JUDGMENT OF THE COURT (First Chamber)

16 June 2011 *

In Joined Cases C-65/09 and C-87/09,

REFERENCES for a preliminary ruling under Article 234 EC from the Bundesgerichtshof (C-65/09) and from the Amtsgericht Schorndorf (C-87/09) (Germany), made by decisions of 14 January and 25 February 2009, received at the Court on 16 February and 2 March 2009, in the proceedings

Gebr. Weber GmbH (C-65/09)

v

Jürgen Wittmer,

and

Ingrid Putz (C-87/09)

v

Medianess Electronics GmbH,

* Language of the case: German.

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, J.-J. Kasel, A. Borg Barthet, M. Ilešič (Rapporteur) and E. Levits, Judges,

Advocate General: J. Mazák,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 25 February 2010,

after considering the observations submitted on behalf of:

— Gebr. Weber GmbH, by R. Lindner, Rechtsanwalt,

— the German Government, by M. Lumma and J. Kemper, acting as Agents,

— the Belgian Government, by T. Materne, acting as Agent,

— the Spanish Government, by J. López-Medel Bascones, acting as Agent,

— the Austrian Government, by E. Riedl and E. Handl-Petz, acting as Agents,

— the Polish Government, by M. Dowgielewicz, acting as Agent,

— the European Commission, by W. Wils and H. Krämer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 May 2010,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Article 3(2) and the third subparagraph 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 (OJ 1999 L 171, p. 12, 'the Directive').

2 The references have been made in proceedings between, as regards Case C-65/09, Gebr. Weber GmbH ('Weber') and Mr Wittmer concerning the delivery of tiles in conformity with the contract of sale and the payment of financial compensation and, as regards Case C-87/09, between Ms Putz and Medianess Electronics GmbH

('Medianess Electronics') concerning the reimbursement of the purchase price of a dishwasher which was not in conformity with the contract of sale, instead of the replacement of the machine.

Legal context

European Union legislation

3 Recital 1 in the preamble to the Directive states:

'Whereas Article 153(1) and (3) [EC] provides that the Community should contribute to the achievement of a high level of consumer protection by the measures it adopts pursuant to Article 95 [EC]'.

4 Recitals 9 to 12 in the preamble to the Directive read as follows:

'(9) Whereas the seller should be directly liable to the consumer for the conformity of the goods with the contract; … whereas nevertheless the seller should be free, as provided for by national law, to pursue remedies against the producer, a previous seller in the same chain of contracts or any other intermediary, unless he has renounced that entitlement; whereas this Directive does not affect the principle of freedom of contract between the seller, the producer, a previous

seller or any other intermediary; whereas the rules governing against whom and how the seller may pursue such remedies are to be determined by national law;

(10) Whereas, 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;

(11) 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'.

5 Article 1 of the Directive, entitled 'Scope and definitions', provides:

'1. The purpose of this Directive is the approximation of the laws, regulations and administrative provisions of the Member States on certain aspects of the sale of consumer goods and associated guarantees in order to ensure a uniform minimum level of consumer protection in the context of the internal market.

2. For the purposes of this Directive:

...

(f) *repair*: shall mean, in the event of lack of conformity, bringing consumer goods into conformity with the contract of sale.

...'

6 Article 2 of the Directive, entitled 'Conformity with the contract', provides:

'1. The seller must deliver goods to the consumer which are in conformity with the contract of sale.

...

5. Any lack of conformity resulting from incorrect installation of the consumer goods shall be deemed to be equivalent to lack of conformity of the goods if installation forms part of the contract of sale of the goods and the goods were installed by the seller or under his responsibility. This shall apply equally if the product, intended to be installed by the consumer, is installed by the consumer and the incorrect installation is due to a shortcoming in the installation instructions.'

7 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, taking into account:

— the value 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 completed without significant inconvenience to the consumer.

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.

6. The consumer is not entitled to have the contract rescinded if the lack of conformity is minor.'

8 Article 4 of the Directive, entitled 'Right of redress', provides:

'Where the final seller is liable to the consumer because of a lack of conformity resulting from an act or omission by the producer, a previous seller in the same chain of contracts or any other intermediary, the final seller shall be entitled to pursue remedies against the person or persons liable in the contractual chain. The person or persons liable against whom the final seller may pursue remedies, together with the relevant actions and conditions of exercise, shall be determined by national law.'

9 Article 5 of the Directive, headed 'Time limits', states in the first sentence of paragraph 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.'

10 Article 7 of the Directive, headed 'Binding nature', provides:

'1. Any contractual terms or agreements concluded with the seller before the lack of conformity is brought to the seller's attention which directly or indirectly waive or restrict the rights resulting from this Directive shall, as provided for by national law, not be binding on the consumer.

