Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 27 November 2014 [1]

**Case C-497/13**

**Froukje Faber**
**v**
**Autobedrijf Hazet Ochten BV**
(Request for a preliminary ruling

from the Gerechtshof Arnhem-Leeuwarden (Netherlands))

(Directive 1999/44/EC — Status of the purchaser — Judicial protection — Lack of conformity of goods — Duty to inform the seller — Burden of proof)

1. In this case, the Gerechtshof Arnhem-Leeuwarden (Netherlands) ('the referring court') seeks a preliminary ruling on two sets of issues regarding Directive 1999/44/EC, which harmonises rules on certain aspects of consumer contracts. [2] The first set concerns in essence whether EU law requires a national court to examine of its own motion whether a party purchasing goods is a consumer within the meaning of Directive 1999/44 and, if so, the scope of that obligation. [3] The second set relates to the consumer's duty to inform the seller of the lack of conformity of goods delivered pursuant to a contract governed by Directive 1999/44 and the burden of proof regarding such lack of conformity in any subsequent proceedings.

2. These issues have arisen in a dispute between Ms Froukje Faber and Autobedrijf Hazet Ochten BV ('Hazet') over compensation for damage resulting from the alleged lack of conformity of a second-hand car sold by Hazet to Ms Faber which caught fire.

## Directive 1999/44

3. Directive 1999/44 contributes to achieving the objective of a high level of consumer protection set out in Article 169 TFEU. [4] It provides for minimum harmonisation. [5] According to recital 5 in the preamble, 'the creation of a common set of minimum rules of consumer law, valid no matter where goods are purchased within the [European Union], will strengthen consumer confidence and enable consumers to make the most of the internal market'.

1 — Original language: English.

2 — 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). This directive was amended, after the material time in the main proceedings, by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights (OJ 2011 L 304, p. 64) ('Directive 2011/83').

3 — I shall use the words 'of its own motion' and '*ex officio*' interchangeably in this Opinion.

4 — Recital 1 in the preamble to Directive 1999/44. Article 169(1) TFEU provides that: 'In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests'.

5 — Article 1(1) of Directive 1999/44.

4. Recital 6 identifies non-conformity of goods with the contract as the main difficulty encountered by consumers and the main source of disputes with sellers. Recital 7 elaborates on the principle of conformity and states that:

'… the goods must, above all, conform with the contractual specifications; … the principle of conformity with the contract may be considered as common to the different national legal traditions; … in certain national legal traditions it may not be possible to rely solely on this principle to ensure a minimum level of protection for the consumer; … under such legal traditions, in particular, additional national provisions may be useful to ensure that the consumer is protected in cases where the parties have agreed no specific contractual terms or where the parties have concluded contractual terms or agreements which directly or indirectly waive or restrict the rights of the consumer and which, to the extent that these rights result from this Directive, are not binding on the consumer'.

5. According to recital 8, in order to facilitate the application of the principle of conformity, 'it is useful to introduce a rebuttable presumption of conformity with the contract covering the most common situations; … that presumption does not restrict the principle of freedom of contract …'. Recital 8 further states that, 'in the absence of specific contractual terms, as well as where the minimum protection clause is applied, the elements mentioned in this presumption may be used to determine the lack of conformity of the goods with the contract; … the quality and performance which consumers can reasonably expect will depend *inter alia* on whether the goods are new or second-hand; … the elements mentioned in the presumption are cumulative; … if the circumstances of the case render any particular element manifestly inappropriate, the remaining elements of the presumption nevertheless still apply'.

6. Recital 19 states that 'Member States should be allowed to set a period within which the consumer must inform the seller of any lack of conformity; … Member States may ensure a higher level of protection for the consumer by not introducing such an obligation; … in any case consumers throughout the [European Union] should have at least two months in which to inform the seller that a lack of conformity exists'.

7. According to recital 22, 'the parties may not, by common consent, restrict or waive the rights granted to consumers, since otherwise the legal protection afforded would be thwarted …'.

8. For the purposes of Directive 1999/44, a 'consumer' is 'any natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to his trade, business or profession' (Article 1(2)(a)); a 'seller' is 'any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession' (Article 1(2)(c)); and 'consumer goods' include 'any tangible movable item' (Article 1(2)(b)).[6]

9. In accordance with Article 2(1), '[t]he seller must deliver goods to the consumer which are in conformity with the contract of sale'. Pursuant to Article 2(2), consumer goods are presumed to be in conformity if they:

'(a) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model;

(b) are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted;

(c) are fit for the purposes for which goods of the same type are normally used;

6 — None of the exceptions to this definition appear to be relevant in the present case. See also point 55 below.

(d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.'

10. Under Article 2(3), '[t]here shall be deemed not to be a lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer'.

11. Article 3(1) provides that the seller is to be liable for any lack of conformity existing when the goods were delivered. The remaining part of Article 3 sets out the remedies available to the consumer. These are summarised in Article 3(2) in the following order: repair or replacement so that the goods are brought into conformity free of charge; appropriate reduction in price; and cancellation of the contract with regard to the goods concerned.

12. Article 5, entitled 'Time limits', states:

'1. 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. If, under national legislation, the rights laid down in Article 3(2) are subject to a limitation period, that period shall not expire within a period of two years from the time of delivery. [7]

2. Member States may provide that, in order to benefit from his rights, the consumer must inform the seller of the lack of conformity within a period of two months from the date on which he detected such lack of conformity.

…

3. Unless proved otherwise, 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 this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.'

13. Article 8(2) ('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.'[8]

14. In accordance with Article 9, 'Member States shall take appropriate measures to inform the consumer of the national law transposing this Directive and shall encourage, where appropriate, professional organisations to inform consumers of their rights'.

## Netherlands law

15. Article 7:5(1) of the Burgerlijk Wetboek (Netherlands Civil Code; 'BW') defines a consumer sale as 'the sale relating to movable property … which is concluded by a seller acting on a commercial basis and a purchaser, a natural person, not acting on a commercial basis'.

7 — See also recital 17 in the preamble. Moreover, pursuant to Article 7(1), Member States may provide that, in the case of second-hand goods, the seller and consumer may agree on a shorter time period for the liability of the seller. The Netherlands has not availed itself of that option.

8 — See also recital 24 in the preamble of Directive 1999/44 and Article 169(4) TFEU.

