

## Sample answer to Consumer Sales Directive – case 5

### Cf. ECJ, C-404/06 – *Quelle*

(for a similar case regarding the Distance Contracts Directive see ECJ, C-489/07 – *Pia Messner*)

May GREAT MOBILES require Paul to pay 100,- EUR?

#### 1) Right to require payment under §§ 439(4), 346 BGB.

The first matter to settle is whether GREAT MOBILES may require Paul to pay 100,- EUR under German law. Following § 439, if the seller furnishes the buyer with a replacement for a defective good (as GREAT MOBILES did in this particular instance), the seller may require the buyer to reconstitute the defective good according to the rules for rescission of contract, §§ 346 *et seq.* BGB. Under § 346 BGB, the use of the goods must be rendered to the other party, thus, GREAT MOBILES may require Paul to hand over the use of the mobile. Since the use of the phone by its nature cannot be reconstituted, § 346 instructs that the value of the use must be compensated. Thus, under German law, Paul is required to pay the 100,- EUR.

However, Member States of the European Union were held to transpose the *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* by January 2002. Following the case law of the European Court of Justice, directives which have not been transposed or have not been transposed correctly, do not possess a direct, horizontal effect. Nonetheless, in view of Art. 10 EC, the courts of the Member States are held to interpret national law in so far as possible to achieve the results envisaged by a directive. The German law provides for methodical instruments not to apply § 439(4), 346 BGB in case these provisions should breach Germany's obligation under Art. 11(1) of the directive, cf. BGH v. 26.11.2008 – VIII ZR 200/05. Consequently, it needs to be assessed whether §§ 439(4), 346 BGB are in line with Art. 3 of the directive.

Note: If there is no option under the law of the relevant Member State to interpret the national law in conformity with the respective directive, the consumer can only claim compensation from the Member State under the Francovich principle. However, a case of state liability only arises if the breach is 'sufficiently serious', which is arguably not the case with respect to § 439(4) BGB.

#### 2) Application of the Directive

Paul may only rely on the provisions of directive 1999/44/EC if the contract between Paul and GREAT MOBILES falls within the application sphere of the directive. Following Art. 1(2), this requires that Paul is considered a consumer, Great Mobiles is considered a seller and the phone contracted for is considered a consumer good for the purposes of the directive. Since Paul bought the phone for his private use and Great Mobiles sold the phone in the course of its trade, they meet the qualification of a consumer, respectively a seller, under Art.

1(2)(a) and (c) of the directive. Furthermore, the phone as a tangible item is a consumer good, and none of the exceptions of Art. 1(2)(b) apply.

### **3) Paul's right to require Great Mobiles to replace the mobile phone**

Following Art. 3 of the directive, Paul as the consumer would have the right to have the phone brought into conformity free of charge, if a lack of conformity existed at the time the goods were delivered. As can be inferred from the presumption provided by Art. 2(1)(c), a mobile phone with a defective display is non-conforming, since it is not fit for the purpose for which such phones are normally used. Also, it has been established that the defect already existed at the time the phone was delivered, even though it only became apparent after and a half years [the rebuttable presumption of Art. 5(3) is irrelevant in the present dispute]. The defect also became apparent within two years after the delivery of the goods, cf. Art.5(1). Thus, Paul was entitled to require a replacement of the phone under Art. 3(2); a request which was fulfilled by Great Mobiles.

### **4) Replacement 'free of charge'**

Following Art. 3(2) of the directive, the replacement must be effected 'free of charge'. The buyer's obligation to compensate the seller for the use of the defective good under §§ 439(4), 346 BGB might not be reconcilable with this proviso.

Guidance may be sought from Art. 3(4) of the directive, which holds that the terms 'free of charge' refer 'to the necessary costs incurred to bring the goods into conformity, particularly the cost of postage, labour and materials'. Since a compensation for the use of the phone is obviously not related to the cost of bringing the goods into conformity, the clarification in Art. 3(4) would seem to imply that the Member States are free to provide for such a compensation. Furthermore, Paul did not have to pay anything for the replacement phone itself. Finally, recital 15 allows the Member States to introduce provisions which take account of the use the consumer has had of the goods.

On the other hand, recital 15 addresses only the rescission of the contract, not the replacement of the goods. This difference is significant because in the case of rescission both the defective good and the purchase price need to be restituted and parties will receive compensation for the use. The consumer will thus receive interest on the returned purchase price. Furthermore, in the case of replacement, the consumer has paid for the possibility to use the phone (by means of the purchase price), whereas in the case of rescission, the seller is held to reimburse this purchase price to the consumer. Also, the wording of recital 15 solely allows for a reduction in the reimbursement of the purchase price; and since the purchase price is not reimbursed in case of a replacement, such a reduction is impossible.

If one looks at the interests involved, requiring the consumer to pay for the use of the phone seems o.k. because he receives a new phone which he most likely will be able to use for a longer period of time. However, in many cases, the additional life expectancy of a product is not of any value to the consumer, as he or she may want to change to a newer and more sophisticated product at some point in time. The problem comes down to the fact that under

Art. 3(2) possibly the consumer may require from the seller only a replacement of a phone which has already been used for 1½ years. With most goods, this will neither be acceptable to the consumer (if one thinks of shoes etc.), nor feasible in the circumstances. However, if the consumer is charged for the use of the defective product, this may deter him from exercising his right to require that the good be brought in conformity with the contract under Art. 3(2) of the directive – especially if the amount eventually owed is hard to foresee.

Please draw your own conclusion from these arguments.