



## Reports of Cases

### JUDGMENT OF THE COURT (Tenth Chamber)

7 September 2017\*

(Reference for a preliminary ruling — Consumer protection — Directive 1999/44/EC — Sale of consumer goods and associated guarantees — Notion of ‘contract of sale’ — Inapplicability of that directive — Lack of jurisdiction of the Court)

In Case C-247/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landgericht Hannover (Hanover Regional Court, Germany), made by decision of 22 April 2016, received at the Court on 29 April 2016, in the proceedings

**Heike Schottelius**

v

**Falk Seifert**

THE COURT (Tenth Chamber),

composed of M. Berger (Rapporteur), President of the Chamber, A. Borg Barthet and E. Levits, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mrs Schottelius, by M. Burger, Rechtsanwalt,
- Mr Seifert, by M. Lorenz, Rechtsanwalt,
- the German Government, by T. Henze, J. Möller, and M. Hellmann, acting as Agents,
- the European Commission, by C. Hödlmayr and D. Roussanov, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

\* Language of the case: German.

## Judgment

- 1 This request for a preliminary ruling concerns the interpretation 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 This request has been made in proceedings between Mrs Heike Schottelius and Mr Falk Seifert regarding expenses allegedly incurred by Mrs Schottelius when repairing defective work.

### Legal context

#### *EU law*

- 3 Recitals 6, 7 and 10 to Directive 1999/44 state:
    - (6) Whereas the main difficulties encountered by consumers and the main source of disputes with sellers concern the non-conformity of goods with the contract; whereas it is therefore appropriate to approximate national legislation governing the sale of consumer goods in this respect, without however impinging on provisions and principles of national law relating to contractual and non-contractual liability;
    - (7) Whereas the goods must, above all, conform with the contractual specifications; whereas the principle of conformity with the contract may be considered as common to the different national legal traditions; whereas in certain national legal traditions it may not be possible to rely solely on this principle to ensure a minimum level of protection for the consumer; whereas under such legal traditions, in particular, additional national provisions may be useful to ensure that the consumer is protected in cases where the parties have agreed no specific contractual terms or where the parties have concluded contractual terms or agreements which directly or indirectly waive or restrict the rights of the consumer and which, to the extent that these rights result from this Directive, are not binding on the consumer;...
  - (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’.
- 4 Article 1 of that 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:
      - (a) *consumer*: shall mean any natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to his trade, business or profession;...

(c) *seller*: shall mean any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession;

...

4. Contracts for the supply of consumer goods to be manufactured or produced shall also be deemed contracts of sale for the purpose of this Directive.'

5 Article 2 of that directive, entitled 'Conformity with the contract', provides in paragraphs 1 and 5 thereof:

'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.'

6 Article 3 of the same 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.

...

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.

...

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.'

*German law*

- 7 Directive 1999/44 was transposed into German law in the context of the reform of the Bürgerliches Gesetzbuch (German Civil Code, 'the BGB') by the Gesetz zur Modernisierung des Schuldrechts (Law on the modernisation of the law of obligations) of 26 November 2001 (BGB1. 2001 I, p. 3138), which came into force on 1 January 2002.
- 8 Paragraph 280 of the BGB, entitled 'Compensation for breach of duty', provides:
- '1. If the obligor fails to comply with a duty arising under the obligation, the obligee may claim compensation for the loss resulting from this breach. ...
- ...
3. The obligee may demand compensation in lieu of performance only if the additional requirements of Paragraphs 281, 282 or 283 are satisfied.'
- 9 Subparagraph 1 of Paragraph 281 of the BGB, entitled 'Compensation in lieu of performance because of failure to perform or failure to perform properly', provides:
- 'In so far as the obligor fails to perform when performance is due or fails to perform properly, the obligee may, subject to the requirements of Paragraph 280(1), demand compensation in lieu of performance if he has fixed to no avail a reasonable period within which the obligor is to perform or to effect supplementary performance. ...'
- 10 According to Paragraph 323 of the BGB, entitled 'Termination for non-performance or for performance not in conformity with the contract':
- '1. If under a contract involving reciprocal obligations the obligor fails to perform when performance is due or fails to perform in conformity with the contract, the obligee may terminate the contract, if he has fixed to no avail a reasonable period within which the obligor is to perform or to effect supplementary performance.
- ...'
- 11 In Book 2, Section 8, Title 9, of the BGB, Subtitle 1, entitled 'Contract for work', contains Paragraphs 634, 636 and 637.
- 12 Paragraph 634 of the BGB, entitled 'Customer's rights in the case of defects', provides:
- 'Where the requirements of the following provisions are satisfied and except as otherwise provided, if the work is defective, the customer may:
- ...
2. remedy the defect himself and demand reimbursement of the necessary expenses pursuant to paragraph 637;
  3. terminate the contract under Paragraphs 636, 323 and 326(5) ...; and
  4. claim compensation under Paragraphs 636, 280, 281, 283 and 311a ...'