...'

11 Article 8 of the Directive, headed '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.'

National legislation

12 Paragraph 433(1) of the Bürgerliches Gesetzbuch (German Civil Code, 'the BGB'), headed 'Contractual obligations under a purchase agreement', provides:

'By a purchase agreement, the seller of goods is obliged to deliver the goods to the purchaser and to procure ownership of the goods for the purchaser. The seller must procure the goods for the purchaser free from material and legal defects.'

13 Paragraph 434 of the BGB, headed 'Material defects', provides:

'1. Goods are free from material defects if, upon the passing of the risk, the goods have the agreed quality. …'

14 Paragraph 437 of the BGB, headed 'Rights of the purchaser in the case of defects', reads as follows:

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

1. require subsequent performance in accordance with Paragraph 439;

2. rescind the contract in accordance with Paragraphs 440, 323 and 326(5) or reduce the purchase price in accordance with Paragraph 441,

3. claim damages under Paragraphs 440, 280, 281, 283 and 311a or reimbursement of wasted expenditure in accordance with Paragraph 284.'

15 Paragraph 439 of the BGB, headed 'Subsequent performance', reads 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 bear the costs necessary for the purposes of subsequent performance, in particular the costs of transport, carriage, labour and materials.

3. The seller may … refuse the type of subsequent performance chosen by the purchaser if it is possible only at disproportionate cost. In that regard, account must be taken in particular of the value of the goods in the non-defective state, the significance of the defect, and whether the alternative type of subsequent performance could be resorted to without significant disadvantage for the purchaser. In such a case the right of the purchaser shall be limited to the alternative type 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. If the seller delivers goods free from defects for the purposes of subsequent performance, he may require the purchaser to return the defective goods …'

The actions in the main proceedings and the questions referred for a preliminary ruling

Case C-65/09

16 Mr Wittmer and Weber concluded a contract of sale in respect of polished tiles at a price of EUR 1 382,27. After having had about two thirds of the tiles laid in his house, Mr Wittmer noticed that there was shading on the tiles which was visible to the naked eye.

17 Consequently, Mr Wittmer submitted a complaint, which Weber rejected after consulting the manufacturer of the tiles. In an independent procedure for taking evidence instituted by the claimant, the appointed expert concluded that the shadings were fine micro-brush-marks which could not be removed, so that the only remedy possible was complete replacement of the tiles. The expert estimated the cost of this at EUR 5 830.57.

18 In the absence of a response to his notice addressed to Weber, Mr Wittmer brought an action before the Landgericht Kassel (Regional Court, Kassel) against Weber for delivery of tiles free of defect and payment of EUR 5 830,57. That court ordered Weber to pay Mr Wittmer EUR 273.10, as a reduction of the sales price, and dismissed the action as to the remainder. On appeal against the decision of the Landgericht Kassel

by Mr Wittmer, the Oberlandesgericht Frankfurt (Higher Regional Court, Frankfurt) ordered Weber to deliver a new set of tiles free from defects and to pay Mr Wittmer EUR 2 122,37 for removing and disposing of the defective tiles, and dismissed the action as to the remainder.

19 Weber appealed on a point of law against the judgment of the Oberlandesgericht Frankfurt to the Bundesgerichtshof (Federal Court of Justice), which states that its judgment will depend on whether the appellate court was right to find that Mr Wittmer could seek reimbursement of the cost of removing the defective tiles. Since Mr Wittmer cannot claim such reimbursement under German law, the answer to that question depends on the interpretation of Article 3(2) and the third subparagraph of Article 3(3) of the Directive, in accordance with which Paragraph 439 of the BGB should, if appropriate, be interpreted.

20 The Bundesgerichtshof observes in that regard that the use of the term 'replacement' in Article 3(2) of the Directive may imply the existence of an obligation not just to deliver goods in conformity with the contract of sale, but also to replace the defective goods and therefore to remove them. Furthermore, the obligation to take account of the nature and the purpose of the goods, laid down in Article 3(3), combined with the obligation to bring the goods into conformity, could suggest that the obligation on the seller to replace the goods includes not only the delivery of goods in conformity, but also the removal of the defective goods to allow the use of the replacement goods in a manner consistent with their nature and purpose.