16. In accordance with Article 7:17(1) BW, goods delivered must be in conformity with the contract.

17. Article 7:18(2) BW, which transposed Article 5(3) of Directive 1999/44 into Netherlands law, provides that:

'In the case of a consumer purchase it is presumed that the goods delivered are not in conformity with the contract if the lack of conformity becomes apparent within six months after delivery, unless the nature of the goods or the nature of the lack of conformity preclude this.'

18. According to the Explanatory Memorandum to Article 7:18(2) BW, it is for the purchaser to assert (and to prove, in the event of a dispute) that the goods are not in conformity with the contract and that the lack of conformity became apparent within six months of delivery. It is then for the seller to assert and prove that, when delivered, the goods were in fact in conformity with the contract.

19. Article 7:23(1) BW provides:

'The purchaser can no longer rely on a lack of conformity with the contract of the goods delivered, if he has not given notice thereof to the seller within the appropriate period after he discovered or ought reasonably to have discovered it. If, however, it appears that the goods lack a characteristic which according to the seller they possessed, or if the lack of conformity relates to facts which he knew or ought to have known, but which he did not disclose, the notification must then take place within the appropriate time after the discovery. In the case of a consumer sale, the notification must take place within the appropriate time after the discovery, where a notification within a period of two months after the discovery is in good time.'

20. According to the referring court, the purchaser must inform the seller that what was delivered is not in conformity with the contract within the meaning of Article 7:17 BW. This need not be done in writing; an oral communication may be sufficient. There is settled case-law of the Hoge Raad (Netherlands Supreme Court) according to which, where the seller has raised the defence that information was not given in good time (which is the description in the third sentence of Article 7:23(1) of the temporal condition with respect to consumer purchases), the obligation rests with the purchaser to assert and, where necessary, to prove that he complained in good time and in a manner that was discernible by the seller.

21. The referring court has explained that, where the seller is informed too late, the purchaser loses all rights relating to the lack of conformity.

22. Whether or not the purchaser has informed the seller within the appropriate time (which is the description in the first and second sentences of Article 7:23(1) of the generally applicable temporal condition with respect to purchases) depends (according to the case-law of the Hoge Raad) on whether he (i) carried out an investigation which could reasonably be expected of him in the circumstances in order to determine the conformity of the goods delivered, and (ii) informed the seller within the appropriate time after he discovered (or, through such an investigation, ought to have discovered) the lack of conformity. The length of time available for the investigation referred to under (i) depends on the circumstances of the case, including, inter alia, the nature and discernibility of the defect, how it comes to light and the expertise of the purchaser. An investigation by an expert may be necessary. As regards the length of the period referred to under (ii), in the case of non-consumer sales, due regard is to be had to all the interests concerned and taking into account all relevant circumstances. Thus, no fixed period applies. In the case of consumer sales, whether informing the seller more than two months after the discovery is in good time depends on the facts and circumstances of the case.

23. Notwithstanding that (with the exception of the final sentence) Article 7:23(1) BW applies to both consumer and non-consumer sales, the referring court has stated that that provision implements Article 5(2) of Directive 1999/44.

24. Under Netherlands law, most aspects of consumer protection law are not considered to be rules of public policy.

25. Pursuant to Article 22 of the Wetboek van Burgerlijke Rechtsvordering (Civil Procedure Code; 'Rv'), a judge may in all circumstances and at each stage of the procedure ask either or both of the parties to provide further explanation of their positions. In accordance with Article 23 Rv, the judge decides on all that the parties have advanced or requested and, in accordance with Article 24 Rv, on the basis of the facts, circumstances and grounds on which the parties base their complaint(s). Article 149 Rv in principle precludes a judge from taking account of facts, other than well-known facts, which are not included in the parties' submissions.

26. In appeal procedures, a judge may decide only on pleas made by the parties. However, he may apply rules of public policy of his own motion. Parties may submit new facts but only in their first set of written observations on appeal.

27. At the hearing, the Netherlands Government further explained that, despite his passive role in civil proceedings, a Netherlands judge is required to decide what legal rules apply to a particular set of facts and has certain other means available to him in order to clarify litigation, such as the right to ask the parties for additional information.

## Facts, procedure and questions referred

28. On 27 May 2008, Ms Faber bought a used car from Hazet for which she paid EUR 7 002. The car was delivered to her that same day. The contractual terms were set out in a standard 'Koopovereenkomst particulier' (Private Sales Contract), completed with, inter alia, Ms Faber's name and address, the details of the car she bought, the conditions pertaining to the purchase ('without any guarantee'), the price and the signatures of Ms Faber and a representative of Hazet.

29. On 26 September 2008, Ms Faber was driving the car to a business appointment. Her daughter was also in the car. The car caught fire and burnt out completely. The emergency services ordered the car to be towed to Hazet's garage for safekeeping. Ms Faber submits that she had contact by telephone with Hazet whilst she and her daughter, both passengers in the tow truck, were on their way to Hazet on the day of the fire. Hazet denies that at that stage Ms Faber mentioned anything about the possible cause of the fire or Hazet's involvement. At Hazet's request, the car was transported to Autodemontagebedrijf Reuvers ('Reuvers') where it was to be kept in accordance with applicable environmental laws.

30. Early in 2009, Hazet contacted Ms Faber by telephone regarding the wreck and was told that she was still waiting for the police technical report on the fire.

31. On 16 February 2009, Ms Faber asked the police for the technical report but the police responded on 26 February 2009 that no technical report had been prepared.

32. The wreck was dismantled on 8 May 2009 by Reuvers, which had informed Hazet by email two days earlier of its intention to do so in the absence of any instruction to the contrary. [9]

9 — It does not appear from the national file that Ms Faber, the car's owner, was contacted either by Hazet or Reuvers before this was done.

33. By letter of 11 May 2009, Ms Faber informed Hazet that she held it liable for the damage (totalling EUR 10828.55) which she had suffered due to the fire, which included the purchase price of the car, a laptop, a camera, a leather jacket, another jacket, a navigation device and a photograph on canvas intended for the client she was on her way to meet when the car caught fire. She also claimed to have suffered psychological damage.

34. In early July 2009, Ms Faber asked the loss adjuster Extenso to conduct a technical investigation into the cause of the fire. On 7 July 2009, Extenso responded that that was impossible because the car had already been dismantled and thus was no longer available for investigation.

35. Hazet denied liability and refused to pay damages. It argued, inter alia, that Ms Faber had failed to comply with Article 7:23(1) BW by informing it too late of the alleged lack of conformity and that she had waited nine months before ordering a technical investigation.

