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ECLI:EU:C:2019:447

JUDGMENT OF THE COURT (First Chamber)

23 May 2019 (*)

(Reference for a preliminary ruling — Consumer protection — Directive 1999/44/EC — Lack of conformity of the goods delivered — Article 3 — Right of the consumer to repair or replacement of the goods free of charge, within a reasonable time and without any significant inconvenience — Determination of where the consumer must make goods acquired under a distance contract available to the seller to be brought into conformity — Concept of bringing the goods into conformity ‘free of charge’ — Right of the consumer to rescind the contract)

In Case C-52/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Amtsgericht Norderstedt (District Court, Norderstedt, Germany), made by decision of 27 December 2017, received at the Court on 29 January 2018, in the proceedings

Christian Füllä

v

Toolport GmbH

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, C. Toader, A. Rosas, L. Bay Larsen and M. Safjan (Rapporteur), Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the German Government, by T. Henze, M. Hellmann, J. Möller and A. Berg, acting as Agents,
- the French Government, by D. Colas, J. Traband and A.-L. Desjonquères, acting as Agents,
- the European Commission, by N. Ruiz García and M. Noll-Ehlers, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 January 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns 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 (OJ 1999 L 171, p. 12).

2 The request has been made in proceedings between Mr Christian Fülle and Toolport GmbH, a company incorporated under German law, concerning a claim for reimbursement, of the purchase price of a tent, made by Mr Fülle in the exercise of his right to rescind the sale contract.

Legal context

European Union law

3 Under recitals 1 and 10 to 12 of Directive 1999/44:

‘(1) 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];

...

(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;

(12) Whereas in cases of a lack of conformity, the seller may always offer the consumer, by way of settlement, any available remedy; whereas it is for the consumer to decide whether to accept or reject this proposal’.

4 Article 1 of that directive, entitled ‘Scope and definitions’, provides, in paragraph 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.’

5 Article 2 of that directive, entitled ‘Conformity with the contract’, provides in paragraph 1 thereof:

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

6 Article 3 of the directive, entitled ‘Rights of the consumer’, reads as follows:

‘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.’

7 Article 8 of Directive 1999/44, entitled ‘National law and minimum protection’, provides, in paragraph 2 thereof:

‘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.’

German law

8 Directive 1999/44 was transposed into German law by way of amendments to the Bürgerliche Gesetzbuch (German Civil Code; ‘the BGB’). Article 269 of the BGB, entitled ‘Place of performance’, states:

‘1. Where no place of performance has been specified or is evident from the circumstances, in particular from the nature of the obligation, performance must be made in the place where the obligor had his residence at the time when the obligation arose.

2. If the obligation arose in the commercial undertaking of the obligor, the place of the commercial undertaking takes the place of the residence if the obligor maintained his commercial undertaking at another place.

3. From the sole circumstance that the obligor has assumed the costs of transport it may not be concluded that the place to which shipment is to be made is to be the place of performance.’

9 Article 439 of the BGB, entitled ‘Repair’, in the version applicable to the main proceedings, provided:

‘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, including in particular the costs of transport, carriage, labour and materials.

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.’

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

10 On 8 July 2015, Mr Fülle bought from Toolport, by telephone, a tent measuring 5 metres by six.

11 After the tent was delivered to Mr Fülle's place of residence, he found that the tent was not in conformity and thus asked Toolport to bring it into conformity at his residence. He neither returned it to Toolport nor proposed to do so. For its part, Toolport rejected Mr Fülle's complaints regarding the lack of conformity of the tent, regarding them as unfounded. At the same time, it failed to inform Mr Fülle that the tent had to be returned to Toolport's place of business and did not offer to advance the cost of that return to him.

12 At that stage, the parties did not discuss the place where the tent was to be brought into conformity. Furthermore, the contract concluded between the parties did not make any provision in that regard.

13 In those circumstances, Mr Fülle requested the rescission of the contract and reimbursement of the purchase price of the tent as consideration for his returning the item.