13 Subparagraph 1 of Paragraph 637 of the BGB, entitled ‘Self-help [to remedy the defect]’, provides:

‘In the event that a defect is not remedied within a reasonable period of time set by the customer for the purposes of remedying such defect, the customer may remedy the defect himself and demand repayment of the expenses incurred, unless the contractor is entitled to refuse to remedy the defect.’

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

14 Mrs Schottelius’s husband engaged the services of Mr Seifert, a contractor, to renovate the swimming pool in the couple’s garden. The handover of the work took place in 2011 and payment for the work was made.

15 The documents before the Court indicate (i) that the land on which the swimming pool was built belongs to Mrs Schottelius, such that she is the owner of the pool, and (ii) that, by a contract of 3-4 November 2011, her husband assigned to her all rights under a warranty issued in his favour by the contractor. By contrast, it is not apparent from those documents that Mr Seifert had originally sold the swimming pool to Mr and Mrs Schottelius.

16 After the completion of the renovation work in respect of that swimming pool, a number of defects became apparent that were only identifiable once the pool was used. These defects affected the cleaning system and the pump in particular. Mrs Schottelius and her husband requested that Mr Seifert repair the defects. As Mr Seifert failed to respond to that request, Mrs Schottelius engaged in independent evidentiary proceedings concerning the defects at issue.

17 According to the documents before the Court, an expert established during those proceedings that the defects were serious and that the contractor had failed to adhere to normal building standards. The works to repair the defects were ultimately carried out by Mrs Schottelius’s husband with the help of a friend. To carry out such repair works, the necessary materials had to be acquired.

18 The applicant subsequently brought an action against Mr Seifert for reimbursement of the expenses incurred in carrying out the repair works.

19 The Landgericht Hannover (Hanover Regional Court, Germany) takes the view that, in principle, this action should not be upheld, since all the national laws that are potentially applicable in the case require the consumer expressly to set an additional deadline so that the contractor may repair the defects in question, unless the setting of such a deadline is superfluous, which it is not possible to establish on the basis of the facts and the evidence submitted in the main proceedings. The referring court states that such a date was set, in good time, not by Mrs Schottelius, the beneficiary of the rights under the warranty, but by her husband, as set out in a letter from a lawyer dated 16 November 2011. Further, the notice given by Mrs Schottelius’s husband, as a third party, is, according to the referring court, invalid under German law, since Mr Schottelius had assigned his rights under the guarantee to his wife. Mrs Schottelius maintains that, in any event, Mr Seifert had a sufficient period of time to remedy the defects in question.

20 On the other hand, according to the referring court, the action need not be dismissed if, in accordance with the second indent of Article 3(5) of Directive 1999/44 read in conjunction, in particular, with recitals 7 and 10 thereof, and contrary to German law, it were to follow from the principle whereby performance must conform to the contract that the setting of a time limit, by the consumer, for rectifying the defects in question is not a pre-condition for invoking secondary rights under a warranty which arise on account of those defects.

21 In those circumstances, the Landgericht Hannover (Hanover Regional Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Can a principle of EU consumer law be derived from the second indent of Article 3[(5)] of Directive [1999/44] to the effect that for all transactions in respect of consumer goods between non-consumers and consumers it is sufficient, in order to claim secondary rights under a warranty, that the non-consumer with warranty obligations has not taken remedial action within a reasonable time, it not being necessary in that respect for a period of time for removing the defect to be fixed expressly, and that the relevant provisions of national law, for instance also in the case of a contract for work on consumer goods, should be interpreted accordingly and if necessary applied restrictively?’

