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relevant information to consumers is not always sufficient. The way in which the information is presented to consumers is sometimes equally important. One could say that in general the traditional average consumer image is still dominant in EU consumer law and academia, but the genie is out of the bottle since *Canal Digital* and *Teekanne*. In the *Schyns* case the CJEU also (implicitly) acknowledges that the average consumer has his or her weaknesses when acting on the financial marketplace. At the same time the CJEU still stresses the importance of the consumer's own responsibility for the decisions his makes. The approach taken by the court on this point does not seem to be fully consistent.

Regarding art. 5(6) CCD the Court rules that Member States must ensure that consumers receive adequate explanation about the credit product(s) offered. Thereby the court seems to consider that the average consumer cannot solely decide based on the mandatory precontractual information as provided in the ESIC form ex art. 5(1) CCD. Some consumers need more explanation and if so, creditors and intermediaries must provide additional explanation. National legislation that obliges creditors and intermediaries to proactively seek and offer the most suitable credit agreement to a particular consumer does not violate the aim and contents of the CCD. In fact such an obligation contributes to the CCD's goal of achieving a high level of consumer protection, according to the CJEU. Also with regards to art. 8(1) CCD the CJEU acknowledges the weakness of the average consumer by allowing Member States to force creditors to deny credit to consumers that are not creditworthy. In other words: the Court acknowledges that there are consumers that are willing to borrow more money than they actually can repay given their personal situation. Without doubt, that can be seen as an irrational decision. In my opinion the CJEU seems to accept that we cannot demand perfect rationality and full independency from the average consumer. Some consumers need additional personalized information and other consumers are even required to be denied a loan.

At the same time the CJEU explicitly stresses 'the fundamental responsibility of the consumer to protect his own interests' as one of the principles behind the CCD.[39] Eventually, this serves as a red line that national legislation is not allowed to cross when implementing the CCD and imposing consumer protection rules on creditors. From this view the court assumes that the average consumer is still capable of taking care of his own business, as long as a creditor or an intermediary provides sufficient information and adequate explanations and checks his creditworthiness. These conflicting statements raise the question which consumer image the Court had in mind when reaching its decision. Was it the traditional *Gut Springenheide* consumer who is expected to take care of his or her own interests in a rational way, or was it a more modern consumer image in the spirit of *Teekanne* and *Canal Digital*?

V. Concluding remarks

The *Schyns* case makes clear that Member States have a large amount of freedom when implementing the open norms of art. 5(6) and art. 8 (1) CCD. Far-reaching protective measures in national consumer credit law are not interfering with the aim and nature of the CCD. Hereby the CJEU appears to have rehabilitated the concept of responsible lending in the CCD.

39 Case C-58/18 *Schyns*, para 34 and 47.

Guillem Izquierdo Grau*

Where Should the Consumer Make Goods Available to the Seller to Bring them into Conformity? An Appraisal of Directive (EU) 2019/771

I. Introduction

This contribution deals with some issues regarding the performance of the remedies granted by Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods (CSD).[1] The CSD was adopted on 11 June 2019 and its provisions should apply to all consumer sales contracts from 1 January 2022. The CSD repeals the Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (hereinafter, Directive 1999/44/EC).[2]

Regarding the obligation of the seller to bring damaged goods into conformity, article 14 CSD deals with the manner in which the seller has to fulfill his obligation to bring goods into conformity by repair or replacement. Article 14.2 CSD stipulates that: 'Where the lack of conformity is to be remedied by repair or replacement of the goods, the consumer shall make the goods available to the seller. The seller shall take back the replaced goods at the seller's expense.' This obligation has to be fulfilled in accordance with article 14.1 CSD which states that the repair or replacement shall be carried out without any significant inconvenience to the consumer. Regarding the location where the consumer must make the goods available to the seller, Recital 56 CSD states: 'This Directive should not lay down provisions on where the obligations of a debtor have to be performed. This Directive

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1 Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods [2019] OJ L136/28.

