OPINION OF ADVOCATE GENERAL MAZÁK
delivered on 18 May 2010[1]

I — Introduction

1. By decision of 14 January 2009, received at the Court on 16 February 2009, the Bundesgerichtshof (Federal Court of Justice) (Germany) referred questions to the Court of Justice under Article 234 EC for a preliminary ruling on the interpretation of Article 3 of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees ('the Directive').[2]

2. The reference has been made in the course of proceedings between Gebr. Weber GmbH ('Weber'), a company in the construction materials business, and one of Weber's customers, Mr Jürgen Wittmer, who had had defective floor tiles delivered by that company.

3. By the questions referred, the national court essentially wishes to know whether, under the Directive, the seller of defective goods may refuse the form of remedy required by the consumer, such as replacement of the defective goods, in cases where that remedy would involve disproportionately high costs for the seller, as in the present case, and, if not, whether the seller must bear the costs of removing the defective goods from a thing into which the consumer has incorporated them.

4. The issues raised in the present case are very similar to those in Case C-87/09[3] on which I am also delivering my Opinion today.

II — Legal framework

A — Community law

5. The Directive was adopted on the basis of Article 95 EC. Recital 1 in the preamble thereto states that, in accordance with Article 153(1) and (3) EC, the European Community must contribute to the achievement

1 — Original language: English.
2 — OJ 1999 L 171, p. 12.
3 — *Putz*, pending before the Court.

of a high level of consumer protection by the measures it adopts pursuant to Article 95 EC.

6. Recital 10 in the preamble to the Directive states that 'in the case of non-conformity of the goods with the contract, consumers should be entitled to have the goods restored to conformity with the contract free of charge, choosing either repair or replacement, or, failing this, to have the price reduced or the contract rescinded'.

7. Recital 11 in the preamble to the Directive reads as follows:

'Whereas the consumer in the first place may require the seller to repair the goods or to replace them unless those remedies are impossible or disproportionate; whereas whether a remedy is disproportionate should be determined objectively; whereas a remedy would be disproportionate if it imposed, in comparison with the other remedy, unreasonable costs; whereas, in order to determine whether the costs are unreasonable, the costs of one remedy should be significantly higher than the costs of the other remedy.'

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

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

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

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

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

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

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

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

— if the consumer is entitled to neither repair nor replacement,

or

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

or

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

…'

9. Article 8 of the Directive, entitled 'National law and minimum protection', provides:

'1. The rights resulting from this Directive shall be exercised without prejudice to other rights which the consumer may invoke under the national rules governing contractual or non-contractual liability.

2. 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.'

B — *National law*

10. In the case of defective goods, Paragraph 437 of the German Civil Code (Bürgerliches Gesetzbuch, 'the BGB') confers the following rights on the purchaser:

'If goods are defective, the purchaser may, provided the requirements of the following provisions are met and unless otherwise specified,

1. require subsequent performance under Paragraph 439;

2. terminate the contract … or reduce the purchase price under Paragraph 441;

3. claim damages … or reimbursement of unnecessary expenditure …'

11. Paragraph 439 of the BGB, entitled 'Subsequent performance', by which Article 3 of the Directive was transposed into German law, provides as follows:

'1. By way of subsequent performance, the purchaser may require the repair of the defect or the delivery of goods which are free from defect, according to his preference.

2. The seller shall pay the costs necessary for the purposes of subsequent performance, including in particular the cost of transport, carriage, labour and materials.

3. Without prejudice to Paragraph 275(2) and (3), the seller may refuse the manner of subsequent performance chosen by the purchaser if such performance is possible only at disproportionate cost. In that regard, account must be taken in particular of the value that the goods would have if there were no lack of conformity, the significance of the lack of conformity, and whether the alternative remedy could be effected without significant inconvenience to the purchaser. In such cases the right of the purchaser shall be restricted to the alternative means of subsequent performance; this is without prejudice to the right of the seller also to refuse the alternative remedy, subject to the conditions laid down in the first sentence.

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

III — Facts, procedure and the questions referred

12. In January 2005, Mr Wittmer purchased from Weber 45.36 m2 of polished Italian-manufactured floor tiles at a price of EUR 1 382,27, 33 m2 of which he had laid in his house.