### **Consideration of the question referred**

22 By its question, the referring court asks, in essence, whether the second indent of Article 3(5) of Directive 1999/44 must be interpreted as meaning that, in accordance with a principle of EU consumer protection law, in order for a consumer who has entered into a contract with a seller for consumer goods to be able to enforce his secondary rights under a warranty, it is sufficient for the seller to have failed to take remedial action within a reasonable period of time, without it being necessary for the consumer to have set a time limit for rectifying the defects in question.

23 In the present proceedings, a plea of lack of jurisdiction has been submitted by the German Government and the European Commission. According to that government and the institution, Directive 1999/44 is not applicable to the dispute in the main proceedings since, inter alia, the relevant contract is not a ‘contract of sale’ within the meaning of that directive, but is rather a ‘contract for work’. They claim that the latter type of contract falls outside the scope of that directive.

24 In this regard, it should be noted at the outset that it is for the Court to examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (see, to that effect, orders of 3 July 2014, *Tudoran*, C-92/14, EU:C:2014:2051, paragraph 35 and case-law cited, and of 4 September 2014, *Szabó*, C-204/14, not published, EU:C:2014:2220, paragraph 16).

25 It also follows from established case-law that, in principle, the Court only has jurisdiction to interpret the provisions of EU law that are actually applicable in the main proceedings (see, to that effect, judgments of 18 December 1997, *Annibaldi*, C-309/96, EU:C:1997:631, paragraph 13, and of 7 July 2011, *Agafitei and Others*, C-310/10, EU:C:2011:467, paragraph 28 and case-law cited, and order of 14 April 2016, *Târşia*, C-328/15, not published, EU:C:2016:273, paragraph 19 and case-law cited).

26 In the present case, it must be noted, first, that the referring court is raising a question as to how the second indent of Article 3(5) of Directive 1999/44 should be interpreted. Thus, it proceeds from the premiss that the directive is applicable in a situation such as the one at issue in the main proceedings.

27 Second, it is apparent from the documents before the Court and, in particular, from the order for reference that under the applicable national law the contract at issue in the main proceedings is a ‘contract for work’.

28 In such circumstances, in order to establish whether the Court has jurisdiction to answer the question that has been referred to it, it is necessary to consider whether Directive 1999/44 must be interpreted as also applying to a contract for work, such as the contract at issue in the main proceedings, which relates to the renovation of a swimming pool by a contractor.

29 In this regard, it should be recalled, in the first place, that the scope of Directive 1999/44 is limited to ‘contracts of sale’, although the directive does not define that term.

- 30 It is clear from, inter alia, Article 1(1) of that directive that the latter's objective is to approximate the laws, regulations and administrative provisions of the Member States on certain aspects of the 'sale' of consumer goods and associated guarantees. It is also apparent from that directive and, in particular, from Article 1(2) thereof, which defines, inter alia, the terms 'consumer' and 'seller', that the directive only applies to contracts of sale entered into between a professional seller and a consumer-purchaser.
- 31 In the second place, it should be noted that, according to the Court's settled case-law, it follows from the need for a uniform application of EU law that, where a provision thereof makes no reference to the law of the Member States with regard to a particular concept, that concept must be given an autonomous and uniform interpretation throughout the European Union which must take into account the context of the provision and the objective pursued by the legislation in question (see, inter alia, judgment of 9 November 2016, *Wathelet*, C-149/15, EU:C:2016:840, paragraph 28 and case-law cited).
- 32 Although the text of Directive 1999/44 does not define 'contract of sale', nor does it contain any reference to national laws as regards the meaning to be applied to that term. It therefore follows that it must be regarded, for the purposes of application of the directive, as designating an autonomous concept of EU law which must be interpreted in a uniform manner throughout the European Union (see, by analogy, judgment of 18 October 2011, *Bristle*, C-34/10, EU:C:2011:669, paragraph 26).
- 33 In the third place, in order to determine whether a contract for work, such as the one at issue in the main proceedings, which involves a supply of services, can be considered to be a 'contract of sale' within the meaning of that directive, it should be noted that the directive sets out explicitly the contracts that involve a supply of services which are capable of being deemed to be equivalent to contracts of sale.
- 34 Indeed, it is apparent from the provisions of Directive 1999/44 as well as from the context of the directive that the notion of 'sale' only covers certain contracts that are capable of falling within other classifications under national legal systems, namely contracts for work or services.
- 35 Thus, first, under Article 1(4) of that directive, 'contracts for the supply of consumer goods to be manufactured or produced shall also be deemed contracts of sale.' Consequently, a contract whose subject is the sale of an asset that must first be manufactured or produced by the seller does fall within the scope of the directive.
- 36 Second, Article 2(5) of Directive 1999/44 deems a lack of conformity resulting from incorrect installation of the consumer goods to be equivalent to lack of conformity of the goods if, among other things, installation forms part of the contract of sale of those goods. Thus, the service for the installation of goods, when associated with the sale, does fall within the scope of that directive.
- 37 It follows from the findings above that, first, Directive 1999/44 applies not only to contracts of sale *sensu stricto*, but also to certain categories of contract involving a supply of services, which, in accordance with applicable national law, are capable of falling within the classification of contracts for services or work, namely contracts for the supply of consumer goods to be manufactured or produced and contracts providing for the installation of such goods linked to the sale.
- 38 Second, in order for those categories of contract involving a supply of services to be classified as 'contracts of sale' within the meaning of that directive, the supply of services must be ancillary to the sale.
- 39 In the fourth place, such an interpretation of the notion of 'contracts of sale' within the meaning of Directive 1999/44 is supported by the preparatory documents relating to that directive and by the United Nations Convention on Contracts for the International Sale of Goods signed in Vienna on 11 April 1980, on which that directive was based.