2 In December 2015, the European Commission announced a set of measures to react appropriately to the challenges of the digital revolution in order to use this opportunity for economic growth, providing a general framework and efficient tools. The adoption of the CSD and the Directive (EU) 2019/770 of the European Parliament and the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services are the major developments of the harmonisation of European private law in the context of the *Digital Single Market Strategy*. See Commission "A Digital Single Market Strategy for Europe", COM (2015) 192 final. See also Alberto De Franceschi, 'European Contract Law and the Digital Single Market: Current Issues and New Perspectives' in Alberto De Franceschi (ed), *European Contract Law and the Digital Single Market*, (Intersentia Publishing 2016). Reiner Schulze and Dirk Staudenmayer, 'Digital Revolution – Challenges for Contract Law' in Reiner Schulze and Dirk Staudenmayer, (eds), *Digital Revolution: Challenges for Contract Law in Practice* (Nomos 2016).

should, therefore, neither specify the place of delivery, nor prescribe where the repair or replacement should take place; such questions should be left to national law.' Therefore, the location where the consumer should make goods available to the seller to be brought into conformity depends entirely on national law, but must be in accordance with the requirements of art. 14 CSD.

Furthermore, the location where the consumer's obligation is to be fulfilled also affects the seller who could cite art. 13.3 CSD and refuse to bring the faulty good into conformity due to the disporportionality of the remedies. Thus, the location where the goods made available to the seller is extremely relevant when determining the viability of the remedies.

With regard to shipping costs, the CSD states that all remedies should be fulfilled free of charge even in cases where the shipping costs are extremely high. Thus, article 14.1 CSD may not be proportionate for all cases, especially in such cases where the faulty good is located some distance away from the seller's place of business. In such cases, the consumer shall offer to cover the excess costs following the principles of case C-65/09 *Weber and Putz*.[3] If the seller does not consider the consumer's offer reasonable, the consumer shall be entitled to claim for a price reduction or the termination of the contract.

This contribution comments on the new provisions and analyses how they should be applied in practice.

II. Where should the consumer make goods available to the seller?

According to article 14.2 (1), the consumer shall make the goods available to the seller to be brought into conformity. Nonetheless, the Directive does not lay down provisions on where the obligations of a debtor should be carried out (Recital 56). To determine the location, national law must be applied, taking into consideration the entire body of rules of the applicable law, in particular, art. 6 Regulation Rome I,[4] especially in accordance with the requirements of article 14.1 CSD, which states that repair and replacement shall be carried out: 1) free of charge; 2) within a reasonable period of time and; 3) without any significant inconvenience to the consumer.

Moreover, according to the principles of Case C-52/18 *Christian Fülla and Toolport GmbH,* the relevant criteria to determine the location where the consumer must fulfill his obligation depend on the nature of the faulty good:

> Thus, in certain cases, by reason both of the nature of the goods, especially if they are very heavy, large, particularly fragile or where there are particularly complex requirements for their dispatch, and of their intended use by an average consumer, in particular involving their prior installation, their dispatch to the place of business might constitute, for that consumer, a significant inconvenience contrary to the requirements set out in the third subparagraph of Article 3(3) of Directive 1999/44.[5]

This contribution focuses on the location where the consumer must fulfill his obligation and make the goods available to the seller. Other obligations which the seller has to comply with, such as the delivery location, where repair or replacement should take place or the location where the repaired or replaced good should be delivered to the consumer, are not dealt with. As the starting point is found in national law, and *Fülla* concerned a German case, the following will analyse the solutions provided by the German *BürgerlichesGesetzbuch*[6] (hereinafter BGB).

Article 269 BGB offer three guidelines to determine the location where the obligations have to take place: 1) A location agreed upon by both parties; 2) the circumstances and nature of the contract; 3) the debtor's home address. Regarding the first criteria, the parties may specify the place where the obligation has to be fulfilled. Therefore, an agreement should be reached on the location based on the provisions of article 14.1 CSD and following the principles of Case C-52/18 *Fülla*. Hence, the location where the consumer has to carry out his or her obligation depends on the nature of the good. If in order to perform the remedies the consumer has, in all cases, to offer goods at the seller's place of business, regardless of the nature of the good, this would not be in accordance with the CSD and might be considered an unfair contract term.