14 Since Toolport failed to comply with that request, Mr Fülle brought an action before the Amtsgericht Norderstedt (Local Court, Norderstedt, Germany).

15 During the proceedings before that court, Toolport claimed, for the first time, that its place of business was the place where the item in question was to be brought into conformity.

16 In the view of the referring court, the determination of the place where the goods at issue are brought into conformity is essential in order to ascertain whether Mr Fülle has given Toolport an opportunity to repair or replace the item or a 'reasonable time' within the meaning of Article 3(5) of Directive 1999/44 to be able to have the contract rescinded in accordance with that provision.

17 In that regard, the referring court points out that, under German law, the place where goods are brought into conformity is determined in accordance with Article 269 of the BGB, according to which what is decisive is, first of all, what has been agreed between the parties. In the absence of any contractual agreement as to that place, regard must be had to the circumstances of the specific case, in particular the nature of the obligation in question. If no conclusive findings can be drawn therefrom, the place where goods are brought into conformity must be the place where the obligor was domiciled or had its commercial establishment at the time when the obligation arose.

18 Consequently, the referring court notes that, in the light of the case-law of the Bundesgerichtshof (Federal Court of Justice, Germany), Article 269 of the BGB must be interpreted as meaning that, in the present case, the consumer is required to place the item in question at the disposal of the seller at its place of business, so that it may be brought into conformity.

19 Nevertheless, the referring court expresses doubts as to the compatibility of such an interpretation with Directive 1999/44, stating that, having regard to the characteristics of the item in question, the organisation of the transport is likely to be a 'significant inconvenience' for the consumer within the meaning of Article 3(3) of that directive.

20 According to that court, the place where goods are brought into conformity which is the most appropriate place for ensuring the broadest protection of the consumer is the place where those goods are located. Such an approach would enable the seller itself to arrange to examine the item in the most efficient manner. The seller could thus examine the item at the place where it is located or have the item sent to it at its expense and in accordance with its instructions.

21 By contrast, determination of the place where goods are brought into conformity on the basis of the circumstances of each individual case should, in the view of that court, be excluded since it creates legal uncertainty, at least for the consumer.

22 The referring court is also uncertain as to whether the principle that goods must be brought into conformity free of charge, laid down in the first subparagraph of Article 3(3) of Directive 1999/44, covers the consumer's right to request the seller to advance to him the transport costs of those goods to the seller's place of business in order to enable the seller to repair or replace the goods.

23 In those circumstances, the Amtsgericht Norderstedt (Local Court, Norderstedt) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling.

(1) Is the third subparagraph of Article 3(3) of Directive 1999/44/EC to be interpreted as meaning that a consumer must in all cases offer goods acquired under a distance contract to an undertaking in order to enable repair or replacement only at the place where the goods are located?

(2) If Question 1 is answered in the negative:

Is the third subparagraph of Article 3(3) of Directive 1999/44 to be interpreted as meaning that a consumer must in all cases offer goods acquired under a distance contract to an undertaking in order to enable repair or replacement at the undertaking's place of business?

(3) If Question 2 is answered in the negative:

What criteria can be derived from the third subparagraph of Article 3(3) of Directive 1999/44 as regards how to specify the place where the consumer must offer goods acquired under a distance contract to the undertaking in order to enable repair or replacement?

(4) If the place where the consumer must offer goods acquired under a distance contract to an undertaking for examination and to enable repair is — in all cases or in this specific case — the undertaking's place of business:

Is it compatible with the first subparagraph of Article 3(3) of Directive 1999/44, in conjunction with Article 3(4) thereof, for a consumer to have to pay the costs of outward and/or return transport, or does it follow from the requirement 'to repair free of charge' that the seller is required to make an advance payment?