21 The Bundesgerichtshof notes that it would however not be necessary to answer that question if Weber were entitled to refuse to reimburse the cost of removing the tiles which were not in conformity because the cost is disproportionate. That court states that, under Paragraph 439(3) of the BGB, the seller may refuse the type of subsequent performance chosen by the buyer not only where that type of performance would

result in disproportionate cost in comparison to the alternative type of performance ('relative lack of proportionality'), but also where the cost of the method chosen by the buyer, even if it is the only method possible, is inherently disproportionate ('absolute lack of proportionality'). In the present case, the request for subsequent performance by delivery of tiles free from defects is such a case of 'absolute lack of proportionality', since it would oblige Weber to pay, in addition to the cost of the delivery, assessed at EUR 1 200, the cost of removing the defective tiles of EUR 2 100, a total of EUR 3 300, exceeding the threshold of 150 % of the value of the goods free from defects, on the basis of which the proportionality of such a request is a priori evaluated.

22 The Bundesgerichtshof considers, however, that the seller's right, under national law, to refuse subsequent performance because of such absolute lack of proportionality of the cost could be incompatible with Article 3(3) of the Directive, which, as it is worded, seems to refer only to relative lack of proportionality. However, it is not inconceivable that a refusal based on absolute lack of proportionality can be subsumed under the concept of 'impossibility' provided for in Article 3(3), in so far as it should not be assumed that the Directive envisages only cases of physical impossibility and intends to oblige the seller to fulfil supplementary performance even if this does not make economic sense.

23 In those circumstances, the Bundesgerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Are the provisions of the first and second subparagraphs of Article 3(3) of [the Directive] 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 type 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 [the Directive] to be interpreted as meaning that, where the goods are brought into conformity by replacement, the seller must bear the cost 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?'

Case C-87/09

24 Ms Putz and Medianess Electronics concluded a sales contract over the internet for a new dishwasher for the price of EUR 367, plus payment-on-delivery costs of EUR 9.52. The parties agreed on delivery to the door of Ms Putz's house. The delivery of the dishwasher and the payment of the price took place as agreed.

25 After Ms Putz had the dishwasher installed in her house, a defect, which was not attributable to the installation of the machine and could not be repaired, became apparent.

26 The parties then agreed on the replacement of the dishwasher. In this context, Ms Putz demanded that Medianess Electronics not only deliver a new dishwasher, but also that it remove the defective machine and install the replacement machine or that it pay the costs of removal and new installation, which Medianess Electronics refused.

Since Medianess Electronics failed to respond to the notice which she had addressed to it, Ms Putz rescinded the contract of sale.

27 Ms Putz thereupon brought proceedings against Medianess Electronics before the Amtsgericht Schorndorf (Local Court, Schorndorf) seeking reimbursement of the purchase price against return of the defective dishwasher.

28 The order for reference states that, under German law, the validity of the rescission of the contract depends on whether Ms Putz had, to no avail, given Medianess Electronics an effective period of time for subsequent performance of the contract, restricting herself to seeking only that to which she was entitled. Accordingly, the resolution of the present case thus depends upon whether Ms Putz was entitled to demand that the seller remove the defective machine and install the new machine or bear the costs of those operations.

29 The Amtsgericht Schorndorf notes that German law does not oblige a seller who is not at fault to bear the cost of removing defective goods or installing replacement goods, even where the purchaser, before the discovery of the defect, had already installed the defective goods in accordance with their purpose. It considers however that such an obligation may result from the Directive, because it aims to ensure a high level of consumer protection and provides, in the third subparagraph of Article 3(3), that any replacement must be completed without significant inconvenience to the consumer.

30 That court observes that if the purchaser does not have the cost of installing the replacement goods reimbursed, she must bear those costs twice, namely once for the installation of the defective machine, and once for the installation of the replacement goods. If delivery had been in conformity with the contract, she would have had to

pay only once. The court considers that it is certainly conceivable that the seller is obliged to pay the cost of installing the replacement goods only where there is fault on his part. However, the fact that the consumer cannot be found to be at fault and that the defect is more likely attributable to the seller than to the consumer justifies granting the consumer a right irrespective of the seller's fault, as the seller may, in addition, more easily seek redress from the manufacturer.

31 As regards the removal of the defective machine, the referring court states that conformity with the contract means not only the delivery of a machine free from defects, but also that no defective goods be left at the purchaser's home, which supports the interpretation that the seller is obliged to remove such goods. Moreover, defective goods left in the purchaser's home might constitute a considerable inconvenience for the purchaser. Lastly, the word 'replacement', which is referred to in Article 3 of the Directive, seems to indicate that the obligation on the seller is not limited solely to the delivery of replacement goods free from defects but also obliges him to exchange them for the defective goods.

32 In those circumstances the Amtsgericht Schorndorf decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Are the provisions of Article 3(2) and the third subparagraph of Article 3(3) of [the Directive] to be interpreted as precluding a national statutory provision under which the seller, in the event that he has brought consumer goods into conformity with the contract by way of replacement, does not have to bear the cost of installing the subsequently delivered consumer goods into a thing into which the consumer has, in a manner consistent with their nature and purpose, incorporated the consumer goods not in conformity, if installation was not originally a contractual requirement?