For instance, an agreement to make goods available at the seller's place of business could be in accordance with the requirements of article 14.1 CSD when the faulty good is small and easy to transport (i. e. a smartphone, an electric razor).[7] Nevertheless, more controversial would be an agreement to make goods available at the seller's place of business when the faulty good is heavy or large such as a domestic appliance (a fridge or a washing machine) or a car. In such cases, delivering the goods to the seller`s place of business would likely cause a major inconvenience for the consumer. Thus, as mentioned in article 14.1.c) CSD, after taking the nature of the good into consideration an agreement shall be reached as to where the good is to be delivered.

Where no location has been specified in the contract, the principles of Case C-52/2018 *Fülla* state that the debtor`s obligation is to do so at a location determined by the circumstances.[8] Therefore, taking into account the circumstances of the contract and the nature of the goods, article 269 BGB shall be interpreted in accordance with article 14 CSD and follow the principles of Case C-52/2018 *Fülla*. In other words, the nature of the good shall determine the location where the consumer must make the good available to the seller in the absence of any agreement between the parties.

In such cases, the seller may already offer an after-sales service or a transport network to take back the faulty good even if making the good available to the seller may represent a major inconvenience to the consumer. Thus, in absence of any agreement between the parties all the conditions stipu-

3 Joined cases C-65/09 and C-87/09 *Gebr. Weber v Jürgen Wittmer and Ingrid Putz v Medianess Electronics GmbH*, ECLI:EU:C:2011:396.

4 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177.

5 Case C-52/18 *Christian Fülla v Toolport GmbH*, ECLI:EU:C:2019:447.

6 Bürgerliches Gesetzbuch. 269. Leistungsort. *(1) Ist ein Ort für die Leistung weder bestimmt noch aus den Umständen, insbesondere aus der Natur des Schuldverhältnisses, zu entnehmen, so hat die Leistung an dem Ort zu erfolgen, an welchem der Schuldner zur Zeit der Entstehung des Schuldverhältnisses seinen Wohnsitz hatte.*'

7 Case C-52/18 *Fülla* (n 5).'(44) In other cases, it may be assumed, by contrast, that dispatch to the place of business of the vendor of compact goods, which require neither special handling nor a particular means of transport, is not likely to constitute a significant inconvenience for that consumer.'

8 Case C-52/18 *Fülla* (n 5).'(45) Consequently, the place where the consumer is required to make goods acquired under a distance contract available to the seller for them to be brought into conformity which is most suitable to ensure that they can be brought into conformity free of charge, within a reasonable time and without significant inconvenience to the consumer, depends on the specific circumstances of each individual case.'

lated in the contract shall be considered to determine the location where the consumer's obligations shall be fulfilled.

Furthermore, if due to the nature of the good it is not possible to determine the location where the consumer shall make the good available to the seller, the consumer shall fulfill said obligation in his or her place of residence in accordance with article 269 BGB. This solution is in accordance with the provisions of article 14.1 CSD as being the most convenient for the consumer.

By contrast, article 269 BGB has not been interpreted in the same vein in the light of the case law of the *Bundesgerichtshof* (Federal Court of Justice, Germany). Article 269 BGB should be interpreted as specifying that the consumer is required to place the good in question at the disposal of the seller at his or her place of business. The current interpretation of article 269 BGB leads the German court to order a stay of proceedings and to claim for a preliminary ruling regarding the compatibility of such an interpretation of article 269 BGB with Directive 1999/44/EC.[9] Therefore, in accordance with the ruling in paragraphs 17 and 18 Case C-52/18 *Fülla*:

'(17) In that regard, the referring court points out that, under German law, the place where goods are brought into conformity is determined in accordance with Article 269 of the BGB, according to which what is decisive is, first of all, what has been agreed between the parties. In the absence of any contractual agreement as to that place, regard must be had to the circumstances of the specific case, in particular the nature of the obligation in question. If no conclusive findings can be drawn therefrom, the place where goods are brought into conformity must be the place where the obligor was domiciled or had its commercial establishment at the time when the obligation arose.

(18) Consequently, the referring court notes that, in the light of the case-law of the Bundesgerichtshof (Federal Court of Justice, Germany), Article 269 of the BGB must be interpreted as meaning that, in the present case, the consumer is required to place the item in question at the disposal of the seller at its place of business, so that it may be brought into conformity.'