(5) If the place where the consumer must offer goods acquired under a distance contract to an undertaking for examination and to enable repair is — in all cases or in this specific case — the undertaking's place of business and a requirement for the consumer to pay costs in advance is compatible with the first subparagraph of Article 3(3) of Directive 1999/44, in conjunction with Article 3(4) thereof:

Is the third subparagraph of Article 3(3) of Directive 1999/44, in conjunction with the second indent of Article 3(5) thereof, to be interpreted as meaning that a consumer who has merely notified a defect to the undertaking is not entitled to have a contract rescinded without offering to transport the goods to the place where the undertaking is located?

(6) If the place where the consumer must offer goods acquired under a distance contract to an undertaking for examination and to enable repair is — in all cases or in this specific case — the undertaking's place of business and a requirement for the consumer to pay costs in advance is not compatible with the first subparagraph of Article 3(3) of Directive 1999/44, in conjunction with Article 3(4) thereof:

Is the third subparagraph of Article 3(3) of Directive 1999/44, in conjunction with the second indent of Article 3(5) thereof, to be interpreted as meaning that a consumer who has merely notified a defect to the undertaking is not entitled to have a contract rescinded without offering to transport the goods to the place where the undertaking is located?

Admissibility of the request for a preliminary ruling

24 The German Government takes the view that the admissibility of the request for a preliminary ruling is doubtful in that both the statement of facts and the presentation of the relevant provisions of national law are rudimentary and that the relevance of the questions referred for the resolution of the dispute cannot be inferred from the facts alone.

25 In that regard, it should be recalled that, according to the Court's settled case-law, where the questions submitted concern the interpretation of EU law, the Court is in principle required to give a ruling. It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU 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 (judgment of 7 March 2018, *flightright and Others*, C-274/16, C-447/16 and C-448/16, C-74/16, EU:C:2018:160, paragraph 46 and the case-law cited).

26 In the present case, first, the statement in the order for reference of the facts of the dispute in the main proceedings, set out in paragraphs 10 to 15 of this judgment, and the presentation of the relevant national legal framework, referred to in paragraphs 8 and 9 of this judgment, are sufficiently clear and complete to enable the Court to give a useful answer to the questions submitted to it.

27 Second, as is apparent from paragraphs 16 to 22 of this judgment, the referring court sets out the reasons which have led it to ask the Court of Justice about the interpretation of the scope of the consumer's rights under Article 3 of Directive 1999/44 in the context of the dispute in the main proceedings and, in particular, the need, for the resolution of that dispute, to determine where the consumer is required to make an item acquired under a distance contract available to the seller for it to be brought into conformity.

28 It follows therefrom that the reference for a preliminary ruling is admissible.

Consideration of the questions referred

The first three questions

29 By its first three questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 3(3) of Directive 1999/44 must be interpreted as meaning that the place where the consumer is required to make an item acquired under a distance contract available to the seller in order to be brought into conformity, pursuant to that provision, is always the place

where the item is located or, if that is not the case, is always the place where the vendor's business is situated or, if not, it asks what criteria emerge from that provision for the determination of that place.

30 As a preliminary point, it must be borne in mind that, by virtue of Article 3(2) of Directive 1999/44, in cases where the goods delivered are not in conformity, the consumer has the right to require either the goods to be brought into conformity, by repair or replacement, in accordance with Article 3(3) of that directive, or, if that is not possible, an appropriate reduction in the price or the rescission of the contract, in accordance with Article 3(5) and (6) thereof (see, to that effect, judgment of 17 April 2008, *Quelle*, C-404/06, EU:C:2008:231, paragraph 27).

31 The first and third subparagraphs of Article 3(3) of that directive state that, 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. To that end, any repair or replacement must 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.

32 In that regard, it must be noted that, although Article 3(3) of Directive 1999/44 does not specify the place where goods not in conformity are to be made available to the seller to be repaired or replaced, the fact remains that that provision lays down certain conditions which are intended to place limits on the bringing of those goods into conformity. Thus, any repair or replacement must be made free of charge, within a reasonable time and without significant inconvenience to the consumer. That triple requirement is the expression of the intention of the EU legislature to ensure effective protection for the consumer (judgment of 16 June 2011, *Gebr. Weber and Putz*, C-65/09 and C-87/09, EU:C:2011:396, paragraph 52).