13. Subsequently, shading appeared on the surface of the tiles, visible to the naked eye. In an independent procedure for taking evidence instituted by Mr Wittmer, an expert concluded that the shading in question was fine micro-brush-marks which could not be removed, so that the only remedy possible was complete replacement of the tiles. The costs for this were estimated by the expert at EUR 5 830.57.

14. Having, to no avail, demanded performance and set a time-limit for it, Mr Wittmer brought proceedings against Weber before the Landgericht (Regional Court) Kassel, claiming delivery of tiles free of defect and payment of EUR 5 830.57 plus interest. Granting merely a price reduction, that court ordered Weber to pay EUR 273.10 plus interest and dismissed the action as to the remainder.

15. On appeal by Mr Wittmer, the Oberlandesgericht (Higher Regional Court) Frankfurt am Main, partially varying the judgment of the Landgericht, ordered Weber by judgment of 14 February 2008 to deliver 45.36 m2 of tiles free of defects and to pay EUR 2 122.37 plus interest, representing the cost of removing the defective tiles.

16. In the main proceedings, it falls to the Bundesgerichtshof to decide on the appeal on a point of law lodged against that judgment, by which Weber contests the order to pay EUR 2 122.37 plus interest. According to that court, the decision on the appeal depends on whether the Oberlandesgericht correctly assumed that Mr Wittmer may require Weber to reimburse the costs of removing the tiles.

17. The referring court points out, in essence, that, contrary to the view taken by the Oberlandesgericht, under German law Mr Wittmer is not entitled to require Weber to reimburse the costs of removing the defective tiles. The latter could rightly refuse, under Paragraph 439(3) of the BGB, subsequent performance in the form of delivery of tiles free of defects and accordingly also removal of the defective tiles.

18. It explains that, according to that provision, the seller may refuse the form of subsequent performance chosen by the buyer, if such performance is possible only at disproportionate cost. That applies not only where the form of subsequent performance chosen by the buyer would result in disproportionate costs in comparison with the other form of subsequent performance ('relative lack of proportionality'), but also where the subsequent performance chosen – or the only possible form of subsequent performance – in itself results in disproportionate costs ('absolute lack of proportionality').

19. Since it is, according to the referring court, established in the present case that one form of subsequent performance, namely repair of the defective goods, is impossible, a right to refuse the remaining form of performance may arise only in the case of an absolute lack of proportionality, which must be assumed in the present case. In addition to the actual costs of delivering the tiles free of defects, in the sum of approximately EUR 1 200

including transport, the seller would incur the costs of removing the defective tiles, in the sum of approximately EUR 2 100, giving total costs of EUR 3 300, which is considerably more than 150 % of the value of the tiles free of defects.

20. The fact, however, that German law provides in Paragraph 439(3) of the BGB for a right on the part of the seller to refuse subsequent performance, not only on the basis of a lack of proportionality of the costs of the form of subsequent performance chosen in comparison with the other form of subsequent performance (relative lack of proportionality), but also if those costs are in themselves disproportionate (absolute lack of proportionality), could be contrary to Article 3(3) of the Directive, which appears, according to its wording, to provide only for relative lack of proportionality.

21. Finally, in the view of the referring court, in so far as according to the Directive a seller may not be allowed to refuse a form of subsequent performance on the ground of absolute lack of proportionality, the question arises in the present case whether under Article 3 of the Directive the seller may be required, under the title of replacement, to remove the defective goods from another thing into which they have been incorporated for their intended purpose and, accordingly, to reimburse the costs for this. The applicable German legislation does not, in principle, impose such an obligation on the seller.

22. Against that background, the Bundesgerichtshof decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Are the provisions of the first and second subparagraphs of Article 3(3) of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees to be interpreted as precluding a national statutory provision under which, in the event of a lack of conformity of the consumer goods delivered, the seller may refuse the form of remedy required by the consumer when the remedy would result in the seller incurring costs which, compared with the value the consumer goods would have if there were no lack of conformity, and with the significance of the lack of conformity, would be unreasonable (absolutely disproportionate)?

