1 Introduction

1. A sale of consumer goods is probably one of the most frequently concluded contracts in Europe. To enhance the functioning of the internal market, the European legislator harmonised the most important matters of consumer sales in the Consumer Sales Directive. The Directive was enacted in 1999 and in 2002 and 2003 entered into force in the legal systems explored in this book. The Directive regulates the issues of non-conformity, buyer’s remedies in case of the delivery of non-conforming goods, and consumer guarantees. The Directive also regulates the burden of proof in consumer sale cases and introduces the presumption of non-conformity.

2. One of the principles of European consumer law is to provide for the fair and equal treatment of consumers in all Member States in the context of domestic and cross-border transactions. The uniform simplification in the allocation of the burden of proof in consumer sales law is considered as one of the means for improving consumer protection and boosting consumers’ confidence in participating in the internal market. The latter is indispensable for ensuring the balanced growth and development of the internal market.

3. Generally, to be able to receive remedies for the delivery of non-conforming goods, a buyer is required to prove the existence of non-conformity at the time of delivery. It is often difficult to establish whether the non-conformity of goods existed already at the time of the conclusion of the contract, whether it occurred at the time of the delivery of the goods, or whether the non-conformity came into being only after the goods left the seller’s control.

   The European legislator has recognised that the traditional rules on the burden of proof are too burdensome for a consumer and in Article 5 (3) of the Consumer Sales Directive introduced the presumption of non-conformity. Article 5 (3) of the Consumer Sales Directive provides that ‘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.’ The presumption of non-conformity aims to simplify the supply of evidence and to ease the process of receiving remedies in case of the delivery of

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non-conforming goods in order to encourage consumers to participate in cross-border sales, which should foster integration of the common market.²

4. The substance and impact of the presumption of non-conformity has not been entirely foreseen by the European legislator. What initially was considered to be a measure for easing the burden of proof lying with the consumer transpired to be a complex legal construction whose interpretation and application, more than a decade after the implementation to the domestic systems, still causes considerable difficulties.

The provision introducing the presumption required an immediate alteration of the national rules on the allocation of the burden of proof in (consumer) sales law. The change prompted many questions on the conditions and precise legal consequences of a new tool of consumer protection. The questions that arrived considered also whether the presumption of non-conformity is in fact a proper measure to facilitate the balance between the parties. In some cases it disturbed the well-established application of other substantive and procedural measures of protection available to consumers.

5. The Consumer Sales Directive contains provisions which go to the core of the systems of private law found in the Member States. In particular, the impact of Article 5 (3) of the Consumer Sales Directive is far reaching. The implementation of this provision alters the allocation of the burden of proof regarding the moment of the existence of non-conformity, having implications in all the Member States. This is the first European provision which does so on such a large scale. Having that said, the operation of the presumption of non-conformity still depends on the national concepts, notions and practices regarding the burden of proof. To be able to assess the role and function of the presumption of non-conformity in the Member States, it is necessary to analyse the influence the national concepts and practices regarding the burden of proof have on the presumption.

### 1.1 Research questions

6. To date there is no comprehensive work analysing the role and function of the presumption of non-conformity, its actual influence on consumers’ position in litigation and their chances of receiving remedies for the delivery of non-conforming goods, and its influence on the application of substantive law in general. Given the importance of the topic and the practical implications, it is clear that a more in-depth analysis is necessary. This research seeks to bridge the gap in the literature and provide a comprehensive analysis of the presumption of non-conformity in the context of European consumer sales law.

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² The importance of the presumption of non-conformity goes beyond the European borders, the Consumer Protection (Fair Trading) Act of Singapore amended in 9 March 2012 contains in Section 12B of Part III the same presumption as found in Article 5 (3) of the Consumer Sales Directive, including the prerequisites, rebuttal and the exclusion criteria.
the frequency with which it is applied, there is a necessity to analyse and clarify the operation of the most crucial provisions of consumer sales law in the Member States.

7. The main question of this research regards the role the presumption of non-conformity has in the facilitation of the burden of proof lying with the consumer, in order to receive remedies for the delivery of non-conforming goods. Answering the above question has several objectives. The first is to identify how the presumption of non-conformity has been implemented into domestic systems. The second is to identify how the presumption operates within the national legal frameworks. And finally, whether the presumption of non-conformity meets the expectations and objectives set out for it by the European legislator.

Reaching the above-mentioned aims will allow the determination of whether the allocation of the burden of proof in consumer cases is similar in the jurisdictions investigated, whether the presumption eases the burden of proof that lies with the consumer and whether (and how) the national rules of the burden of proof affect the application of (European) consumer sales law.

8. The importance of this research is multi-faceted. It investigates how the presumption of non-conformity is implemented in four legal systems: Poland, Germany, England and Wales, and the Netherlands. It shows how this presumption operates in different legal systems and what its importance for the consumers is. It presents the relationship between the different systems in the context of the presumption of non-conformity. Finally, it allows for an evaluation of whether the goal of the Consumer Sales Directive in the context of the presumption of non-conformity has been achieved and if so, whether it has been done in the same way in the different jurisdictions.

1.2 Approach

9. To achieve the goals set for this study several topics will be investigated. The first necessary task will be to explain the main definitions and general rules on the burden of proof existing in the four jurisdictions examined: Poland, Germany, England and Wales, and the Netherlands. The matters such as allocation of the burden of proof and standard of proof will be discussed. Moreover, a brief explanation of the concepts of the burden of proof of four Member States is necessary to identify what is a general rule of the burden of proof and how the presumption of non-conformity alters (if at all) this general rule. Consequently, there will be an examination of how the presumption of non-conformity affects the consumer’s position with regard to evidence in relation to the traditional allo-
cation of the burden of proof when no simplifications regarding the supply of evidence apply.