33 It follows therefrom that the place where goods not in conformity are to be made available to the seller to be repaired or replaced must be appropriate for ensuring that they are brought into conformity in compliance with that triple requirement.

34 Thus, with regard, first, to the 'free of charge' requirement attaching to the seller's obligation to bring the goods into conformity, which means that the seller cannot make any financial claim in connection with the performance of its 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, to that effect, judgment of 17 April 2008, *Quelle*, C-404/06, EU:C:2008:231, paragraph 34), it must be noted that it cannot be made subject to the place where the consumer is required to make goods acquired under a distance contract available to the seller for them to be brought into conformity.

35 It is true that the first and second subparagraphs of Article 3(3) of Directive 1999/44 state that the seller may refuse to repair the goods or to replace them free of charge if that proves to be impossible or disproportionate in so far as one of those remedies imposes unreasonable costs on the vendor in comparison to the other. However, the criteria for assessing the unreasonable nature of such costs, set out in the second subparagraph of Article 3(3) of that directive, refer to the value which the goods would have if there were no lack of conformity, the significance of the lack of conformity and the question whether the other remedy could be implemented without significant inconvenience to the consumer, and are applicable irrespective of where the consumer is required to make goods acquired under a distance contract available to the seller for them to be brought into conformity.

36 As regards, in the second place, the requirement that the goods be brought into conformity ‘within a reasonable time’, it should be noted that the rapidity of such bringing into conformity is likely to vary according to the place where the consumer is required to make the goods available to the seller for that purpose.

37 As the Advocate General observed in point 60 of his Opinion, in certain circumstances, particularly if the goods are located in a country other than that of the seller’s place of business, the seller might need a lot of time in which to organise the inspection of those goods, with a view to their repair or replacement, at that location. In such a case, it cannot be ruled out that the making of goods available to the seller at its place of business may mean they are brought into conformity more quickly.

38 However, if the seller already has an after-sales service or a transport network available where the goods are located, their being brought into conformity may prove to be more rapid if the seller physically inspects them at that place or itself arranges for the goods to be transported to its place of business.

39 In the third place, the third subparagraph of Article 3(3) of Directive 1999/44 requires the goods to be brought into conformity ‘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’.

40 It follows therefrom, first, that the place where the goods are to be made available to the seller to be brought into conformity cannot be chosen in such a way as not to represent any inconvenience for the consumer, since that availability normally requires some investment from the consumer in terms of time and effort involving the packaging and delivery of the goods, but a significant inconvenience, as the Advocate General noted in point 68 of his Opinion, understood as a burden likely to deter the average consumer from asserting his rights.

41 In that regard, it is necessary to take account of the fact that Article 3 of Directive 1999/44 seeks to strike 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 (judgment of 16 June 2011, *Gebr. Weber and Putz*, C-65/09 and C-87/09, EU:C:2011:396, paragraph 75).

42 Second, in order to assess whether, in the context of bringing the goods into conformity, a situation might be a significant inconvenience for the average consumer, account must be taken of the nature of the goods and the purpose for which the consumer required the goods.

43 Thus, in certain cases, by reason both of the nature of the goods, especially if they are very heavy, large, particularly fragile or where there are particularly complex requirements for their dispatch, and of their intended use by an average consumer, in particular involving their prior installation, their dispatch to the place of business of the seller might constitute, for that consumer, a significant inconvenience contrary to the requirements set out in the third subparagraph of Article 3(3) of Directive 1999/44.

44 In other cases, it may be assumed, by contrast, that dispatch to the place of business of the vendor of compact goods, which require neither special handling nor a particular means of transport, is not likely to constitute a significant inconvenience for that consumer.

45 Consequently, the place where the consumer is required to make goods acquired under a distance contract available to the seller for them to be brought into conformity which is most suitable to ensure that they can be brought into conformity free of charge, within a reasonable time and without significant inconvenience to the consumer, depends on the specific circumstances of each individual case.