36. On 26 October 2010, Ms Faber brought an action before the Rechtbank te Arnhem ('the Rechtbank') seeking compensation from Hazet, together with statutory interest and extrajudicial costs, for the damage suffered. She claimed that the car was not in conformity with the Private Sales Contract and that Hazet had therefore breached Article 7:17 BW. Ms Faber did not specifically claim that she was a consumer.

37. Hazet contested that claim and added that Ms Faber had informed it of the alleged lack of conformity too late and thus, in accordance with Article 7:23(1) BW, had forfeited her right to damages.

38. On 27 April 2011, the Rechtbank rejected Ms Faber's claims and upheld Hazet's argument based on Article 7:23(1) BW: the first contact between the parties was in early 2009 and thus more than three months after the fire (which is described as the moment when the lack of conformity was discovered). Ms Faber had not put forward any special circumstances that could justify that delay. The Rechtbank did not take a position on whether Ms Faber's communication to Hazet was sufficiently clear during the telephone conversations on the date of the fire and in early 2009 to constitute valid notice to the seller or on whether her purchase was a consumer purchase within the meaning of Article 7:23(1) BW.

39. On 26 July 2011, Ms Faber appealed against that judgment to the referring court. In the appeal proceedings, Ms Faber again did not claim to have signed the Private Sales Contract in her capacity as a consumer. Nor did she appeal that part of the Rechtbank's judgment. The referring court does not consider it possible to take a position on this point based on the information contained in the file.

40. A lawyer assisted Ms Faber in the proceedings at first instance and on appeal.

41. Against that background, the referring court has asked the Court for guidance on the following questions:

'(1) Is the national court, either on the grounds of the principle of effectiveness, or on the grounds of the high level of consumer protection within the European Union sought by Directive 1999/44, or on the grounds of other provisions or norms of European law, obliged to investigate of its own motion whether, in relation to a contract, the purchaser is a consumer within the meaning of Article 1(2)(a) of Directive 1999/44?

(2) If the answer to the first question is in the affirmative, does the same hold true if the case file contains no (or insufficient or contradictory) information to enable the status of the purchaser to be determined?

(3) If the answer to the first question is in the affirmative, does the same hold true in appeal proceedings, where the purchaser has not raised any complaint against the judgment of the court of first instance, to the extent that in that judgment that assessment (of its own motion) was not carried out, and the question of whether the purchaser may be deemed to be a consumer was expressly left open?

(4) Must (Article 5 of) Directive 1999/44 be regarded as a norm which is equivalent to the national rules which in the internal legal system are deemed to be rules of public policy?

(5) Do the principle of effectiveness, the high level of consumer protection within the European Union sought by Directive 1999/44 or other provisions or norms of EU law preclude Netherlands law relating to the burden resting on the consumer-purchaser of presenting the facts and adducing the evidence in relation to the duty of informing the seller (in good time) of the presumed lack of conformity of delivered goods?

(6) Do the principle of effectiveness, the high level of consumer protection within the European Union sought by Directive 1999/44 or other provisions or norms of EU law preclude Netherlands law relating to the burden resting on the consumer-purchaser of presenting the facts and adducing the evidence that the goods are not in conformity and that that lack of conformity became apparent within six months of delivery? What is the meaning of the words "any lack of conformity which becomes apparent" in Article 5(3) of Directive 1999/44 and in particular: to what extent must the consumer-purchaser establish facts and circumstances concerning (the cause of) the lack of conformity? Is it sufficient in that regard that the consumer-purchaser establish, and in the case of a substantiated challenge prove, that the purchased goods do not function (well), or must he also establish, and in the case of a substantiated challenge prove, which defect in the purchased goods caused the purchased goods not to function (well)?

(7) Does the fact that Ms Faber has been assisted by a lawyer in both instances in these proceedings … play a role when answering the foregoing questions?'

42. Written observations have been submitted by the Austrian, Belgian and Netherlands Governments and by the European Commission. Hazet, the Netherlands Government and the Commission presented oral submissions at the hearing on 11 September 2014.

## Assessment

### *Preliminary remarks*

43. In a private dispute such as the one at issue, neither party can rely on the direct effect of Directive 1999/44. However, national courts hearing such a case are required, 'when applying the provisions of domestic law, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the applicable directive in order to achieve an outcome consistent with the objective pursued by that directive'.[10] In the present case, the referring court seeks guidance on the interpretation of Directive 1999/44 in order to assist it in applying Articles 7:18(2) and 7:23(1) BW.

10 — See, for example, judgment in *LCL Le Crédit Lyonnais*, C-565/12, EU:C:2014:190, paragraph 54 and the case-law cited.

44. The questions referred arise in the context of court proceedings initiated by Ms Faber, a purchaser of a second-hand car, who seeks remedies for damage from the seller, Hazet. The latter relies on a provision of national law (of which one part applies generally to purchases and another specifically to consumer sales) in order to defend the action, claiming that Ms Faber has lost her right to seek remedies because she informed it too late of the alleged lack of conformity.

45. It seems that the question of Ms Faber's status as a consumer did not arise at first instance because the Rechtbank took the position that, in any event, she had informed Hazet too late and thus had lost her right to claim damages. Nor did Ms Faber herself, in bringing a claim based on a provision of national law that apparently applies to all types of sale (Article 7:17(1) BW), state that she was a consumer.

46. In dealing with Ms Faber's appeal, the referring court considers it to be relevant to know whether or not she was a consumer because that determines what law applies (including the final sentence of Article 7:23(1) BW). However, because the Rechtbank made no findings in that regard, Articles 24 and 149 Rv and the provisions governing appeals prevent the referring court from examining that issue of its own motion. In an appeal, it can only do so where the relevant laws are of public order and, according to the referring court, that is not the case for (national) consumer protection law.

47. Against that background, questions 1 and 4 concern whether EU law requires a national court to examine of its own motion whether a purchaser is a consumer within the meaning of Directive 1999/44 and thus whether effect must be given to that directive. (Indeed, the national court would have first to consider the scope of application of the directive before it could give effect to, in particular, Article 5,[11] by interpreting applicable national law in a manner that is in conformity with that provision.) The Court has confirmed, in the context of consumer protection law (notably on unfair terms in consumer contracts[12]), the application of the principle that, in the absence of harmonisation of procedural rules, national rules continue to apply subject to compliance with the principles of effectiveness and equivalence.[13] In the present case, it seems to me that questions 1 to 3 concern in particular the principle of effectiveness and whether the Court's case-law, notably in the area of unfair terms in consumer contracts, applies by analogy; whereas question 4 can be read as being more about the principle of equivalence. If there is a requirement to examine *ex officio* whether a purchaser is a consumer within the meaning of Directive 1999/44, the referring court then seeks guidance, in questions 2 and 3, on the circumstances in which a national court has that obligation.