2. If the answer to the first question is in the affirmative: are the provisions of Article 3(2) and the third subparagraph of Article 3(3) of that directive to be interpreted as meaning that, where the goods are brought into conformity by replacement, the seller must bear the costs of removing the consumer goods not in conformity from a thing into which, in a manner consistent with their nature and purpose, the consumer has incorporated them?'

IV — Legal analysis

A — *Preliminary remarks*

23. The legal problem that the Court is called upon to deal with in the present case has been a classical subject of contract law or, more specifically, sale of goods law ever since Roman jurists such as *Julian* or *Ulpian* were discussing the legal consequences of the sale of 'defective' cattle on the markets of the ancient world, namely the issue of the scope of the seller's liability for the delivery of defective goods or, seen from the angle of the protection of the buyer, the question as to which remedies should be available to the buyer in cases where he has delivered to him goods which are not in conformity with the contract of sale.

24. As is apparent not only from the submissions of the parties to the present proceedings, the various national legal rules of the Member States in this area, although providing in many cases, in their practical application, for similar results and comparable levels of legal protection, in fact differ – in any event in their traditional, pre-harmonisation versions – significantly from each other.[4] Those divergences concern not only the details of the legal concepts, conditions and definitions used, but also, at a more general level, the schemes of remedies as such, that is both the forms of remedies provided for in case of breach of contract and the relationship and hierarchy between those remedies, the role of damages in or in connection with those schemes as well as the delimitation between contractual and non-contractual claims that may arise upon the delivery of goods not in conformity.

25. In addition, as the information provided by the Bundesgerichtshof in the present case shows, when it comes to specific problems related to lack of conformity and its consequences, such as the question of the liability of the seller for the costs of removing goods not in conformity, there remain uncertainties and divergences in the legal literature within one and the same legal system as to the buyer's actual rights and their legal basis.

26. That being said, at the European Union law level we are considering this issue of the costs of removal of the defective goods through the specific lens of the protection afforded to consumers by the Directive.

4 — See in this context also Proposal for a European Parliament and Council directive on the sale of consumer goods and associated guarantees (COM(95) 520 final – COD 96/0161, OJ 1996 C 307, p. 8), explanatory memorandum at I.A.4.

27. In that regard, it is important to note, on the one hand, that, as is stated in recital 1 in the preamble to the Directive and as the Court rightly emphasised in *Quelle*, the Directive is intended to ensure a high level of consumer protection. [5]

28. On the other hand, it must be borne in mind that the Directive constitutes a measure of minimum harmonisation – not of all, but only of certain aspects of the sale of consumer goods. Thus, the Directive undertakes, as is apparent from recital 6 in the preamble thereto, to approximate national legislation governing the sale of consumer goods in respect of non-conformity of goods with the contract, without, however, impinging on provisions and principles of national law relating to contractual and non-contractual liability.

29. Against that background and in the absence of express provisions to that effect in the Directive, it appears only legitimate to ask whether the liability of the seller to the consumer for 'lack of conformity', which is governed by the Directive, is meant to include liability for costs such as the costs of removing defective goods which have been installed, after delivery, by the consumer at issue, so that the consumer can, under the title of the remedy of 'replacement' or on the basis of some other provision of the Directive, require the seller to bear those costs – costs which at least in a number of national legal systems would be dealt with, as some parties have submitted, as an issue of 'consequential damages' rather than as a pure question of defective performance.

30. In the light of the objective of the Directive to strengthen consumer protection, an affirmative answer to this question may appear appropriate. It is, however, not that simple. Like any developed legal system governing the rights and obligations of the buyer and seller arising upon defective performance, the scheme of remedies under the Directive may not simply favour either the consumer or the seller, but must instead seek to strike a fair balance between their respective interests. [6]

31. That being said, the two questions on the interpretation of Article 3 of the Directive, by which the referring court seeks to ascertain whether Mr Wittmer may have a right as a consumer to require the seller to bear the costs of removing the defective tiles at issue in the main proceedings, are essentially aimed at determining, first, whether under the Directive the seller may refuse, even in

5 — See to that effect Case C-404/06 [2008] ECR I-2685, paragraphs 30 and 36.

6 — See, for a reference to the protection afforded also to the seller's financial interests under the Directive, *Quelle*, cited in footnote 5, paragraph 42.

a case where repair of the defective goods is impossible, replacement of those goods on the ground that this is disproportionate and, second, whether the rights conferred by Article 3 of the Directive on the consumer include the right to claim the costs of removing the defective goods.