2. Are the provisions of Article 3(2) and the third subparagraph of Article 3(3) of [the Directive] to be interpreted as meaning that the seller, in the event that he has brought consumer goods into conformity with the contract by way of replacement, must bear the costs of removing the consumer goods not in conformity from a thing into which the consumer has, in a manner consistent with their nature and purpose, incorporated them?'

Joinder of the cases

33 Having regard to the connexity between Case 65/09 and Case C-87/09, it is appropriate, in accordance with Article 43 of the Rules of Procedure, read in conjunction with Article 103 of those rules, to join those cases for the purpose of the judgment.

Consideration of the questions referred

Admissibility of the questions in Case C-65/09

34 Weber argues that both questions referred in Case C-65/09 are inadmissible. The first question is hypothetical, because the answer is not relevant to the outcome of the dispute in the main proceedings. German law does not oblige a seller who is not at fault to remove goods not in conformity, so that the claim for reimbursement of the cost of that removal would have to be rejected, irrespective of the amount of the cost. The inadmissibility of the first question also entails the inadmissibility of the second

question, since the referring court made the second question conditional on the first question being answered in the affirmative.

35 It should be recalled that in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions referred concern the interpretation of European Union law, the Court is in principle bound to give a ruling (see, inter alia, Case C-419/04 Conseil général de la Vienne [2006] ECR I-5645, paragraph 19; Case C-119/05 Lucchini [2007] ECR I-6199, paragraph 43; and Case C-52/09 TeliaSonera [2011] ECR I-527, paragraph 15).

36 The Court may refuse to rule on a question referred for a preliminary ruling from a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or 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 submitted to it (see, inter alia, *Conseil général de la Vienne*, paragraph 20; *Lucchini*, paragraph 44; and *TeliaSonera*, paragraph 16).

37 It is clear, however, that this is not so in the present case.

38 By its questions, the Bundesgerichtshof is seeking an interpretation of the Directive precisely in order to determine whether national law is compatible with the Directive, in so far as that law, first, does not oblige the seller to bear the cost of removing goods

which are not in conformity and, second, allows the seller the possibility of refusing to deliver replacement goods if that delivery gives rise, particularly because of that cost, to disproportionate expense. In addition, the order for reference states that the answers to the questions submitted are decisive for the outcome of the main proceedings, since the Bundesgerichtshof states that it can interpret that law, if appropriate, in accordance with the Directive. The order in which the questions are put is irrelevant in this context. In that last regard, it should also be noted that Weber itself submitted in its observations on the substantive issues that, in order to answer the first question, it was important to know the extent of the obligation to replace goods not in conformity resulting from Article 3(3) of the Directive, and therefore to have an answer to the second question, and it suggested that that question be examined first.

39 Consequently, the objection of inadmissibility raised by Weber must be rejected.

The obligation on the seller to bear the cost of removing the goods not in conformity and installing replacement goods

40 By the second question in Case C-65/09 and the first and second question in Case C-87/09, which should be considered together, the referring courts are asking whether Article 3(2) and the third subparagraph of Article 3(3) of the Directive are to be interpreted as meaning that, where consumer goods not in conformity which, before the defect became apparent, were installed by the consumer in a manner consistent with their nature and purpose are brought into conformity by way of replacement, the seller is obliged either himself to remove the goods from where they were installed and to install the replacement goods there or else to bear the cost of the removal and installation of the replacement goods, notwithstanding the fact that under

the contract of sale the seller was not obliged to install the consumer goods originally purchased.

41 Weber and the German, Belgian and Austrian Governments consider that those questions must be answered in the negative. They consider that the term 'replacement' used in the first subparagraph of Article 3(2) of the Directive refers only to delivery of goods which are in conformity with the contract of sale and that that article cannot therefore impose obligations not provided for by the contract on the seller. Nor do such obligations to remove defective goods and to install replacement goods arise from Article 3(3) and (4), according to which replacement should take place 'free of charge' and 'without significant inconvenience to the consumer'. Those conditions only relate to delivery of the replacement goods and are not intended to impose obligations on the seller which go beyond those in the contract, or to protect the consumer from expense and inconvenience resulting from the use he had made, under his own responsibility, of the goods not in conformity. The damage caused as a result of the installation of the defective goods by the consumer does not therefore fall within the scope of the Directive but should be claimed, where appropriate, on the basis of the applicable national law on contractual liability.