Regarding the nature of the good, more controversial are the cases where mobile goods, such as a car or a sailboat, are located some distance away from the seller's place of business. This could occur in the case where a Spanish consumer bought a car from a German seller located in Osnabrück and the lack of conformity has to be remedied while the consumer is on holidays in Italy. Is the consumer required to make the faulty good available at the seller's place of business? To answer this question, it is necessary to apply national law, taking into account the requirements of article 14.1 CSD, given that the Directive does not provide any rule for such cases. The parties could agree on the location to carry out the consumer's obligation bearing in mind the nature of the good. This implies that the good could be some distance away when the lack of conformity has to be remedied. After-sales service or the seller's transport network to return the good to the seller's place of business should be taken into consideration when agreeing on the location. In absence of any agreement, the nature of the good which may be extremely heavy and mobile means that the consumer could fulfill his obligation by making the good available to the seller at the nearest garage or seaport. This solution would be in accordance with the requirements of article 14.1 CSD, irrespective of what is mentioned below regarding shipping costs in these cases. Organizing the shipping arrangements to make the good available at the seller's place of business would otherwise represent a major inconvenience for the consumer.

Thus, the performance of the remedies is a synallagmatic obligation: Given a situation where the lack of conformity should be remedied, the seller has to address this as previously agreed with the consumer and the consumer has to make the good available to the seller. The location where the consumer has to make the good available to the seller depends on the nature of the good and the criteria offered by national law must be applied in accordance with the requirements of article 14.1 CSD and the provisions of the Case C-52/18 *Fülla*.

III. The shipping costs

1. Means of transport and remedies. Does the CSD provide a balanced solution?

Although the CSD is focused on distance sales, article 14 CSD does not provide any provision for an effective remedy when the consumer and the faulty good are located in another country, far away from the seller's place of business. For instance, a Spanish consumer bought a car from a German seller and the gearbox started failing while the consumer was in Italy on holiday. Should the seller bear the shipping costs in such cases where the consumer is some distance away from the seller's place of business?

In such cases, initial remedies–repair or replacement of defective goods –might be enough to resolve the issue of lack of conformity. Nonetheless, the shipping costs could frustrate these remedies (art. 13.3 CSD) and the consumer would be entitled to claim for a price reduction or the termination of the contract in accordance with article 13.4.a) CSD. This, however, does not solve the consumer's dilemma.[10] Article 14.1 CSD requires that repair and replacement shall be carried out free of charge, within a reasonable period of time and without a significant inconvenience for the consumer. It may however be excessively burdensome for the seller who has to bear the shipping costs at his or her expense, irrespective of the consumer's location and that of the faulty good. Thus, a balanced solution should be adopted in such cases when the parties are located in different countries. Following the principles of case C-65/09 *Weber GmbH and Putz*[11]and C-52/18 *Fülla*, in such cases where the faulty good and the consumer are located in different countries to the seller, the shipping costs could be shared.[12]

Certainly, the case C-65/09 *Weber and Putz* does not recognize a right to share the shipping costs when the good is far away from the seller. The ECJ notes that when replacement is the only remedy possible, if the costs of removal, transport and installation of the new good (tiles) are disproportionate in relation to the significance of the non-conformity and the cost of the good if it is in conformity, then the seller should be entitled to pay proportionate costs. If the seller does not agree to the consumer's offer to share the costs, the consumer would be entitled to either a price reduction or the termination of the contract (art. 13.4.a CSD *in fine*). If the consumer

9 Case C-52/18 *Fülla* (n 5).
10 María Paz García Rubio, 'Non Conformity of Goods and Digital Content and its Remedies', in Javier Plaza Penadés and Luz María Martínez Velencoso (eds), *European Perspectives on the Common European Sales Law* (Springer 2015) 175.
11 Joined cases C-65/09 and C-87/09 *Weber and Putz* (n 3).
12 Joined Cases C-65/09 and C-87/09 *Weber and Putz* (n 3), para 74 and 78.

opted for the termination of the contract, he would not have to pay shipping costs (art. 16.3.a) CSD).