32. It appears to me more logical to examine those questions, which are in fact closely intertwined, in reverse order, that is, to examine first whether the rights of the consumer under Article 3 of the Directive in case of lack of conformity include a claim such as that at issue and if so, second, whether that claim may be subject to a requirement of proportionality as described by the referring court. [7]

B — *As to whether the consumer may require the seller to bear the costs of removing goods not in conformity (Question 2)*

33. By its second question, the referring court wishes to ascertain whether the provisions of Article 3(2) and (3) of the Directive are to be interpreted as meaning that, where the goods are brought into conformity by replacement, the consumer may claim from the seller the costs of removing the goods not in conformity from a thing into which, in a manner consistent with their nature and purpose, the consumer has incorporated them.

1. Main arguments of the parties

34. In the present proceedings, observations have been submitted by Weber, the Commission and the Austrian, Belgian, German, Polish and Spanish Governments. Weber, the Commission and the Austrian and German Governments were also represented at the hearing on 25 February 2010.

35. Weber and the Austrian, Belgian and German Governments contend that the second question should be answered in the negative.

36. Weber and the German Government argue, in essence, that, in a case such as the present, the seller is liable to deliver goods in conformity with the contract of sale. Accordingly, in the case of a lack of conformity, to be assessed at the time of delivery, the seller is, according to Article 3(2) and (3) of the Directive, required to bring the defective goods into conformity, that is, in the case of

7 — The interplay of those two aspects leads in principle to several options as regards the possible obligation of the seller to pay for removing the defective goods.

replacement, to deliver goods in conformity. His obligations cannot be extended beyond that such as to include, as suggested in the present case, removal of the defective goods which have been used by the consumer, subsequent to delivery, according to his will. In that regard, the use a consumer may make of delivered goods is, also if it is in conformity with their nature and purpose, difficult for the seller to foresee so that the costs of removal of one and the same product may vary widely from case to case.

37. In addition, in their view, such an obligation to remove the defective goods, or to bear the corresponding costs, follows neither from the wording of Article 3(2) and (3) of the Directive, which refers to replacement of the defective goods, nor from the fact that, according to Article 3(3) and (4) of the Directive, such replacement must be completed 'free of charge' and 'without any significant inconvenience to the consumer'. Those conditions refer merely to the obligation of the seller to deliver, afresh, goods free of defect and cannot be construed so as to impose on him an additional obligation of bearing the costs of removal.

38. Those parties emphasise, finally, that damage caused as a consequence of the use – or removal – of the defective goods at issue may give rise to a claim by the consumer under national rules on contractual or non-contractual liability.

39. The Austrian and Belgian Governments align themselves, essentially, with those arguments. The Belgian Government specifies, however, that the seller has to bear the costs of transporting the defective goods.

40. By contrast, the Commission and the Polish and Spanish Governments maintain that in a case of replacement of goods not in conformity, the seller must also bear the costs of removing those goods and therefore suggest that the second question be answered in the affirmative.

41. More particularly, the Commission takes the view that the repair or replacement to which the consumer is entitled under Article 3(3) of the Directive refers necessarily to the goods not in conformity in the state and environment at the time when the lack of conformity occurs. It follows that if the goods not in conformity have been, in a manner consistent with their nature and purpose, incorporated into another thing, the goods not in conformity constitute, in that state, the object of repair or replacement. Thus, the consumer has, by means of replacement, to be put into a situation in which he would have been if goods free of defects had been delivered to him, which means that, if necessary, the goods not in conformity have to be removed and the goods free of defects installed. That interpretation is also corroborated by

the use of the word 'replacement' in Article 3(2) and (3) of the Directive. The Commission conceded, however, at the hearing that the fact that replacement has, pursuant to the provisions of Article 3(3) and (4) of the Directive, to be completed free of charge and without any significant inconvenience to the consumer is not relevant as regards the determination of the obligations which arise in connection with the right to replacement.

42. While relying, by contrast, on those latter provisions, the Spanish and Polish Governments share, essentially, the view taken by the Commission.