48. However, question 4 can also be interpreted (more broadly) as asking whether, if the referring court determines that Ms Faber was a consumer and finds that she informed the seller of the lack of conformity on time (Article 7:23(1), final sentence, BW), that court must then *ex officio* apply the burden of proof in Article 7:18(2) BW which implements Article 5(3) of Directive 1999/44. I shall also address that aspect of question 4.

49. Where, in accordance with Article 5(2) of Directive 1999/44, a Member State requires the consumer to inform the seller of a lack of conformity within two months in order to benefit from his rights under, in particular, Article 3 of Directive 1999/44, question 5 asks in essence how to establish whether the consumer acted in time. Question 6 focuses on Article 5(3) and the burden of proof which applies in order to establish whether or not lack of conformity (and thus liability of the seller) exists. I shall consider these two questions separately. Question 7 is self-standing.

50. Before doing so, I first comment briefly on the context in which questions 1 to 4 and 7 have arisen.

11 — See, for example, judgment in *VB Pénzügyi Lízing*, C-137/08, EU:C:2010:659, paragraph 49.

12 — Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

13 — See further point 62 below.

51. I disagree with the Commission's view that the questions concerning the *ex officio* examination of the scope of application of Directive 1999/44 are inadmissible. The basis for the Commission's position is that none of the parties to the main dispute appears to doubt Ms Faber's consumer status and that these questions are therefore purely hypothetical.

52. It is well established that there is a presumption of relevance with regard to questions of interpretation referred by a national court in the factual and legislative contexts which it defines. The Court may refuse to give a preliminary ruling only where it is quite obvious that the questions posed bear no relation to the actual facts of the main action or to 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. [14]

53. In the present case, the issue before this Court is not who is a consumer within the meaning of Directive 1999/44. Nor is it the task of this Court to decide whether or not the referring court (and earlier the Rechtbank) had sufficient facts available to decide on Ms Faber's status. [15] Rather, the Court is asked about the position under EU law as regards the *ex officio* examination of the status of a purchaser in circumstances where national law appears to preclude such an examination. Thus, the questions referred are pertinent and not hypothetical to the proceedings before the referring court. I therefore propose an answer to them all.

54. Notwithstanding the fact that I consider the questions on *ex officio* examination to be admissible, I admit that I was somewhat surprised, taking into account the additional explanations given by the Netherlands Government at the hearing on the role of the judge under Netherlands law, by the fact that (leaving aside any reasons why Ms Faber did not expressly rely on her consumer status) the Rechtbank did not examine her status and the referring court considers it cannot do so. Ms Faber has relied, at first instance and on appeal, on provisions of the BW that apply both to consumer sales and other sales and (at least partly) appear to implement Directive 1999/44. Hazet has relied on a provision whose final sentence applies specifically to consumer sales and the remainder generally to all sales and which implements Article 5(2) of Directive 1999/44. Moreover, at the hearing, the Netherlands Government confirmed that it is the task of courts to establish the applicable law, to determine whether national law transposes EU law and to interpret Netherlands law in conformity with EU law. That said, however, in the absence of a clearer understanding of Netherlands law, those concerns are an insufficient basis for declaring questions 1 to 4 and 7 inadmissible.

55. Finally, for the sake of completeness, I add that it follows from, inter alia, recitals 8 and 16 in the preamble to Directive 1999/44, the option in Article 1(3) for Member States to exclude from the scope of 'consumer goods' second-hand goods sold at certain types of public auction and the option in Article 7(1), second subparagraph, to shorten the time of the seller's liability with respect to second-hand goods that Directive 1999/44 applies in principle to such goods.

*Questions 1 to 4 and 7*

56. Directive 1999/44 guarantees rights for consumers, in particular remedies for lack of conformity of the goods delivered by the seller. However, it does not touch on whether national courts must raise of their own motion whether Directive 1999/44 and the protection which it offers apply to a dispute before them.

14 — See, for example, judgment in *Kušionová*, C-34/13, EU:C:2014:2189, paragraph 38 and the case-law cited.

15 — Even if I agree with the Commission, as well as the Netherlands Government, that considerable factual information appears to be available to decide that question.

57. It is settled law that, in the absence of harmonisation of procedural rules, Member States remain competent to organise their judicial system (the principle of procedural autonomy).[16] The mere fact of the primacy of EU law does not mean that national procedural law must always be set aside in order to give effect to EU law.[17] However, Member States' exercise of that competence is subject to the principles of effectiveness and equivalence, which are part of EU law[18] and indirectly guarantee respect for the primacy of EU law.

58. The principle of equivalence requires national law to treat claims based on EU law no less favourably than those based on national law.[19] In that regard, the national court must consider the purpose and the essential characteristics of domestic actions which are claimed to be similar.[20] One particular application of this principle, which is also visible in the Court's case-law involving other EU consumer protection directives, is that, where national law requires examination *ex officio* of a rule of national law, then the same must apply to the equivalent rule of EU law. Thus, '[w]here, by virtue of domestic law, courts or tribunals must raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding [EU] rules are concerned' or 'if domestic law confers on courts and tribunals a discretion to apply of their motion binding rules of law'.[21]

59. The principle of effectiveness means that national law must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law.[22] When assessing compliance with this principle, it is necessary to take account of the role of a particular provision in a procedure and the course and special features of that procedure, viewed as a whole, before the national bodies; and to consider, where appropriate, the basic principles of the domestic judicial system, including protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings.[23]

60. In the present case, national procedural law requires judges to respect the principle of party autonomy. They must base their decision on the claims, arguments and facts put forward by the parties. With the exception of well-known facts, they may consider only those facts which formed part of the parties' submissions. Appellate courts may apply of their own motion only rules of public policy.[24] I have already expressed my doubts as to whether Netherlands law does in fact preclude in circumstances such as those of the present case national courts from determining whether a person such as Ms Faber is a consumer on the basis of the legal and factual information available to them.[25] However, for the purpose of this case, the assumed starting point must be that these rules together do preclude, as a matter of Netherlands law, a national court from examining the position of a purchaser such as Ms Faber. Otherwise, questions 1 to 4 and 7 would never have arisen in the context of the present dispute.

16 — See in the context of consumer protection, for example, judgment in *Sánchez Morcillo and Abril García*, C-169/14, EU:C:2014:2099, paragraph 31 and the case-law cited.