42 The Polish and Spanish Governments and the Commission take the opposite view. The Spanish Government considers that the seller should bear all the costs associated with the replacement of the defective goods, including the cost of removing those goods and of installing the replacement goods, failing which the consumer would have to bear those costs twice, which would be incompatible with the high level of protection aimed at by the Directive. The Polish Government points out that the objective of Article 3(3) and (4) of the Directive is to ensure that the consumer does not bear any cost for the implementation of the legal protection measures provided for in the first place by the Directive, namely the repair or replacement of the goods not in conformity. According to the Commission, the parallelism in Article 3(2) and (3) of the Directive of the two methods of bringing defective goods into conformity suggests that replacement, just as repair, relates to goods in the situation in which they are when the lack of conformity becomes apparent. If the goods not in conformity

have already been installed in a manner consistent with their nature and purpose, it is in that situation that they should be brought into conformity. The replacement must therefore be carried out so that the new goods are placed in the same situation as that of the defective goods. In addition, the fact that the consumer must, if the goods not in conformity are not removed by the seller, keep those goods and cannot use the replacement goods, due to the fact that replacement goods are not installed, represents 'significant inconvenience to the consumer' within the meaning of Article 3(3).

43 As a preliminary point, it should be borne in mind that, under Article 3(1) of the Directive, the seller is to be liable to the consumer for any lack of conformity in the goods at the time when they are delivered.

44 Article 3(2) of the Directive lists the rights which the consumer may rely on against the seller in cases where the goods delivered are not in conformity. In the first place, the consumer has the right to require the goods to be brought into conformity. If that is not possible, he may subsequently seek a reduction in the price or rescission of the contract.

45 As regards the bringing into conformity of the goods, Article 3(3) of the Directive states that the consumer is entitled to require the seller to repair the goods or to replace them – in either case free of charge – unless that is impossible or disproportionate.

46 The Court has already had occasion to note that it thus follows from the wording of Article 3 of the Directive, as well as from the related travaux préparatoires, that the European Union legislature intended to make the 'free of charge' aspect of the seller's obligation to bring goods into conformity an essential element of the protection afforded to consumers by that directive. The 'free of charge' requirement attaching to the seller's obligation to bring the goods into conformity, whether by repair or replacement, is intended to protect consumers from the risk of financial burdens which might dissuade them from asserting their rights in the absence of such protection (see Case C-404/06 *Quelle* [2008] ECR I-2685, paragraphs 33 and 34).

47 It is clear that if the consumer, in the event that goods not in conformity are replaced, could not require the seller to bear the cost of removing the goods from where they had been installed in a manner consistent with their nature and purpose, and of installing the replacement goods in the same place, that replacement would impose an additional financial burden on him that he would not have had to bear if the seller had correctly performed the contract of sale. If the seller had from the outset delivered goods in conformity with the contract, the consumer would only have had to bear the installation costs once and would not have had to bear the cost of removing the defective goods.

48 Interpreting Article 3 of the Directive as not obliging the seller to bear the cost of removing the goods not in conformity and installing the replacement goods would thus have the consequence that the consumer, in order to exercise the rights conferred on him by that article, would have to bear those additional costs resulting from the delivery by the seller of goods not in conformity.

49 In such a case, contrary to Article 3(2) and (3) of the Directive, the goods would not be replaced free of charge to the consumer.

50 It is true that the costs of removing goods not in conformity and installing replacement goods are not among those specifically laid down in Article 3(4) of the Directive, which defines the expression 'free of charge' as referring to 'the necessary costs incurred to bring the goods into conformity, particularly the cost of postage, labour and materials'. However, the Court has already held that it follows from the use by the European Union legislature of the adverb 'particularly' that that list is illustrative, not exhaustive (see *Quelle*, paragraph 31). Furthermore, those costs are from this point necessary so that the goods not in conformity can be replaced and are therefore 'necessary costs incurred to bring the goods into conformity' within the meaning of Article 3(4).

51 Furthermore, as the Commission points out, it is apparent from the scheme of Article 3(2) and (3) of the Directive that both methods of bringing into conformity set out in that article seek to ensure the same level of consumer protection. It is common ground that the repair of goods not in conformity is carried out, as a general rule, on those goods in the situation in which they are at the time the defect becomes apparent, so that the consumer, in that case, does not bear the cost of removal and new installation.

52 It should also be noted that, pursuant to Article 3(3) of the Directive, the repair and replacement of goods not in conformity is to be completed not only free of charge but also within a reasonable time and without significant inconvenience to the consumer. Those three requirements are the expression of the clear resolve of the European Union legislature to provide effective protection to consumers (see, to that effect, *Quelle*, paragraph 35).