2. Appraisal

43. It should be noted, at the outset, that a literal interpretation of Article 3(2) and (3) of the Directive is not conclusive as to whether the consumer's right to 'replacement' of the goods not in conformity includes the right to require the seller to remove those goods or to bear the corresponding costs.

44. While in some language versions of the Directive, such as the English ('replacement') and French ('remplacement'), the corresponding terms used may, in principle, be understood as connoting also the removal of the defective goods, other versions, including the German ('Ersatzlieferung') and Slovak ('sa … nahradí'), appear to support a somewhat narrower definition, referring to replacement-delivery or delivery of replacement goods rather than to the whole course of action that may, technically, result in the replacement of the defective goods.

45. However, a contextual or systematic reading of Article 3 of the Directive rather lends support, in my view, to an understanding of the seller's liability which does not cover the costs of removing the goods not in conformity.

46. In that regard, Article 3(2) of the Directive lists exhaustively the remedies which are available to the consumer against the seller in the case of a lack of conformity, namely repair, replacement, price reduction or rescission.

47. More particularly, according to the scheme of remedies under the Directive, the consumer may, in the first place, by means of the performance-oriented remedies of repair or replacement, require the seller to bring the defective goods into conformity. In that way, the original *synallagma* under the contract of sale is restored and the consumer obtains the

performance for which he contracted. Serving the main interest of the parties to a contract, that solution is given preference, under the Directive, over price reduction or rescission of the contract. [8]

48. Those latter, subsidiary remedies are, by contrast, characterised by a mutual surrender of benefits. Thus, the balance of the respective interests of the consumer and the seller, which has been disturbed by the seller's defective delivery, is restored either by correspondingly reducing the obligations of the consumer – price reduction – or by absolving both parties from the obligations under the contract through rescission.

49. In any event, it can be noted that in either case, the rights of the consumer remain, as I see it, in principle limited by the obligations contracted under the contract of sale.

50. That view is confirmed if the broader context of Article 3 of the Directive is taken into account.

8 — That the Directive imposes such a hierarchy follows clearly from the wording of Article 3(3) of the Directive in connection with recital 11 in the preamble thereto. Cf. also *Quelle*, cited in footnote 5, paragraph 27.

51. The abovementioned consumer rights laid down in that provision specify – or constitute the corollary to – the scope of the seller's liability to the consumer, which is, according to Article 3(1) of the Directive, to be accepted for any lack of conformity which exists at the time the goods were delivered.

52. That definition of liability, in turn, obviously mirrors the description in Article 2(1) of the Directive of the fundamental obligation of the seller under a consumer sales contract as the delivery of goods to the consumer which are in conformity with the contract of sale.

53. It appears from the aforementioned provisions that the consumer rights laid down in Article 3 of the Directive are rooted in the concept of conformity with the contract and, accordingly, have to be construed by reference to the rights and obligations as laid down in the original contract of sale.

54. In other words, the rights afforded to consumers under Article 3 of the Directive are aimed at remedying the lack of conformity by comparison with what was originally owed to the consumer under the contract of sale, namely to bring the consumer into possession of goods free from defects.

55. That liability of the seller for defective performance or, more particularly, defects in the goods themselves, which are addressed by the remedies afforded to consumers by the Directive and which require the seller to bring about (belatedly), by repair or replacement free of charge, the situation originally owed to the consumer, must in my view be distinguished from possible liability – as is suggested in this case – for further work to be carried out or corresponding costs incurred in connection with goods not in conformity, but subsequent to the time of delivery – to which Article 3(1) of the Directive refers – and to the use made of them by the consumer.

56. That latter, more extensive, form of liability would thus require the seller, as the Commission has proposed, to put the consumer into a situation in which he would have found himself at a certain time after delivery if goods free from defects had been delivered to him, that is, in the present case, into a situation where the defective tiles which were attached to the floor by the consumer are removed from the floor and, eventually, the new tiles free from defects laid. That liability would accordingly, as several parties have observed, extend to facts and circumstances which occurred after the passing of the risk to the consumer, which are therefore dependent on his will and, in particular, the use he makes of the goods concerned.