It should be observed that in chapters 5 and 6 the expressions: ‘presumption’, ‘reversed burden of proof’ and ‘shift of the burden of proof’ are used repeatedly, often not explaining precise legal consequences. In such cases it should be understood that the general duty to provide evidence and prove the particular fact has been altered. The precise legal consequences thereof will be discussed only where necessary.

10. Another important matter to be analysed is the notion of non-conformity. There are at least two reasons why the notion of non-conformity could be considered as the core element of the Consumer Sales Directive. First of all, the existence of non-conformity is a condition for seller’s liability. Without this element the consumer is not entitled to claim remedies. Second of all, the successfully proven existence of non-conformity is a requirement for the application of the presumption of non-conformity. In this book, the notion of non-conformity will first be briefly discussed from the perspective of the Consumer Sales Directive. Subsequently, a relatively detailed analysis from the perspective of national implementations will be provided. The main focus will be placed on the differences in understanding what the non-conformity is and whether the national concepts include all the criteria of non-conformity found in the Consumer Sales Directive. The questions of what facts and circumstances constitute non-conformity in different jurisdictions and who has to prove these facts and circumstances will take a central place in the discussion.

11. After presenting the matters of national rules on the burden of proof and the analysis of the topics of non-conformity, the main research topics will be analysed. How the presumption of non-conformity has been implemented into domestic laws, how it operates, what are the legal consequences of its application, does it facilitate a similar allocation of the burden of proof among the Member States in question and finally, whether the presumption of non-conformity in fact provides simplifications in the supply of evidence. Another issue regards the potential and actual factors that may hinder the expected or desired functioning of the presumption of non-conformity. This includes the question of the role of national rules on the burden of proof, or rules of another character, for the application of substantive law having its origin in the Consumer Sales Directive.

12. As already stated, this book will compare the law of four jurisdictions: Poland, Germany, England and Wales, and the Netherlands. The selection of legal systems was made based on legal and practical factors. To obtain as broad picture of the application and the role of the presumption of non-conformity as possible, it was important to compare legal systems coming from different legal families, civil law and common law systems. These systems are characterised by different weight of the national and European legislation and the
importance of judiciary in the creation, application and interpretation of legal rules. It was also important to include systems of different civil procedure principles and different practices in terms of resolving consumer disputes. Furthermore, it was desirable to include legal systems having different (initial) approaches to consumer protection, systems where the consumer protection already developed before the promulgation of European measures, and systems where the consumer (sales) law is a new discipline. Finally, in the selection of legal systems investigated one will find systems that were reluctant to implement the European consumer directives, and the systems that duly and timely complied with the implementation duties. The practical reasons to choose these legal systems considered mainly the language abilities to read and understand legal concepts.

13. The analysis of the domestic law of Member States was based mainly on the exploration of national legislation and policy documents, literature study, and a review of the selection of case law regarding the matters at issue.

At this point, there are major amendments of the consumer sales law in two of the jurisdictions. On 9 May 2014 the Polish Parliament passed the statute amending Polish sales law and on 30 May 2014 President signed the new Consumer Rights Act. The new law entered into force on 25 December 2014.

The English Parliament is in an advanced stage of the legislative process of a new Consumer Rights Bill, amending, inter alia, the provisions of consumer sales. At this point Lords amendments to the Bill are under consideration of the House of Commons. Regarding the Polish amendment, this book considers changes passed on 9 May 2014 that entered into force on 25 December 2014, regarding the English amendment, it considers the version of the Consumer Rights Bill as presented to Parliament on 21 January 2014. Throughout this book, often for the sake of convenience the direct reference is made to English law, however it should be understood as English and Welsh law.

14. Comparing European legislation and the legislation of four different legal systems in the context of consumer sales generates several practical problems. The first problem regards the issues of language and terminology. The most problematic notion described in this book is the notion of non-conformity. Different systems use of different terms to describe similar legal constructions. Throughout this book several terms will be used to discuss the topics of non-conformity. Defects, physical defects, material defects, satisfactory quality and fitness for purpose, (Sach)mangel, Grundmangel, Folgemangel, all these terms will be used to describe and explain the elements of non-conformity in various jurisdictions. They may have different scopes at times, but what they have in common is to be a counterpart of the notion of non-conformity from Article 2 (2) of the Consumer Sales Directive,

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3 http://services.parliament.uk/bills/2014-15/consumerrights.html (23.01.2015).
including the criteria therein, and to be a requirement for the application of the presumption of non-conformity from Article 5 (3) of the Directive. In having to deal with such rich terminology some simplifications and (minor) inaccuracies were inevitable.

Another matter which has proven to be problematic in the comparison of the four jurisdictions in the context of the burden of proof in consumer sales regards the practices and customs of each jurisdiction which do not necessarily have their explanation in the legal provisions. In particular, when it comes to the topics regarding the theories of the burden of proof, the function these rules have in litigation and the capacity of particular terms that must be invoked and proven to win the case were difficult to grasp and compare.

Despite these difficulties, this book provides a comprehensive analysis of the operation of the presumption of non-conformity in four jurisdictions, showing the potential weaknesses and advantages of the presumption of non-conformity as such and the importance of the rules on the burden of proof in solving consumer disputes.