

## European Union, CJEU, Weber & Putz, judgement 16 June 2011

### Deciding bodies and decisions

Federal Court of Justice  
Court of Justice of European Union

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### Area of law

Consumer protection

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### Subject matter

ex officio power of judge  
effective remedy - proportionality

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### Summary Facts Of The Case

Mr Wittmer and Weber concluded a contract of sale in respect of polished tiles. 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 clearly visible. The only possible remedy was complete replacement of the tiles, which was on charge of the seller. Added to the replacement, Mr Wittmer asked the seller to remove the defective goods and replace them on the floor. Since the seller refused, Mr Wittmer had it done by another professional and then sought to recover the cost of removal from the seller. The Regional Court of Kassel ordered Weber to pay Mr Wittmer only a reduction of the sales price, and dismissed the action as to the remainder. On appeal against the decision by Mr Wittmer, the Higher Regional Court of Frankfurt ordered Weber to deliver a new set of tiles free from defects and to pay Mr Wittmer half of the cost for removing and disposing of the defective tiles, and dismissed the action as to the remainder.

Weber appealed to the Federal Court of Justice, which states that its judgment will 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.

Thus, on 14 January 2009, the Federal Court of Justice decided to stay the proceedings and to refer the following questions:

“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)?  
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?”

On, 16 June 2011 the CJEU decided the case. The CJEU started its reasoning from art 3(3) of the Consumer Sales Directive affirming that “bringing into conformity of the goods” means that the consumer is entitled to require the seller to repair the goods or to replace them unless that is impossible or disproportionate. The fact that the obligation to bring the goods into conformity should be ‘free of charge’ was intended to protect consumers from the risk of financial burdens which might dissuade them from asserting their rights in the absence of such protection.

The CJEU then affirmed that 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.

However, the possibility to refuse repair or replacement may be invoked by the seller if these are 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. This is justified as it allows effective protection of the legitimate financial interests of the seller, which is additional to the protection provided for in Articles 4 and 5 of the Directive.

Then the decision of the CJEU was the following:

“Article 3(2) and (3) of Directive 1999/44/EC 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.

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.”

The Federal Court of Justice then decided the case on 21 December 2011. The Federal court followed the reasoning of the CJEU and accommodated the new prerequisites within the statutory framework in relation to the obligation to remove the defective goods: § 439(1) BGB that allows consumers to claim free delivery of a conforming good was broadly interpreted to encompass also de-installation and removal of the non-conforming goods. However, as regards the specific content of § 439(3) BGB, the Federal Court asked the legislator to intervene and change the content of the provision. In the decision, the Federal court provided for a case specific solution, based on the consumer protection objective, prohibiting the seller to refuse to provide a first tier remedy on the grounds of disproportionality if the other first tier remedy is impossible. Then the Federal Court divided the replacement costs between the parties, as a result of the seller having to provide replacement at a high cost to himself, which then allows him to claim that the consumer’s right of reimbursement should be limited.

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### Notes on the remedies dimension

The CJEU introduced a set of criteria regarding the remedies available for consumers in case of defective goods. First, the reimbursement of the cost replacement is limited, as the seller may refuse it if it is significantly disproportionate. Second, the national courts may reduce the consumer's right to reimbursement. Third, the seller cannot refuse the repair or the substitution of the defective goods on the basis that this would involve absolutely disproportionate cost. Finally, in case of reduction of reimbursement cost (on the basis of judge's decision) the buyer should be able to choose either price reduction or rescission, instead of replacement.

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### Impact on Jurisprudence

See that the CJEU decision had an impact of foreign jurisprudence:

#### **Netherlands**

Rechtbank Overijssel, 22 January 2014, ECLI:NL:RBOVE:2014:500. The decision assessed whether non-conformity of goods could be recognized and the consequences in terms of allocation of replacement cost regarding defective swimming pools. The District Court affirmed that the swimming pools were non-conforming as per the contract, taking into account the timely notifications of the consumers about the non-conformity in order to rectify the defect by enabling many attempts to repair the swimming pools. The District court, then in the assessment of the costs, mentioned the CJEU's decision in Weber and Putz and decided what should be determined as 'proportional' limitation of the reimbursement. Although the reasoning seemed to allocate a very strong responsibility on the seller, the District court decided in the end that the consumer had to contribute 75% of the replacement costs, allocating on the consumer a very high contribution.

#### **Bulgaria**

Supreme Administrative court, 14 December 2012, n. 11172/2012. The case addressed the appeal of a commercial company trading cell phones against the decision of the lower administrative court issuing the obligation to replace a cell phone by a new one or to refund the amount paid by the consumer. The decision, though not mentioning explicitly the CJEU decision in Weber and Putz, consistently apply the reasoning of the court as regards the interpretation of directive 99/44. The Supreme administrative court affirmed that the request of the consumer to replace the commodity with a new one, after several failed repairs, is not disproportionate in the light of art 112, par. 1 of Bulgarian Consumer Protection Act.

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### Sources - EU and national law

Directive 1999/44

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