17 — For a useful discussion on this topic, see Opinion of Advocate General Jacobs in *van Schijndel and van Veen*, C-430/93 and C-431/93, EU:C:1995:185, points 24 to 30. For a different view, see Opinion of Advocate General Darmon in *Verholen and Others*, C-87/90 to C-89/90, EU:C:1991:223, point 19.

18 — See, in the context of Directive 1999/44, judgment in *Duarte Hueros*, C-32/12, EU:C:2013:637, paragraph 31 and the case-law cited. This was the first case in which the assertion of consumer rights under Directive 1999/44 in legal proceedings was raised. See also Opinion of Advocate General Kokott in *Duarte Hueros*, C-32/12, EU:C:2013:128, point 3.

19 — See, for example, judgment in *Sánchez Morcillo and Abril García*, EU:C:2014:2099, paragraph 31 and the case-law cited.

20 — See, for example, judgment in *Asturcom Telecomunicaciones*, C-40/08, EU:C:2009:615, paragraph 50 and the case-law cited.

21 — Judgment in *van Schijndel and van Veen*, C-430/93 and C-431/93, EU:C:1995:441, paragraphs 13 and 14 and the case-law cited. See also, for example, judgment in *Jőrös*, C-397/11, EU:C:2013:340, paragraph 30 and the case-law cited.

22 — See, for example, judgment in *Sánchez Morcillo and Abril García*, EU:C:2014:2099, paragraph 31 and the case-law cited.

23 — See, for example, judgments in *Sánchez Morcillo and Abril García*, EU:C:2014:2099, paragraph 34 and the case-law cited, and *Kušionová*, EU:C:2014:2189, paragraph 52 and the case-law cited.

24 — See points 25 and 26 above.

25 — See point 54 above.

61. Does EU law nevertheless require a court in circumstances such as those at issue to examine whether Ms Faber fell within the scope of application of Directive 1999/44 and, if so, subject to what conditions?

62. The Court has required, on the basis of in particular the principle of effectiveness, *ex officio* examination of individual provisions of other EU consumer protection directives. [26] It seems to me to have reached that conclusion essentially because the legislator has typically drafted these directives on the assumption that the consumer is the weaker party, who is/may be unaware of his rights and might otherwise not benefit from protection at all. The Court has developed that case-law separately from cases involving similar questions in the context of other parts of EU law. [27]

63. Thus, with regard to Directive 93/13, [28] the Court has held that EU law requires national courts to examine of their own motion the unfairness of a contractual term where they have available to them the necessary legal and factual elements. [29] That is because Directive 93/13 is 'based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge'. [30] A consumer accepts terms prepared by a professional seller, on which he can have no influence. [31] Thus, only positive action unconnected with that of the actual parties to the contract may correct such an imbalance. [32] As a result, the Court has taken the view that, with respect to Directive 93/13, 'effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion'. [33] For the same reasons, a national rule prescribing a limitation period for finding that a contract term is unfair is precluded. [34] However, in the same context, the Court has added that the principle of effectiveness cannot be 'stretched so far as to make up fully for [the] total inertia on the part of the consumer concerned'. [35]

64. As I see it, unfair contract terms are in essence terms of which the seller has particular knowledge, whose unfairness he has no interest in making known but which he has an interest in seeing enforced, whereas the consumer is often unable to contest them or be fully informed about their unfair character. As a result, without third party intervention, legal protection against unfair contract terms is gravely weakened.

65. It may not be so easy to justify *ex officio* intervention by a national court with regard to individual provisions of other consumer protection directives. Thus, Advocate General Kokott took the view in *Duarte Hueros* that, whilst Directives 93/13 and 1999/44 both relate to consumer protection in legal relations and are intended to achieve a high level of consumer protection, the situation where legislation seeks to compensate for the inferior position of a consumer when concluding a contract (Directive 93/13) is distinct from that where legislation concerns implementation of a contract after

26 — That case-law covers provisions of directives involving, inter alia, unfair terms in consumer contracts and consumer credit.

27 — See the distinction made in paragraph 40 of the judgment in *van der Weerd and Others*, C-222/05 to C-225/05, EU:C:2007:318.

28 — Directive 93/13, just like Directive 1999/44, is aimed at achieving a high level of consumer protection. In fact, the Commission (supported by the Parliament) had intended to harmonise in a single instrument certain aspects of the sale of goods and guarantees and unfair terms in consumer contracts. However, the Council preferred to treat these matters separately. See the summary of that debate in the Proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees (presented by the Commission) COM(95) 520 final, p. 2 (and the documents cited there) (OJ 1996 C 307, p. 8). Article 6(1) of Directive 93/13 states: 'Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.'

29 — See, for example, judgment in *Pannon GSM*, C-243/08, EU:C:2009:350, paragraph 32.

30 — See, for example, judgment in *Kušionová*, EU:C:2014:2189, paragraph 48 and the case-law cited.

31 — See, for example, judgment in *Kušionová*, EU:C:2014:2189, paragraph 48 and the case-law cited.

32 — See, for example, judgment in *VB Pénzügyi Lízing*, EU:C:2010:659, paragraph 48 and the case-law cited.

33 — Judgment in *Océano Grupo Editorial and Salvat Editores*, C-240/98 to C-244/98, EU:C:2000:346, paragraph 26.

34 — Judgment in *Cofidis*, C-473/00, EU:C:2002:705, paragraph 38.

35 — Judgment in *Kušionová*, EU:C:2014:2189, paragraph 56 and the case-law cited (the latter concerned a situation in which the consumer had not brought any legal proceedings in order to assert his rights).

its conclusion (Directive 1999/44). She considered that, as regards the latter, unsatisfactory performance does not usually depend on the will of the parties and the consumer is not in the same weak position as is the case with unfair terms because he can easily detect whether the good is of the agreed quality. [36]

66. I agree that the two sets of consumers are not in same position. However, there might still be asymmetry of information (perhaps to a lesser degree) such that, after conclusion of the contract, the consumer remains the weaker party as regards the conformity of the delivered goods with the contract. Unless at the time of conclusion of the contract the consumer was aware or could not reasonably have been unaware of the lack of conformity (or where the lack of conformity originates in material supplied by the consumer), [37] assessment of conformity depends on information, in particular that included in the contract, concerning especially the good's purpose, quality and performance. [38] That follows from the elements listed in Article 2(2). I consider it unnecessary for the purpose of the present case to decide whether that list is exhaustive. [39] It suffices here to consider that that assessment finds its basis in information communicated by the seller to the consumer (prior to the conclusion of the contract); information communicated by the consumer to the seller at the time of the conclusion of the contract; general assumptions about the use of the good; and public statements made by the seller, the producer or his representative. Moreover, it may often be the seller who chooses what specific good is to be delivered to the consumer (though that is not always the case). The consumer is thus often in a weaker position to assess whether and to what extent the good does not correspond with that which he could reasonably have expected to receive.