57. That a seller may be held liable also in respect of that type of more indirect consequences of his defective performance or for damage resulting therefrom is, of course, conceivable and, apparently, indeed the case, subject to differing requirements, under national legal systems as well as, for example, under Article 45 of the United Nations Convention on the International Sale of Goods ('CISG'). [9]

58. Thus, as the German Government has submitted, costs incurred by the consumer in respect of removing defective goods may be recoverable under the German law on damages, subject, however, to the applicable conditions including fault.

59. As regards the Directive, however, it should be pointed out in this context, first, that its system of remedies for lack of conformity does not include any claim for damages, unlike, for example, Article 45(1)(b) of the CISG or, in Article 27, the proposal of the Commission for a Directive of the European

9 — The United Nations Convention on Contracts for the International Sale of Goods was adopted on 11 April 1980 and entered into force on 1 January 1988.

Parliament and of the Council on consumer rights. [10]

60. Second, it may be noted that for the very reason that work or costs such as those at issue are not only consequential to the lack of conformity of the goods, but result also from action falling within the sphere of the consumer's responsibility, in this case incorporating the defective tiles into the floor, the liability of the seller in respect of such costs is usually conditional upon and established by reference to some concept of causality, remoteness or, possibly, fault.

61. It is clear that the Directive does not even allude to a filter or device of that kind.

62. Arguably, such a function may be ascribed to the condition of the 'use of the goods according to their nature and purpose', as suggested by the referring court and supported by the Commission. That concept is in reality however, as Weber and the German Government have pointed out, quite loose and its ability to delimit the liability of the seller and to make his risk calculable rather limited.

63. Whereas the range of possible 'normal' uses that can be made of highly specified and finished goods, like, for example, a computer or a table, may be quite defined and foreseeable, the simpler the goods, the greater the range of possible 'normal' uses. Thus, the closer the goods come to a building component or a raw material, the more numerous and undefined are the purposes for which they may be used, still in accordance with their nature. Accordingly, the costs of removing one and the same product may vary enormously.

64. In the light of the foregoing considerations, I am not of the opinion that a right for the consumer to have the seller remove the defective goods from a thing into which the consumer has incorporated them or to have the seller bear the corresponding costs may be read into his right, under Article 3(2) and (3) of the Directive, to have the defective goods brought into conformity by replacement.

65. I agree also that that finding is not called into question by the 'free of charge' requirement attaching, pursuant to Article 3(2) to (4) of the Directive, to the seller's obligation to bring the goods into conformity by replacement. That requirement defines the conditions under which the seller must offer and carry out the bringing into conformity owed

10 — COM(2008) 614 final – COD 2008/0196.

to the consumer, namely free of charge, but cannot substantially extend the existing remedy itself. Similarly, the 'without any significant inconvenience' requirement in Article 3(3), third subparagraph, of the Directive defines how the bringing into conformity is to be brought about, not what it materially entails.

66. In that regard, finally, the present case has to be distinguished from *Quelle*, in which the Court held that the 'free of charge' requirement means that the seller cannot make any financial claim in connection with the performance of its obligation to bring into conformity the goods to which the contract relates. [11] Accordingly, it concluded, on the basis of further arguments, that the Directive precludes legislation under which a seller of defective goods may require the consumer to pay compensation for the use of those defective goods until their replacement. The present case is, by contrast, not about a financial claim by the seller to the consumer in connection with replacement, but about whether the consumer can claim as part of the bringing into conformity of the defective goods, beyond delivery free of charge of new goods free of defects, removal of the defective goods or claim the corresponding costs from the seller.

67. It follows from all the foregoing considerations that the second question referred should be answered to the effect that the rights of the consumer provided under Article 3(2) and (3) of the Directive do not, where the goods are brought into conformity by replacement, include the right to claim from the seller the costs of removing the goods not in conformity from a thing into which, in a manner consistent with their nature and purpose, the consumer has incorporated them.

C — *As to the requirement of proportionality (Question 1)*

68. By its first question, the referring court is essentially asking whether Article 3 of the Directive is to be interpreted as precluding national legislation under which a seller who has sold consumer goods which are not in conformity may, in a case where repair of the defective goods is to be considered impossible, refuse the alternative remedy, chosen by the consumer, of replacing those goods if that remedy would be disproportionate in that it imposed, in comparison with the value of the goods free of defect and the significance of the lack of conformity, unreasonable costs on the seller.