Notwithstanding the gap in the CSD, a balanced solution should be reached in such cases. Should the seller have to bear the shipping costs in all cases he or she would be assuming an excessive risk in cases of mobile goods, which could be some distance away from the seller's place of business. Furthermore, if the consumer has to bear all the shipping costs, this constitutes a burden which may deter him from asserting his rights.

2. What is the meaning of article 14.2 (2) CSD?

Regarding the performance of the seller`s obligation to bring goods into conformity, article 14.2 (2) CSD stipulates that the seller shall take back the replaced goods at the seller's expense. In accordance with article 14.2 (2) CSD, the seller has to take back the replaced goods at his or her expense. Nevertheless, there is no provision regarding shipping costs for the repair of the goods if the remedy agreed to by both parties is to bring non-conforming goods into conformity. Surprisingly, article 112 Common European Sales Law (CESL) provided the same rule and consequently has been criticised for being too restrictive as it did not provide a similar rule in the case of repair.[13]

Considering article 14.1 CSD, repair and replacement shall be carried out free of charge for the consumer. Moreover, case C-52/2018 *Fülla* confirms this and specifies that costs can include the cost of postage, labour and materials.[14] How should article 14.2 (2) CSD, which refers to the shipping costs of the replaced goods, be interpreted if in accordance with article 14.1 CSD it is clear that the remedies should be carried out by at the seller's expense? It could be interpreted as a principle from the case C-65/09 *Weber and Putz*.[15] However, to avoid seeming redundant, article 14.2 (2) could simply imply that the seller also has to cover all the waste disposal costs or recycling costs for the good. Recital 32 CSD states that ensuring longer durability of goods is important for achieving more sustainable consumption patterns and a circular economy.[16]

IV. Conclusions

In conclusion, first the location where the consumer must make goods available to the seller depends on the application of national law (Recital 56 CSD). The whole body of rules of the Member States regarding this issue should be interpreted in the light of article 14 CSD. The nature of the faulty good (heavy, large) should be taken into consideration when determining the location where the consumer's obligation should take place. Small goods could be shipped to the seller's place of business without any significant inconvenience for the consumer. Should transport to the seller's place of business result in a significant inconvenience for the consumer, the consumer shall fulfill said obligation at his or her place of residence. When the location is not clear, the consumer shall make goods available at his or her place of residence or where the faulty good is located.

Second, regarding shipping costs, article 14.1 CSD provides that the remedies shall be performed free of charge. This principle is also applicable in cases where the shipping costs are extremely high. In these cases the seller could proceed by claiming for an exception which is stated in art. 13.3 CSD. Following the principles of case C-65/09 *Weber and Putz* the consumer shall offer to cover any excess so as not to frustrate repair or replacement. Otherwise, the solution offered by the CSD for such cases could be excessively burdensome for the seller. If the seller does not agree to the consumer's offer, the consumer would be entitled to claim for a price reduction or the termination of the contract (art. 13.4.a CSD *in fine*).

Third, article 14.2 (2) CSD seems to lack relevance in the light of art. 14.1 CSD. Article14.1 CSD states that repair and replacement shall be carried out free of charge and art. 14.2 (2) stipulates that the seller shall take back the replaced goods. Consequently, despite the fact that art. 14.2 (2) CSD does not refer to the seller's obligation to take back the faulty good when it is in need of repair, the requirement of article 14.1 CSD leads us to conclude that all remedies shall be carried out free of charge. Otherwise, the consumer may be discouraged from asserting his rights in case of repair. Hence, the legal provision of article 14.2 CSD regarding the seller's obligation to take back the replaced good may be interpreted as meaning that the seller is obliged to cover the waste disposal and recycling costs for the good. ■

13 Fryderyk Zoll, 'Article 112' in Reiner Schulze (ed), *Common European Sales Law (CESL). Commentary* (Nomos 2012) 512. *"The formulation of the art 112 is too narrow. It does not provide the similar rule in case of repair and such rule is needed there"*.

14 Case C-52/18 *Fülla* (n 5), para 50.

15 Joined Cases C-65/09 and C-87/09 *Weber and Putz* (n 3), para 47.

16 Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions (Commission Report 4 March 2019). In 2016, circular activities such as repair, reuse or recycling generated almost €147 billion in value added while standing for around €17.5 billion worth of investments.