46 In that regard, as regards considerations of legal certainty, it must be borne in mind that, in accordance with Article 1(1) of Directive 1999/44 and Article 8(2) thereof, that directive seeks to ensure a uniform minimum level of consumer protection in the field which it governs. Thus, it follows from those provisions, on the one hand, that the Member States may specify, in their national legislation, the place or places where the consumer is required to make goods acquired under a distance contract available to the seller, for them to be brought into conformity, on condition that they satisfy the requirements of Article 3(3) of that directive. On the other, Member States may adopt or maintain in force more stringent provisions to ensure a higher level of consumer protection, such as specific rules for certain categories of goods.

47 In applying the national law thus adopted, national courts called upon to interpret that law are required to consider the whole body of rules of that law and to apply methods of interpretation that are recognised by those rules in order to interpret it, so far as possible, in the light of the wording and the purpose of Directive 1999/44 in order to achieve the result pursued by the directive and thus to comply with the third paragraph of Article 288 TFEU. That requirement to interpret national law in conformity with EU law includes the obligation for national courts to change their established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of that directive (judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraphs 31 and 33 and the case-law cited).

48 In the light of the foregoing considerations, the answer to the first three questions is that Article 3(3) of Directive 1999/44 must be interpreted as meaning that the Member States remain competent to establish the place where the consumer is required to make goods acquired under a distance contract available to the seller, for them to be brought into conformity in accordance with that provision. That place must be appropriate for ensuring that they can be brought into conformity free of charge, within a reasonable time and without significant inconvenience to the consumer, taking into account the nature of the goods and the purpose for which the consumer required the goods. In that regard, the national court is required to make an interpretation in accordance with Directive 1999/44, including, as necessary, amending established case-law if that law is based on an interpretation of national law which is incompatible with the objectives of that directive.

The fourth question

49 By its fourth question, the referring court asks, in essence, whether Article 3(2) to (4) of Directive 1999/44 must be interpreted as meaning that the consumer's right to have goods acquired under a distance contract brought into conformity 'free of charge' covers the seller's obligation to pay the cost of transporting those goods, for the purposes of bringing them into conformity, to that seller's place of business.

50 In accordance with Article 3(4) of that directive, the notion of 'free of charge' refers to the necessary cost incurred to bring the goods into conformity, particularly the cost of postage, labour and materials.

51 As follows from the case-law cited in paragraph 34 of the present judgment, that obligation to bring goods into conformity free of charge, which the EU legislature intended to make an essential

element of the protection guaranteed to consumers by Directive 1999/44, seeks to protect consumers from the risk of financial burdens which might dissuade them from asserting their rights in the absence of such protection (see, to that effect, judgment of 17 April 2008, *Quelle*, C-404/06, EU:C:2008:231, paragraphs 33 and 34).

52 At the same time, as has already been noted in paragraph 41 of this judgment, that directive not only seeks to protect the interests of the consumer by guaranteeing him complete and effective protection from faulty performance by the seller of his contractual obligations, but also seeks to strike a balance between those interests and any economic considerations advanced by the seller (see, to that effect, judgment of 16 June 2011, *Gebr. Weber and Putz*, C-65/09 and C-87/09, EU:C:2011:396, paragraph 75).

53 In the light of those considerations, it must be observed that the obligation on the seller systematically to advance the cost of transport of goods not in conformity, acquired under a distance contract, to its place of business is likely, first, to increase the time necessary to bring such goods into conformity, to the detriment of its completion within a reasonable time. That would be the case, in particular, where the seller does not use pre-franked return labels and is required to make payment of such an advance. Second, such an obligation might impose an excessive burden on the seller, in particular in cases where, after inspection, the goods prove not to be defective.

54 In those circumstances, the striking of a balance between the interests of the consumer and of the seller which Directive 1999/44 seeks to achieve does not require that the obligation on the seller to bring the goods into conformity free of charge also include, beyond the obligation on the seller to reimburse to the consumer the cost of transporting that property to the seller's place of business, the obligation systematically to advance those costs to the consumer.