67. In any event, in the present case, the question as regards *ex officio* examination does *not* arise with respect to a provision of Directive 1999/44 relating to the performance of the contract. Nor does it concern a provision governing remedies in case of lack of conformity (Article 3) or prescribing temporal conditions and rules of evidence that are pertinent to invoking and establishing the seller's liability for lack of conformity and invoking those remedies (Article 5, which is the subject of questions 5 and 6). [40] Instead, the question arises with respect to the preliminary issue of the *scope of application* of Directive 1999/44. If EU law requires the referring court to examine of its own motion whether Ms Faber is a consumer and that court concludes that she is, then it is clear that both she and Hazet relied on national law implementing Directive 1999/44. The national court would then need to determine whether or not, for example, the final sentence of Article 7:23(1) BW applies and if so interpret that provision in accordance with Article 5(2) of Directive 1999/44. By contrast, in the circumstances of the present case, the question of *ex officio* examination of Article 5(2) does not arise. Thus, as I see it, it is not possible to answer the referring court's questions in the present case by deciding first whether a specific provision should be applied *ex officio* and using the outcome to determine whether or not the scope of application of Directive 1999/44 has therefore also to be considered *ex officio*. [41]

68. Thus, the question of *ex officio* examination arises here at a more general and abstract level.

69. As I see it, the answer to question 1 must be that in circumstances where a purchaser initiated proceedings for damages against a seller based on provisions of national law which apply, inter alia, to consumer contracts but has not specifically claimed to be a consumer, a rule of national procedural law cannot preclude a national court from examining whether that person is indeed a consumer

36 — Opinion of Advocate General Kokott in *Duarte Hueros*, EU:C:2013:128, points 43, 44, 47 and 48.

37 — Article 2(3) of Directive 1999/44.

38 — Article 2(2) of Directive 1999/44. See also recital 7 in the preamble.

39 — Recital 8 in the preamble suggests it is not.

40 — See points 80 to 90 below.

41 — Compare with, for example, the order of reasoning in the judgment in *VB Pénzügyi Lízin*g, EU:C:2010:659, paragraph 49.

within the meaning of Directive 1999/44 and consequently applying national consumer protection law as interpreted in conformity with Directive 1999/44. The principle of effectiveness requires such a national procedural rule to be set aside so as to allow the national court to examine of its own motion whether a purchaser such as Ms Faber is a consumer within the meaning of Directive 1999/44.

70. That is because the legislator has chosen to guarantee consumers a high degree of protection since they are generally in a weaker position in contractual relations with a seller. Thus, Directive 1999/44 guarantees a high level of consumer protection [42] to all natural persons who satisfy the definition in Article 1(2)(a) of that directive. [43] Based on that rationale, the legislator has created a set of rules that, unless otherwise specifically provided, set a minimum level of protection that Member States as well as the parties to consumer contracts must respect. Thus, a mandatory level of protection applies. It therefore makes sense to have a rule of public policy that places an obligation on the national court to examine whether, in proceedings initiated by a purchaser in order to enforce rights as regards the purchase of a good, the plaintiff falls within the scope of application of Directive 1999/44 (and other consumer protection directives) [44] because such protection reinforces the full effectiveness of that directive and minimises the risk that a purchaser, due to his ignorance of the law, will enjoy a lesser degree of protection than that guaranteed by EU law. [45]

71. However, that requirement does not automatically imply that a national court must examine of its own motion each and every provision of Directive 1999/44. With respect to each individual provision, that requirement is to be determined by the Court on a case-by-case basis. That is particularly so because the level of protection of the consumer may differ depending on the provision at issue and a consumer might explicitly decide *not* to exercise a right or otherwise benefit from an individual provision. [46] Moreover, it cannot be excluded that (perhaps exceptionally) individual provisions may protect the seller rather than the consumer. [47]

72. My conclusion does not depend on whether or not the consumer has legal assistance (which is the subject of question 7). Such a circumstance cannot alter the meaning of EU law or the scope of the principles of effectiveness and equivalence. Whilst an individual's awareness of his status and his rights as a consumer should (one would hope) be improved when assisted by a lawyer, the sole fact that a consumer has legal assistance cannot establish or be the basis for a presumption of such awareness. [48]

73. Furthermore, the requirement to examine *ex officio* the scope of application of Directive 1999/44 is subject to the same conditions as those which the Court has set out with respect to other consumer protection directives (the issue raised by questions 2 and 3). Thus, the legal and factual elements necessary for that task must be available to the national court, [49] either because those elements already

42 — See judgment in *Duarte Hueros*, EU:C:2013:637, paragraph 25.

43 — In my view that obligation applies irrespective of Article 9, which requires a Member State to take the appropriate measures to inform consumers of national law transposing Directive 1999/44 and, where appropriate, to encourage professional organisations to inform consumers of their rights; and of the fact that the contract and other elements specific to a particular case might inform the consumer of his rights, especially where national and/or EU law requires such information to be included in the contract or communicated to the consumer prior to its conclusion.

44 — I accept that this position may also have implications for other parts of EU law which similarly overtly protect a weaker party in a contractual relationship with another stronger party or with a public body. An obvious example here is EU law protecting workers in both types of relationship.

45 — See, in the context of individual provisions on unfair contract terms, judgment in *Océano Grupo Editorial and Salvat Editores*, EU:C:2000:346, paragraph 26. In other contexts, see judgments in *Mostaza Claro*, C-168/05, EU:C:2006:675, paragraph 28 and the case-law cited, and *Rampion and Godard*, C-429/05, EU:C:2007:575, paragraph 65.

46 — See, for example, as regards Article 6 of Directive 93/13, judgments in *Jőrös*, EU:C:2013:340, paragraph 41 and the case-law cited, and *Asbeek Brusse and de Man Garabito*, C-488/11, EU:C:2013:341, paragraph 49.

47 — Indeed, that might be the case with respect to distinct elements of Article 5 of Directive 1999/44 which I discuss in the context of questions 5 and 6.

48 — See also judgment in *Rampion and Godard*, EU:C:2007:575, paragraph 65.