53 Having regard to that intention of the legislature, the term 'without significant inconvenience to the consumer' in the third subparagraph of Article 3(3) of the Directive cannot be interpreted in the restrictive manner proposed by the German, Belgian and Austrian Governments. Accordingly, there is no doubt that the fact that the goods not in conformity are not removed and that the replacement goods are not installed by the seller can be a significant inconvenience to the consumer, in particular in situations

such as those at issue in the main proceedings in which, to be used in accordance with their usual purpose, the replacement goods must first be installed, which requires prior removal of the goods not in conformity. Furthermore, the third subparagraph of Article 3(3) explicitly states that account must be taken 'of the nature of the goods and the purpose for which the consumer required the goods'.

54 With regard to the term 'replacement', it should be noted that its precise scope varies in the different language versions. While in some of those language versions, such as the Spanish ('sustitución'), English ('replacement'), French ('remplacement'), Italian ('sostituzione'), Dutch ('vervanging') and Portuguese ('substituição'), that term refers to the operation as a whole, on completion of which the goods not in conformity must actually be 'replaced', thus obliging the seller to undertake all that is necessary to achieve that result, other language versions, such as in particular the German language version ('Ersatzlieferung'), might suggest a slightly narrower reading. However, as the referring courts point out, even in the German language version, the term is not restricted to the mere delivery of replacement goods and could, on the contrary, indicate that there is an obligation to substitute those goods for the goods not in conformity.

55 In addition, interpreting Article 3(2) and (3) of the Directive as meaning that it obliges, in the event of the replacement of goods not in conformity, the seller to bear the cost of removing the goods from where the consumer had installed them in a manner consistent with their nature and purpose, before the defect became apparent, and installing the replacement goods is consistent with the purpose of the Directive, which, as stated in recital 1 in its preamble, is to ensure a high level of consumer protection.

56 It should be borne in mind, in that context, that such interpretation does not lead to an inequitable outcome. Even assuming that the non-conformity of goods does

not result from the fault of the seller, the fact remains that by delivering goods not in conformity the seller fails correctly to perform the obligation which he accepted in the contract of sale, and must therefore bear the consequences of that faulty performance. On the other hand, the consumer, for his part, paid the selling price and therefore correctly performed his contractual obligations (see, to that effect, *Quelle*, paragraph 41). In addition, the fact that the consumer, confident in the conformity of the goods delivered, installed the defective goods, in good faith, in a manner consistent with their nature and purpose, before the defect became apparent, cannot be held against him as a fault.

57 Accordingly, in a situation where neither party to the contract is at fault, it is justified to make the seller bear the cost of removing the goods not in conformity and installing the replacement goods, since those additional costs, first, would have been avoided if the seller had at the outset correctly performed his contractual obligations and, second, are now necessary to bring the goods into conformity.

58 Moreover, the seller's financial interests are protected, not only by the two-year time-limit laid down in Article 5(1) of the Directive and by the fact that, under the second subparagraph of Article 3(3) of the Directive, the seller may refuse to replace the goods where that remedy would be disproportionate in that it would impose unreasonable costs on him (see *Quelle*, paragraph 42) but also by the right of redress, reaffirmed in Article 4 of the Directive, against the person or persons liable in the same contractual chain. The fact that the Directive makes the seller liable to the consumer for any lack of conformity which exists at the time the goods are delivered (see *Quelle*, paragraph 40) is thus compensated by the fact that the seller can, in accordance with the applicable rules of national legislation, pursue remedies against the producer, a previous seller in the same chain of contracts or any other intermediary.

59 That interpretation of Article 3(2) and (3) of the Directive is independent of the issue of whether, under the contract of sale, the seller was obliged to install the goods delivered. While the contract of sale determines, pursuant to Article 2 of the Directive, the conformity of the goods and therefore, in particular, what constitutes a lack of conformity, the fact remains that, in the event that there is such a defect, the seller's obligations arising from the faulty performance of that contract result not only from the contract, but above all from the rules pertaining to consumer protection, in particular Article 3 of the Directive, which impose obligations whose scope is independent of the contract and which may in some cases exceed those provided for by the contract.

60 The rights thus conferred on consumers by Article 3 of the Directive, which do not seek to place consumers in a more favourable position than they could claim under the contract of sale, but merely to re-establish the situation which would have prevailed if the seller had delivered goods in conformity at the outset, are, pursuant to Article 7 of the Directive, binding on the seller. Furthermore, as follows from Article 8(2) of the Directive, the protection provided by it is a minimum and, although Member States may adopt more stringent provisions, they may not undermine the guarantees laid down by the European Union legislature (see *Quelle*, paragraph 36).

61 Lastly, if the seller does not himself remove the goods not in conformity and install the replacement goods, it is for the national court to determine the costs necessary for removal and installation, for which the consumer may claim reimbursement.