55 That being the case, that striking of a balance, for the purposes of consumer protection, requires, as is apparent from paragraphs 34 and 40 of this judgment, that the transport costs paid by consumers do not constitute a burden likely to deter the average consumer from asserting his rights. In that regard, in examining whether a burden is such as to deter such a consumer from asserting his rights, the national court must take into account, as the Advocate General has observed, in point 86 of his Opinion, the circumstances specific to each individual case, including factors such as the amount of transport costs, the value of the goods not in conformity or the possibility, in law or fact, that the consumer is entitled to assert his rights in the event of non-reimbursement by the seller of the transport costs paid by the consumer.

56 In the light of the foregoing considerations, the answer to the fourth question is that Article 3(2) to (4) of Directive 1999/44 must be interpreted as meaning that the consumer's right to the bringing of goods, acquired under a distance contract, into conformity 'free of charge' does not include the seller's obligation to pay the cost of transporting those goods, for the purposes of bringing them into conformity, to the seller's place of business, unless the fact that the consumer must advance those costs constitutes a burden such as to deter him from asserting his rights, which it is for the national court to ascertain.

Questions 5 and 6

57 By its fifth and sixth questions, which it is appropriate to examine together, the referring court asks, in essence, whether the combined provisions of Article 3(3) and the second indent of Article 3(5) of Directive 1999/44 are to be interpreted as meaning that, in a situation such as that at issue in the main proceedings, a consumer who has informed the seller of the non-conformity of goods acquired under a distance contract, without however making those goods available to the

seller at its place of business for them to be brought into conformity, is entitled to rescission of the contract on account of failure to make good the damage within a reasonable time.

58 In that regard, it must be noted that Article 3(3) and (5) of that directive establishes a clear sequence of implementation of remedies to which the consumer is entitled in the event of non-conformity of the goods.

59 Thus, in accordance with 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, unless this is impossible or disproportionate.

60 It is only if the consumer is entitled to neither repair nor replacement of the goods not in conformity or if the seller has failed to implement one of those remedies within a reasonable time or without significant inconvenience to the consumer that the consumer may, under Article 3(5) of that directive, require the rescission of the contract, unless, in accordance with Article 3(6) of Directive 1999/44, the lack of conformity of the goods is minor.

61 In that regard, in so far as it follows from Article 3(3) and (5) of Directive 1999/44, read in the light of recital 10 thereof, that that directive favours, in the interest of both parties to the contract, the performance of that contract by means of the two remedies first provided for, rather than the rescission of the contract (see, to that effect, judgment of 16 June 2011, *Gebr. Weber and Putz*, C-65/09 and C-87/09, EU:C:2011:396, paragraph 72), that directive provides, to that end, where goods are not in conformity, certain positive obligations for both the consumer and the seller.

62 Thus, in accordance with the first subparagraph of Article 3(3) of Directive 1999/44, a consumer who wishes to have goods brought into conformity must make it sufficiently possible for the seller to bring such goods into conformity. To that end, he is required to inform the seller of that non-conformity and the remedy he has chosen, namely repair of the goods or their replacement. In addition, the consumer must make such goods which are not in conformity available to the seller.

63 The seller must carry out any repair or provide a replacement free of charge, within a reasonable time and without significant inconvenience to the consumer and may refuse to do so only if that is impossible or disproportionate. As is clear from paragraph 60 of the present judgment, the consumer may require rescission of the contract only if the seller has failed to fulfil its obligations in that regard, as laid down in Article 3(3) of Directive 1999/44.

64 In the present case, the referring court states that the parties to the main proceedings had neither agreed nor discussed the place where the item at issue was to be made available to the seller to be brought into conformity. However, it is apparent from the order for reference that the consumer, Mr Füllä, informed the seller, Toolport, of the defects affecting that item and requested that company to bring the item into conformity at his home, which did not, however, give rise to any action on the part of Toolport. The seller, for its part, stated for the first time only in the course of the proceedings before the referring court that the item should have been made available at its place of business. According to the referring court, having regard to the characteristics of the item at issue, organisation of its transport to the seller's place of business was likely to cause 'significant inconvenience' to the consumer within the meaning of Article 3(3) of that directive.