49 — See, for example, judgment in *Aziz*, C-415/11, EU:C:2013:164, paragraph 46 and the case-law cited.

form part of the file or because the national court can obtain them in accordance with national procedural law. The national court may not go beyond the ambit of the dispute as defined by the parties. The same obligation of *ex officio* examination and the same conditions apply to an appeal where (i) at least one party has invoked provisions of national law which (at least partly) implement Directive 1999/44 and (ii) depending on whether one party is (or is not) a consumer, he (or she) can (or cannot) benefit from the enhanced protection that these provisions afford.

74. If the Court disagrees with my conclusion, does the principle of equivalence none the less require the national court to examine whether Ms Faber was a consumer within the meaning of Directive 1999/44?

75. As I understand it, the Netherlands procedural law at issue applies irrespective of whether the consumer based his application on EU law or national law.

76. The principle of equivalence also underlies question 4 which refers to Article 5 of Directive 1999/44. As I see it, however, the provision of national law transposing Article 5(2) (here Article 7:23(1) BW) is before the referring court. No question regarding the *ex officio* examination of Article 5(2) therefore arises. Instead, it is for the referring court to interpret national law in conformity with Article 5. [50]

77. However, if the referring court finds that Ms Faber is a consumer *and* complied with Article 7:23(1) BW, the question then arises whether it must *ex officio* apply the rule on the burden of proof set out in Article 7:18(2) BW which transposes Article 5(3) of Directive 1999/44 into Netherlands law. It is only in that context that question 4 must be addressed.

78. The rule on the burden of proof in Article 5(3) applies where it is necessary to establish whether or not the seller is liable for lack of conformity. Where a court of first instance has not made relevant findings of fact (because, for example, it has held that the consumer through tardy notification has forfeited the right to bring such a claim), it seems to me unlikely that an appellate jurisdiction dealing with the consequent appeal would necessarily be able to apply that rule. Whether this conundrum can be solved under national procedural law (for example, by remitting the case back to the first instance court for further factual investigation), I do not know. I therefore have some doubts about whether the issue of *ex officio* examination of the rule in Article 5(3) of Directive 1999/44 is relevant to the referring court's treatment of Ms Faber's appeal.

79. Notwithstanding the fact that, in the context of these proceedings, the Court cannot determine what Netherlands rules of public order are, it may respond to question 4 (and also question 6) by providing guidance on the interpretation of Article 5(3) of Directive 1999/44. That provision offers mandatory protection to a consumer by partially reversing the burden of proof so as to improve the conditions under which a consumer can benefit from his rights under Directive 1999/44, in particular the remedies available in case of the seller's liability. Neither Member States nor the parties to a consumer contract may provide for a stricter burden. [51] The burden of proof is changed in favour of consumers because they are generally in a weak position in relation to sellers as regards the information available about the good and the state in which it was delivered. Without (at least) the partial reversal of the burden of proof, the effective exercise of consumer rights in an area that is the main source of disputes with sellers is seriously undermined. [52] It thus seems to me that the principle of effectiveness requires the *ex officio* application of Article 5(3) provided that the national court has the necessary legal and factual elements available and does not change the ambit of the dispute as

50 — See recitals 22 and 24 in the preamble to and Article 8 of Directive 1999/44.

51 — See recital 22 in the preamble to and Article 8(2) of Directive 1999/44.

52 — See recital 6 in the preamble to Directive 1999/44.

defined by the parties. In so far as Article 5(3) contains similar features to those that characterise a rule of public policy under national law, the principle of equivalence may also require that a national court such as that in the main dispute applies of its own motion any provision of national law which transposes Article 5(3).

*Question 5*

80. The Netherlands has availed itself of Article 5(2) of Directive 1999/44 to impose notification requirements on the consumer. [53] In question 5, the referring court asks how it is to establish that the consumer satisfied those requirements.

81. As I see it, this is governed by national law on evidence. As long as national law provides for a period no shorter than two months, does not prescribe rules that modify the content of the obligations under Article 5 and is otherwise consistent with the principles of equivalence and effectiveness, Directive 1999/44 does not limit Member States' competence to set and apply the evidentiary rules that they deem appropriate.

82. Thus, for example, Article 5(2) does not prescribe how the consumer must inform the seller. That provision neither precludes nor requires that the seller be informed in writing rather than orally. However, since providing such information is a condition precedent for exercising rights guaranteed by Directive 1999/44, I consider that national law may not impose conditions which make it impossible or excessively burdensome for the consumer to prove that he informed the seller in a proper and timely manner for the purposes of Article 5(2). That too flows from the principle of effectiveness.

83. Similarly, national law may not prescribe evidentiary rules which are irreconcilable with the content of the obligation under Article 5(2) and other parts of Article 5. Thus, in my view, a Member State cannot require that at the stage when the consumer informs the seller of the lack of conformity, he must also prove lack of conformity. This interpretation is confirmed by comparing the wording used in paragraphs 2 and 3 of Article 5. *Informing* the seller that lack of conformity is detected (Article 5(2)) is not the same as the reference in Article 5(3) to *proving* that lack of conformity. [54] A consumer informs the seller of the lack of conformity in order to maintain the benefit of his rights under Directive 1999/44. These include not only the benefit of the remedies under Article 3(3) but also the benefit of the temporal conditions and rules of evidence contained in Article 5(3). Informing the seller (where required) cannot logically take place *after* exercise of, or reliance on, the rights in those other provisions. The notification must occur before the consumer decides to ask for remedies and, in that context, submits the necessary evidence to establish the seller's liability. In its initial proposal for Directive 1999/44, the Commission explained that the requirement in (what is now) Article 5(2) 'reinforces legal certainty and encourages diligence on the part of the buyer, taking the seller's interests into account'. [55]

84. In my opinion, that means that Article 5(2) is satisfied if the consumer informs the seller in such a way as to put him on notice of a *possible* lack of conformity and therefore also of his potential liability. In the information which the consumer gives to the seller, he must identify the good and the sale. He must connect the good with the seller. Without that information, the seller cannot know with respect to what good he might be held liable. The information given must also identify the circumstances causing the consumer to inform the seller of the lack of conformity. There may be various reasons why a consumer might consider that the good which was delivered to him, at the time of delivery or

53 — See points 19 to 23 above.

54 — A similar distinction appears to be made in other language versions of Article 5 of Directive 1999/44.

55 — COM(95) 520 final, cited in footnote 28, p. 14.

at some later time, is not what he reasonably could have expected to receive on the basis of the description of that good in the contract and other information which the seller might have provided or that was otherwise available. However, at this stage, the consumer does not have to *prove* the lack of conformity and its possible cause.