11 — Cited in footnote 5, paragraph 34.

69. That question does not arise in the present case if, as I suggest, the consumer may not, as part of his right to have the defective goods replaced, require the seller to bear the costs of removing the defective goods such as those at issue. I will, nevertheless, address the issue, wholly in the alternative, in the event that the Court comes to a different conclusion or chooses to answer the questions in the order proposed by the referring court.

1. Main arguments of the parties

70. Weber – which, moreover, has claimed that the first question is inadmissible – and the German and Austrian Governments take the view that according to Article 3 of the Directive the seller of goods not in conformity with the contract may, even in a case such as the present where the alternative remedy is considered impossible, refuse the remedy required by the consumer if that remedy is disproportionate in that it imposes, in comparison with the value of the goods delivered in conformity, unreasonable costs on the seller and that, consequently, the first question should be answered in the negative.

71. On the basis of slightly varying arguments, those parties consider that interpretation to be supported by the wording, the system and, in particular, the purpose of the Directive, which seeks to strike a balance between the interests of the consumer and those of the seller. Embracing essentially the concept of relative proportionality referred to by the referring court, they maintain that the obligations of the seller under Article 3 of the Directive are always, even in cases where one of the remedies provided under Article 3(3) of the Directive is impossible, subject to the condition of proportionality, so that the seller may not be required to replace defective goods if that would impose costs on him that are totally unreasonable.

72. In that regard, Weber and the German and Austrian Governments agree, essentially, that, although Article 3(3), second subparagraph, of the Directive – as well as recital 11 in the preamble to it – appears to refer only to one remedy being disproportionate in comparison with the other remedy, the criteria laid down in that provision must be understood as being general in scope and as governing also a case such as the present where only one remedy is deemed to be possible. Weber specifies, in this context, that the notion of impossibility under Article 3(3), first subparagraph, of the Directive may be construed so as to cover also cases of lack of (absolute) proportionality. In the view of the Austrian Government, in the circumstances of the present case, replacement can be considered

to be impossible within the meaning of that provision on account of the fact that the tiles cannot be removed and returned without being destroyed.

73. Moreover, according to those parties, in a case such as the present, where the remedies provided for under Article 3(3) of the Directive would be impossible or disproportionate, the consumer is afforded sufficient protection under the Directive in that he may, under Article 3(5) of the Directive, require an appropriate reduction of the price or have the contract rescinded.

74. They emphasise, finally, that the rights and obligations under the Directive are, in any event, as stated in recital 6 in the preamble thereto, without prejudice to the provisions and principles of national law relating to contractual and non-contractual liability, under which the consumer may thus be able to claim damages.

75. The Commission and the Belgian, Polish and Spanish Governments maintain, by contrast, essentially that the test of proportionality applies only as to the choice between the two remedies provided for under Article 3(3) of the Directive and cannot, accordingly, trigger reduction of the price or rescission of the contract as subsidiary remedies provided under Article 3(5) thereof. They suggest, therefore, that the first question should be answered in the affirmative.

76. As regards, more particularly, the Commission, that solution follows, first of all, from the wording of Article 3(3), second subparagraph, of the Directive and of recital 11 in its preamble. In addition, according to the scheme of Article 3 of the Directive, performance of the contract is given priority over reduction in price or rescission, so that the reference to proportionality in that article is to be construed narrowly. The Commission does not, however, deny that in extreme cases, where the only possible and required remedy would be gravely disproportionate in relation to the interest of the consumer in having that remedy pursued, there could be an instance of impossibility within the meaning of Article 3(3), first subparagraph, of the Directive.

77. The Belgian, Polish and Spanish Governments align themselves, in essence, with the arguments of the Commission, considering that it would be contrary to the rights and the high level of protection the Directive intends to provide to consumers if the seller could refuse the only possible remedy on the ground that he may incur excessive costs.

2. Appraisal

78. As I have pointed out above, [12] the Directive imposes a hierarchy upon the scheme of remedies it provides in that it favours repair and replacement, the remedies whereby the consumer gets the performance for which he contracted, over price reduction and rescission, the remedies by which the originally contracted rights and obligations are modified in accordance with the lack of conformity or altogether dissolved.