- 40 In this regard, it must be noted that it is apparent from the Explanatory Memorandum to the Proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees (COM(95) 520 final) submitted by the Commission on 23 August 1996 (OJ 1996 C 307, p. 8) that ‘the complexity and diversity of services do not lend themselves to a simple extension to services of rules governing the sale of goods’. Thus, owing to their particular characteristics, services should not in principle fall within the scope of Directive 1999/44.
- 41 The explicit inclusion of certain categories of contract that contemplate both a sale and a supply of services, as referred to in paragraphs 35 and 36 of this judgment, can be explained, in particular, by the fact that the EU legislature intended, in the first place, to address the difficulty the consumer has in differentiating the two roles performed by the professional and, in the second place, to ensure a high level of consumer protection, as stated in recital 1 of Directive 1999/44.
- 42 The proposal for a directive referred to in paragraph 40 of this judgment explains, to that effect, that the installation of goods linked to a sale should fall within the scope of that directive given, first, the difficulty in practice of distinguishing the service (installation of the goods) from the sale of those goods and, second, the need to protect the consumer consistently.
- 43 As regards the notion of treating contracts for the provision of consumer goods to be manufactured or produced, as referred to in Article 1(4) of Directive 1999/44, as contracts of sale, this was included during the first reading of that proposal for a directive by the Parliament, in the light of Article 3(1) of the United Nations convention mentioned in paragraph 39 of this judgment. The aim was to take into account, inter alia, the difficulty involved in classifying those contracts that include both an obligation to do something, which is particular to contracts for work and services, and an obligation to deliver an asset, which is the characteristic of a contract of sale.
- 44 In the present case, it is apparent from the documents before the Court that Mrs Schottelius and her husband asked Mr Seifert, a contractor, to renovate their swimming pool. For that purpose, they entered into a contract for work with Mr Seifert. Under that contract, the contractor did indeed sell them various goods necessary to renovate that swimming pool, such as, for example, a filtration system featuring a pump. Nevertheless, it is clear that the provision of services for the installation of the goods is the principal subject of that contract for work and that the sale of the goods is merely ancillary by comparison with that provision of services.
- 45 Moreover, in the light of the documents before the Court, that contract for work cannot be classified as a contract for the ‘supply of consumer goods to be manufactured or produced’ within the meaning of Article 1(4) of Directive 1999/44, since the goods required for the renovation of the swimming pool in question did not have to be either manufactured or produced by the contractor.
- 46 Having regard to all the foregoing, it should be held that a contract for work such as the one at issue in the main proceedings does not constitute a ‘contract of sale’ within the meaning of Directive 1999/44 and, therefore, does not fall within the scope of that directive.
- 47 Consequently, in accordance with the case-law set out in paragraph 25 of this judgment, the Court does not have jurisdiction to answer the question submitted for a preliminary ruling by the Landgericht Hannover (Hanover Regional Court).

### **Costs**

- 48 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 (Tenth Chamber) hereby rules:**

**The Court of Justice of the European Union does not have jurisdiction to answer the question referred for a preliminary ruling by the Landgericht Hannover (Hanover Regional Court, Germany) by decision of 22 April 2016.**

[Signatures]