62 It follows from all of the foregoing considerations that Article 3(2) and (3) of the Directive is to be interpreted as meaning that, where consumer goods not in conformity with the contract which were installed in good faith by the consumer in a manner consistent with their nature and purpose, before the defect became apparent, are restored to conformity by way of replacement, the seller is obliged either himself to remove the goods from where they were installed and to install the replacement

goods there or else to bear the cost of that removal and installation of the replacement goods. That obligation on the seller exists regardless of whether he was obliged under the contract of sale to install the consumer goods originally purchased.

The possibility for the seller to refuse to bear the cost of removing defective goods and installing replacement goods where the cost is disproportionate

63 By its first question in Case C-65/09, the referring court essentially asks whether the first and second subparagraphs of Article 3(3) of the Directive must be interpreted as precluding the seller from being able, under national law, to refuse to replace goods not in conformity on the ground that replacement would impose costs on him, because of the obligation to remove the goods from where they have been installed and to install the replacement goods there, that are disproportionate with regard to the value that the goods would have if there were no lack of conformity and to the significance of the lack of conformity.

64 Weber, as well as the Austrian and German Governments propose that that question should be answered in the negative. They consider that the aim of the Directive cannot be to require the seller to bear economically unreasonable costs in the event that there is only one remedy available. Furthermore, there is nothing in the wording of Article 3(3) to shed light on that situation. In addition, in such a case, in accordance with the scheme of that article, recourse should be had *a fortiori* to the criteria laid down in the second subparagraph of Article 3(3), the list of which is not exhaustive. Furthermore, if a comparison with the cost of the alternative remedy is indeed impossible, a possible disproportionality can however be examined with the aid of the other criteria enumerated in that subparagraph. In any event, in view of the purpose

of that provision, which is to protect the seller from economically unreasonable disadvantages, that provision should be given an interpretation which also ensures such protection if there is no alternative remedy available.

65 By contrast, the Belgian, Spanish and Polish Governments and the Commission argue in favour of an affirmative answer to that question. They argue that it is clear from the wording of the second subparagraph of Article 3(3) of the Directive that the article refers only to relative lack of proportionality, which is furthermore confirmed by recital 11 in the preamble to the directive. The objective of that provision is to avoid the consumer being able to abuse his rights by requiring one method of bringing into conformity of the seller when the other method would be less onerous for the seller and would lead to the same result. While both methods of bringing into conformity aim to guarantee the same interests of the consumer, namely the performance of the contractual obligations and the availability of goods in conformity, the alternative remedies of price reduction or rescission of the contract do not allow the protection of those same interests. If the seller can refuse the only remedy possible because of its absolute lack of proportionality, the consumer has only those alternative remedies at his disposal, contrary to the scheme of Article 3, which gives priority to maintaining the reciprocity of the obligations arising from the contract of sale, and to the purpose of the Directive, which is to ensure a high level of consumer protection. The Commission adds, however, that it is not excluded that in extreme cases, where the only possible remedy involves a cost which is highly disproportionate in relation to the interest of the consumer in being compensated, there is an instance of impossibility, within the meaning of the first subparagraph of Article 3(3) of the Directive.

66 In this respect, it should be recalled that, pursuant to the first subparagraph of Article 3(3) of the Directive, the consumer may in the first place require the seller to repair the goods or to replace them, in either case free of charge, unless this is impossible or disproportionate.

67 The second subparagraph of Article 3(3) states that a remedy shall be deemed to be disproportionate if it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable, taking into account 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 consumer.

68 The conclusion must therefore be that, although the first subparagraph of Article 3(3) is, in principle, formulated in a manner which is sufficiently broad to cover cases of absolute lack of proportionality, the second subparagraph of Article 3(3) defines the term 'disproportionate' exclusively in relation to the other remedy, thus limiting it to cases of relative lack of proportionality. Furthermore, it is clear from the wording and purpose of Article 3(3) of the Directive that it refers to two remedies provided for in the first place, namely the repair or replacement of the goods not in conformity.

69 Those findings are corroborated by recital 11 in the preamble to the Directive, which states that a remedy is disproportionate if it imposes, in comparison with the other remedy, unreasonable costs and that, 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.

70 While it is true that, as Weber and the German Government submit, certain language versions of recital 11, including in particular the German language version, are slightly ambiguous in that they refer to 'other remedies', in the plural, the fact remains that a large number of language versions, such as the English, French, Italian, Dutch and Portuguese, do not leave any doubt as to the fact that the legislature intended to refer in that recital, as in Article 3(3) of the Directive, which is worded in all those language

versions, including the German, in the singular, only to the other remedy provided for in the first place by that provision, namely the repair of the goods not in conformity.