79. Thus, according to Article 3(3), first subparagraph, of the Directive, the consumer may 'in the first place' require the seller to bring the goods into conformity by repair or replacement. Subsequently, as appears from Article 3(5) of the Directive, the remedies of price reduction or rescission are available to the consumer if he is 'entitled to neither repair nor replacement' or if the seller has not completed such a remedy within a reasonable time or without significant inconvenience to the consumer.

80. In that regard, the consumer is, as is clear from Article 3(3), first subparagraph, of the Directive, entitled to the performance-oriented remedies of repair or replacement, 'unless this is impossible or disproportionate'.

81. In my view it follows clearly from that provision that that proviso applies to any remedy at 'primary level' so that, whether the consumer chooses repair or replacement, the remedy must in either case be both possible and proportionate, failing which the seller can refuse the primary remedies and the choice of the consumer is restricted to price reduction or rescission.

82. Admittedly, the wording of Article 3(3), second subparagraph, of the Directive, according to which the proportionality of a remedy is to be determined by reference to 'the alternative remedy', appears to indicate that the requirement of proportionality governs only the choice between the two primary remedies and not the choice between those remedies and price reduction or rescission.

83. That interpretation is, however, not compelling and should, not only in the light of the abovementioned provisions of Article 3(3), first subparagraph, of the Directive, be rejected.

12 — See point 47 above.

84. If the Directive were indeed, in accordance with such an interpretation, to be understood as meaning that the consumer could choose, where – as in the circumstances of the main proceedings – one of the two primary remedies referred to in Article 3(3) of the Directive was impossible, the other remedy whether or not it was proportionate, the application of the subsidiary remedies of price reduction or rescission, pursuant to Article 3(5), first indent, of the Directive, would obviously be very limited, namely to cases where both repair and replacement are impossible.

85. In my view, such an interpretation would unduly disregard the interests of the seller and therefore not strike a fair balance between the interests of the consumer and the seller. [13] That that interpretation cannot stand without leading to unacceptable cases of hardship for the seller had, indirectly, also to be recognised by the Commission which submitted that exceptions may be made in extreme cases of grave disproportionality.

86. It should, furthermore, be noted in this context that the Court has recognised that under the Directive the financial interests of the seller are, inter alia, protected by the very fact that, under the second subparagraph of Article 3(3) of the Directive, he may refuse to replace the goods where that remedy would be disproportionate in that it would impose unreasonable costs on the seller. [14]

87. It should be noted, finally, that as regards the determination as to whether a remedy imposes unreasonable costs on the seller and must therefore be deemed disproportionate, the factors to be taken into account under the concept of (absolute) disproportionality described by the referring court reflect in essence those mentioned in Article 3(3), second subparagraph, of the Directive.

88. In the light of all the foregoing, the first question referred by the Bundesgerichtshof should be answered to the effect that the first and second subparagraphs of Article 3(3) of the Directive are to be interpreted as not precluding national legislation under which a seller who has sold consumer goods not in conformity with the contract may, in a case

13 — See also, in that regard, my comment above in point 30.

14 — See to that effect *Quelle*, cited in footnote 5, paragraph 42.

where repair of the defective goods is impossible, refuse the alternative remedy, chosen by the consumer, of replacing those goods if that remedy would be disproportionate in that it imposed, in comparison with the value of the goods free of defect and the significance of the lack of conformity, unreasonable costs on the seller.

V — Conclusion

89. I therefore propose that the Court answer the questions referred as follows:

The rights of the consumer provided under Article 3(2) and (3) of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees do not, where the goods are brought into conformity with the contract by replacement, include the right to claim from the seller the costs of removing the goods not in conformity from a thing into which, in a manner consistent with their nature and purpose, the consumer has incorporated them.

The first and second subparagraphs of Article 3(3) of Directive 1999/44 are to be interpreted as not precluding national legislation under which a seller who has sold consumer goods not in conformity with the contract may, in a case where repair of the defective goods is impossible, refuse the alternative remedy, chosen by the consumer, of replacing those goods if that remedy would be disproportionate in that it imposed, in comparison with the value of the goods free of defect and the significance of the lack of conformity, unreasonable costs on the seller.