85. The legislative history confirms that interpretation. The original Commission proposal for the first subparagraph of Article 5(2) used the final phrase '… from the date on which he detected the lack of conformity or ought normally have detected it' instead of '… from the date on which he detected such lack of conformity'. According to the explanatory memorandum to that proposal, that sentence was intended to make it 'incumbent on the consumer to take normal care in examining the goods after reception'. However, it did not 'establish a strict obligation to carry out a detailed inspection of the good or to conduct tests to evaluate its functioning or performance'.[56]

*Question 6*

86. By question 6, the referring court in essence asks for guidance on the burden of proof under Article 5(3) of Directive 1999/44. Where a Member State requires the consumer to inform the seller pursuant to Article 5(2), that question is relevant only if the consumer first did so in a proper and timely manner and subsequently seeks to benefit, in particular, from the remedies under Article 3 of Directive 1999/44. The presumption in Article 5(3) applies unless it is incompatible with the nature of either the goods or the lack of conformity. However, the referring court has not asked for guidance on that exception and I shall not therefore address it.

87. Article 5(3) partly reverses the burden of proof in favour of the consumer who, subject to a time limit, need *not* demonstrate that the lack of conformity already existed when the good was delivered. Thus, it still falls on the consumer to assert, and where necessary to prove, that the good delivered does not correspond with the standards of quality, performance and fitness for purpose of the good which he reasonably could have expected to receive pursuant to the contract and the information listed in Article 2(2). It is the lack of correspondence that must be shown, not its cause. Thus, in the present case, it is insufficient for a consumer such as Ms Faber to prove only that the fire occurred. Rather, she must show why, as a result of the fire, she considers that the car which was delivered to her did not correspond with the car which, based on the contract and other relevant information, she had expected to receive. In circumstances such as those of the present case, it may be sufficient for Ms Faber to show that the product can no longer (properly) perform the function for which it was purchased (because she can no longer drive the car) without her being required to identify why that became the case.[57]

88. However, the consumer need not assert, and where necessary prove, that the lack of correspondence is attributable to the seller (which would probably involve an inquiry into the state of the good before or when it was delivered to the consumer). Such a requirement would entirely undermine the rule in Article 5(3). Moreover, the seller's liability under Directive 1999/44 is not a fault-based liability. This follows also from Article 4 which grants the *seller* a right of redress against the *producer* whose acts or omissions resulted in the lack of conformity. Moreover, it would be impracticable to place such a burden of proof on the consumer because it is reasonable to assume

56 — COM(95) 520 final, cited in footnote 28, p. 14.

57 — As a member of the bench put it during the questions at the hearing: a car that is in conformity with its purpose does not spontaneously combust.

that, in principle, the seller has more (detailed) information on the good and the state in which it was delivered. The consumer cannot be required to produce evidence which is unavailable to him.[58] It would also go against the entire purpose of the rebuttable presumption in Article 5(3) and the wider objectives of Directive 1999/44.

89. The wording used in Article 5(3) of, and recital 8 in the preamble to, Directive 1999/44 shows that the burden of proof then shifts to the seller who, in order to avoid liability, must show that the lack of conformity did not exist at the time of delivery[59] or otherwise rebut the consumer's claims and contest the evidence. He may do so by, for example, establishing that the defect results from acts or omissions that post-date delivery of the good or is to be attributed to a factor for which he, the seller, is not responsible. Only at that later stage will the success of the consumer's claim depend on him bringing proof regarding the cause of the lack of conformity.

90. Finally, Article 5(3) identifies who must prove what and in which order. However, it does not prescribe how to prove the required elements. As I see it, in the absence of EU rules that is a matter for national procedural law on evidence, which in this context must of course also respect the principles of equivalence and effectiveness.[60]

## Conclusion

91. In the light of all the foregoing considerations, I am of the opinion that the Court should answer the request for a preliminary ruling from the Gerechtshof Arnhem-Leeuwarden to the following effect:

In circumstances where a purchaser initiated proceedings for damages against a seller based on provisions of national law which apply, inter alia, to consumer contracts but has not specifically claimed to be a consumer, a rule of national procedural law cannot preclude a national court from examining whether that person is indeed a consumer within the meaning 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 and consequently applying national consumer protection law as interpreted in conformity with Directive 1999/44. However, that requirement is subject to the condition that the legal and factual elements necessary for that task must be available to the national court, either because those elements already form part of the file or because the national court can obtain them in accordance with national procedural law. The national court may not go beyond the ambit of the dispute as defined by the parties. The same obligation of *ex officio* examination and the same conditions apply to an appeal where (i) at least one party has invoked provisions of national law which (at least partly) implement Directive 1999/44 and (ii) depending on whether one party is (or is not) a consumer, he (or she) can (or cannot) benefit from the enhanced protection that these provisions afford. The fact that a consumer was assisted by a lawyer does not alter this conclusion.

The principle of effectiveness requires the *ex officio* examination of Article 5(3) provided that the national court has the necessary legal and factual elements available and does not change the ambit of the dispute as defined by the parties. In so far as Article 5(3) contains similar features to those that characterise a rule of public policy under national law, the principle of equivalence may also require that a national court such as that in the main dispute applies of its own motion the provision of national law which transposes Article 5(3).

58 — See also, for example, in the context of consumer credit, Opinion of Advocate General Wahl in *CA Consumer Finance*, C-449/13, EU:C:2014:2213, point 37.

59 — That was also the intention of the Commission in proposing this provision: see COM(95) 520 final, cited in footnote 28, p. 12.

60 — See, for example, judgment in *Arcor*, C-55/06, EU:C:2008:244, paragraph 191 and the case-law cited.

Directive 1999/44 does not limit Member States' competence to set and apply evidentiary rules as regards the requirement, pursuant to Article 5(2) of Directive 1999/44, that the consumer inform the seller of the lack of conformity as long as national law (i) provides for a period no shorter than two months, (ii) does not prescribe rules that modify the content of the obligations under Article 5 of Directive 1999/44 and (iii) the applicable rules are not otherwise less favourable that those governing domestic actions and are not framed in such a manner as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law.

Article 5(3) of Directive 1999/44 partly reverses the burden of proof in favour of the consumer who, subject to a time limit, need *not* demonstrate that the lack of conformity already existed at the time of delivery of the good. Thus, it still falls on the consumer to identify that the good delivered does not correspond with that which he reasonably could have expected to receive pursuant to the contract and the information listed in Article 2(2). However, the consumer need not prove that the lack of correspondence is attributable to the seller.