65 In that regard, it must be held that the consumer, who clearly informed the seller of the existence of a lack of conformity in an item acquired under a distance contract, the transport of which to the place of business of the seller was likely to cause him a significant inconvenience, and who made the item available to the seller at his home for it to be brought into conformity, without

having obtained, in return, any information from the seller regarding the place where the item was to be made available to it to be brought into conformity or any other adequate positive action to that end and who therefore did not make the item available to the seller in the place in question, satisfied the obligation of diligence imposed on him by the first subparagraph of Article 3(3) of Directive 1999/44 (see, to that effect, judgment of 4 June 2015, *Faber*, C-497/13, EU:C:2015:357, paragraphs 61 to 63).

66 By contrast, the obligation on the seller to apply a remedy within a reasonable time, the failure of which gives the consumer, pursuant to the second indent of Article 3(5) of Directive 1999/44, the right to require the rescission of the contract, is not satisfied if the seller does not take any appropriate steps, at the very least, to inspect the goods not in conformity, including the obligation to inform the consumer, within a reasonable time, of the place where the goods not in conformity are to be made available to him to be brought into conformity.

67 In the light of the foregoing considerations, the answer to the fifth and sixth questions is that the combined provisions of Article 3(3) and the second indent of Article 3(5) of Directive 1999/44 are to be interpreted as meaning that, in a situation such as that at issue in the main proceedings, a consumer who has informed the vendor of the non-conformity of goods acquired under a distance contract, the transport of which to the seller's place of business was likely to cause a significant inconvenience to him, and who has made the goods available to the seller at his home for them to be brought into conformity, is entitled to rescission of the contract as a result of the failure to compensate him within a reasonable time, if the seller has failed to take any adequate steps to bring those goods into conformity, including that of informing the consumer of the place where those goods are to be made available to it for it to bring them into conformity. In that regard, it is for the national court, by means of an interpretation in conformity with Directive 1999/44, to ensure the right of that consumer to rescission of the contract.

Costs

68 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. 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(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 the Member States remain competent to establish the place where the consumer is required to make goods acquired under a distance contract available to the seller, for them to be brought into conformity in accordance with that provision. That place must be appropriate for ensuring that they can be brought into conformity free of charge, within a reasonable time and without significant inconvenience to the consumer, taking into account the nature of the goods and the purpose for which the consumer required the goods. In that regard, the national court is required to make an interpretation in accordance with Directive 1999/44, including, as necessary, amending established case-law if that law is based on an interpretation of national law which is incompatible with the objectives of that directive.

2. Article 3(2) to (4) of Directive 1999/44 must be interpreted as meaning that the consumer's right to the bringing of goods, acquired under a distance contract, into conformity 'free of charge' does not include the seller's obligation to pay the cost of transporting those

goods, for the purposes of bringing them into conformity, to the seller's place of business, unless the fact that the consumer must advance those costs constitutes such a burden as to deter him from asserting his rights, which it is for the national court to ascertain.

3. The combined provisions of Article 3(3) and the second indent of Article 3(5) of Directive 1999/44 are to be interpreted as meaning that, in a situation such as that at issue in the main proceedings, a consumer who has informed the vendor of the non-conformity of goods acquired under a distance contract, the transport of which to the seller's place of business was likely to cause a significant inconvenience to him, and who has made the goods available to the seller at his home for them to be brought into conformity, is entitled to rescission of the contract as a result of the failure to compensate him within a reasonable time, if the seller has failed to take any adequate steps to bring those goods into conformity, including that of informing the consumer of the place where those goods are to be made available to it for it to bring them into conformity. In that regard, it is for the national court, by means of an interpretation in conformity with Directive 1999/44, to ensure the right of that consumer to rescission of the contract.

[Signatures]

* Language of the case: German.