71 It is consequently apparent that the European Union legislature intended to give the seller the right to refuse repair or replacement of the defective goods only if this is impossible or relatively disproportionate. If only one of the two remedies is possible, the seller may therefore not refuse the only remedy which allows the goods to be brought into conformity with the contract.

72 That choice made by the European Union legislature in the second subparagraph of Article 3(3) of the Directive, as pointed out by the Belgian and Polish Governments and the Commission, derives from the fact that the Directive favours, in the interest of both parties to the contract, the performance thereof by means of the two remedies provided for in the first place, rather than cancellation of the contract or reduction in the selling price. The choice is explained, in addition, by the fact that generally those two last alternative remedies do not ensure the same level of protection for consumers as the bringing into conformity of the goods.

73 Although the second subparagraph of Article 3(3) of the Directive consequently precludes national legislation from granting the seller the right to refuse the only possible remedy because of its absolute lack of proportionality, that article nevertheless allows effective protection of the legitimate financial interests of the seller, which is additional, as stated in paragraph 58 of the present judgment, to the protection provided for in Articles 4 and 5 of the Directive.

74 It must be observed in that regard that, concerning in particular the specific situation referred to by the referring court, in which replacement of the defective goods, as the only possible remedy, involves disproportionate costs because of the need to remove

the goods not in conformity from where they were installed and to install the replacement goods, Article 3(3) of the Directive does not preclude the consumer's right to reimbursement of the cost of removing the defective goods and installing the replacement goods from being limited, where necessary, to an amount proportionate to the value the goods would have if there were no lack of conformity and the significance of the lack of conformity. Such limitation leaves intact the consumer's right to seek replacement of goods not in conformity.

75 In that context, it must be pointed out that Article 3 aims to establish a fair balance between the interests of the consumer and the seller, by guaranteeing the consumer, as the weak party to the contract, complete and effective protection from faulty performance by the seller of his contractual obligations, while enabling account to be taken of economic considerations advanced by the seller.

76 In considering whether, in the case in the main proceedings, it is appropriate to reduce the consumer's right to reimbursement of the costs of removing the goods not in conformity and of installing the replacement goods, the referring court will therefore have to bear in mind, first, the value the goods would have if there were no lack of conformity and the significance of the lack of conformity, and secondly, the Directive's purpose of ensuring a high level of protection for consumers. The possibility of making such a reduction cannot therefore result in the consumer's right to reimbursement of those costs being effectively rendered devoid of substance, in the event that he had installed in good faith the defective goods, in a manner consistent with their nature and purpose, before the defect became apparent.

77 Finally, in the event that the right to reimbursement of those costs is reduced, the consumer should be able to request, instead of replacement of the goods not in conformity, an appropriate price reduction or rescission of the contract, pursuant to the last indent of Article 3(5) of the Directive, since the fact that a consumer cannot have

the defective goods brought into conformity without having to bear part of these costs constitutes significant inconvenience for the consumer.

78 It follows from all of the foregoing that Article 3(3) of the Directive must be interpreted as precluding national legislation from granting the seller the right to refuse to replace goods not in conformity, as the only remedy possible, on the ground that, because of the obligation to remove the goods from where they were installed and to install the replacement goods there, replacement imposes costs on him which are disproportionate with regard to the value that the goods would have if there were no lack of conformity and to the significance of the lack of conformity. That provision does not, however, preclude the consumer's right to reimbursement of the cost of removing the defective goods and of installing the replacement goods from being limited, in such a case, to the payment by the seller of a proportionate amount.

Costs

79 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national courts, the decision on costs is a matter for those courts. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **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 must be interpreted as meaning that, where consumer goods not in conformity with the contract which were installed in good faith by the consumer in a manner consistent with their nature and purpose, before the defect became apparent, are restored to conformity by way of replacement, the seller is obliged either to remove the goods from where they were installed and to install the replacement goods there or else to bear the cost of that removal and installation of the replacement goods. That obligation on the seller exists regardless of whether he was obliged under the contract of sale to install the consumer goods originally purchased.**

2. **Article 3(3) of Directive 1999/44 must be interpreted as precluding national legislation from granting the seller the right to refuse to replace goods not in conformity, as the only remedy possible, on the ground that, because of the obligation to remove the goods from where they were installed and to install the replacement goods there, replacement imposes costs on him which are disproportionate with regard to the value that the goods would have if there were no lack of conformity and the significance of the lack of conformity. That provision does not, however, preclude the consumer's right to reimbursement of the cost of removing the defective goods and of installing the replacement goods from being limited, in such a case, to the payment by the seller of a proportionate amount.**

[Signatures]