' requirement applies as a whole and in full, being intended to protect the purchaser from the risk of financial burdens which might dissuade him from asserting his rights.

25 The German Government observes that the wording of the Directive gives no clear indication whether the seller may, in cases where goods not in conformity are replaced, claim payment for the use of those goods. It points out that, in terms of internal logic, the 15th recital in the preamble to the Directive sets out a very general principle of law, leaving the Member States entirely free to legislate on the question concerning the situations in which the consumer is required to pay compensation for the use of goods.

26 As a preliminary point, it should be borne in mind that, under Article 3(1) of the Directive, the seller is to be liable to the consumer for any lack of conformity in the goods at the time when they are delivered.

27 Article 3(2) of the Directive lists the rights which the consumer may rely on against the seller in cases where the goods delivered are not in conformity. Initially, the consumer has the right to require the goods to be brought into conformity. If that is not possible, he may subsequently require a reduction in the price or rescission of the contract.

28 As regards the bringing into conformity of the goods, Article 3(3) of the Directive states that the consumer is entitled to require the seller to repair the goods or to replace them – in either case free of charge – unless that is impossible or disproportionate.

29 The German Government argues that, in both Proposal 96/C 307/09 for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees (OJ 1996 C 307, p. 8) and Amended Proposal 98/C 148/11 for a European Parliament and Council Directive (OJ 1998 C 148, p. 12), submitted by the Commission, the text merely referred either to a repair of the goods free of charge or to a replacement thereof. The fact that those proposals are silent as to the financial consequences of replacement goes to show that it was not intended that the Directive should govern the question of compensation for use.

30 However, that is entirely irrelevant since it is the expression 'in either case free of charge' – used in Common Position (EC) No 51/98, adopted by the Council on 24 September 1998 with a view to adopting the Directive (OJ 1998 C 333, p. 46) – which was retained in the definitive text, thus

reflecting the intention of the Community legislature to strengthen consumer protection.

31 The expression 'free of charge' is defined in Article 3(4) of the Directive as referring to 'the necessary costs incurred to bring the goods into conformity, particularly the cost of postage, labour and materials'. It follows from the use by the Community legislature of the adverb 'particularly' that that list is illustrative, not exhaustive.

32 The fact, relied upon by the German Government, that Press Release C/99/77 of the 'Parliament – Council' Conciliation Committee of 18 March 1999 on agreement on consumer guarantees gives a restrictive definition of the term 'free of charge' is irrelevant in that regard. It is settled case-law that, where a statement recorded in Council minutes is not referred to in the wording of a provision of secondary legislation, it cannot be used for the purpose of interpreting that provision (see, inter alia, Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 18, and Case C-402/03 *Skov and Bilka* [2006] ECR I-199, paragraph 42).

33 Thus it follows from the wording of the Directive, as well as from the related travaux préparatoires, that the Community legislature intended to make the 'free of charge' aspect of the seller's obligation to bring goods into conformity an essential element of the protection afforded to consumers by the Directive.

34 The 'free of charge' requirement attaching to the seller's obligation to bring the goods into conformity, whether by repair or replacement, is intended to protect consumers from the risk of financial burdens which, as the Advocate General observed in point 49 of her Opinion, might dissuade them from asserting their rights in the absence of such protection. The certain nature of the 'free of charge' aspect, which was intentional on the part of the Community legislature, means that the seller cannot make any financial claim in connection with the performance of its obligation to bring into conformity the goods to which the contract relates.

35 Support for that interpretation is to be found in the intention, manifested by the Community legislature in the third subparagraph of Article 3(3) of the Directive, to provide effective protection to consumers. That provision states that any repair or replacement is to be completed not only within a reasonable time but also without significant inconvenience to the consumer.

36 That interpretation is also consistent with the purpose of the Directive which, as stated in the first recital in the preamble thereto, is to ensure a high level of consumer protection. As follows from Article 8(2) of the Directive, the protection provided by it is minimal and, although Member States may adopt more stringent provisions, they may not undermine the guarantees laid down by the Community legislature.

37 The other arguments advanced by the German Government against that interpretation are not such as to call it into question.

38 As regards, first, the scope which must be accorded to the 15th recital in the preamble to the Directive, which permits account to be taken of the use the consumer has had of the goods not in conformity, it should be noted that the first part of that recital refers to a 'reimbursement' to be made to the consumer, whereas the second part mentions the 'detailed arrangements whereby rescission of the contract is effected'. Those expressions are identical to those used in the Common Position of the Council to which the German Government also referred.

39 That terminology makes it clear that the situation envisaged in the 15th recital is restricted to cases where the contract is terminated, as provided for in Article 3(5) of the Directive, and where, pursuant to the principle that the contracting parties must each give up the benefits they have received, the seller must reimburse to the consumer the selling price of the goods. Contrary to the contentions of the German Government, the 15th recital cannot, therefore, be interpreted as a general principle enabling the Member States to take account, in any situation they wish, including that of a mere request for replacement submitted pursuant to Article 3(3) of the Directive, of the use which the consumer has had of goods not in conformity.

40 As regards, secondly, the German Government's assertion that the fact that, by virtue of the replacement of goods not in conformity, the consumer has the benefit of new goods without having to make proper payment constitutes unjust enrichment, it should be borne in mind that Article 3(1) of the Directive makes the seller liable to the consumer for any lack of conformity which exists at the time the goods are delivered.

41 If a seller delivers goods which are not in conformity, it fails correctly to perform the obligation which it accepted in the contract of sale and must therefore bear the consequences of that faulty performance. By receiving new goods to replace the goods not in conformity, the consumer – who, for his part, paid the selling price and therefore correctly performed his contractual obligation – 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.

42 The fact remains that the seller's financial interests are protected, on the one hand, by the two-year time-limit laid down in Article 5(1) of the Directive and, on the other, by the fact that, under the second subparagraph of Article 3(3) of the Directive, it may refuse to replace the goods where that remedy would be disproportionate in that it would impose unreasonable costs on the seller.

43 In the light of all the foregoing, the answer to the question referred must be that Article 3 of the Directive is to be interpreted as precluding national legislation under which a seller who has sold consumer goods which are not in conformity may require the consumer to pay compensation for the use of those defective goods until their replacement with new goods.

Costs

44 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Article 3 of 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 is to be interpreted as precluding national legislation under which a seller who has sold consumer goods which are not in conformity may require the consumer to pay compensation for the use of those defective goods until their replacement with new goods.

[Signatures]

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* Language of the case: German.