

OPINION OF ADVOCATE GENERAL

MAZÁK

delivered on 18 May 2010¹

I — Introduction

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

2. The reference has been made in proceedings brought by Ms Ingrid Putz against Medianess Electronics GmbH ('Medianess Electronics') concerning the purchase of a dishwasher that turned out to be defective, in respect of which Ms Putz is, having terminated the contract of sale, seeking reimbursement of the purchase price against return of the defective dishwasher.

3. By the questions referred, the national court essentially wishes to know whether under the provisions of Article 3 of the

Directive, in a case where a defective consumer product, such as the dishwasher in the present case, is brought into conformity by way of replacement, the seller has to bear, on the one hand, the costs of disconnecting the defective product and, on the other, the costs of installing the new product free from defects.

4. The issues raised in the present case partially overlap with those raised in Case C-65/09³ on which I am also delivering my Opinion today.

II — Legal framework

A — Community law

5. The Directive was adopted on the basis of Article 95 EC. Recital 1 in the preamble thereto states that, in accordance with

¹ — Original language: English.

² — OJ 1999 L 171, p. 12.

³ — *Gebr. Weber*, pending before the Court.

Article 153(1) and (3) EC, the European Community must contribute to the achievement of a high level of consumer protection by the measures it adopts pursuant to Article 95 EC.

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

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

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free of charge, choosing either repair or replacement, or, failing this, to have the price reduced or the contract rescinded.'

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.

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

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.

'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.'

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

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

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

the national rules governing contractual or non-contractual liability.

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

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.’

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

or

B — *National law*

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

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

or

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

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

...’

1. require subsequent performance under Paragraph 439;

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

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

‘1. The rights resulting from this Directive shall be exercised without prejudice to other rights which the consumer may invoke under

3. claim damages ... or reimbursement of unnecessary expenditure ...’

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

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

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

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

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

III — Facts, procedure and the questions referred

12. Ms Putz, as a consumer, ordered over the internet a new stainless steel Bomann GSP 627 IX dishwasher from Medianess Electronics, the seller, for the price of EUR 367 plus payment-on-delivery costs of EUR 9.52. Delivery to the door of Ms Putz’s house was agreed. Accordingly, the product was delivered by Medianess Electronics on 25 April 2008 and the purchase price paid on delivery.

13. After Ms Putz had the dishwasher installed in her house, a defect became apparent, about which she complained to the seller. A fitter instructed by the seller established that the defect was not attributable to the installation work but rather lay in the machine itself.

14. It is, according to the referring court, not in dispute that a removal of the defect is not possible, so that for subsequent performance of the contract only replacement of the defective product can be considered. There is also no evidence of fault on the part of the seller.

15. Having agreed on replacement of the defective product, Ms Putz requested, by email of 13 June 2008, that Medianess Electronics not only deliver a dishwasher free from

defects, but also disconnect the defective machine in her kitchen and install the new one, which Medianess Electronics refused by email of 17 June 2008.

demand that the seller disconnect the defective machine (the issue raised by the second question referred) and install the new machine (the issue raised by the first question referred), or to demand that the seller bear the corresponding costs.

16. Since Medianess Electronics failed to respond to another request to that effect, Ms Putz has rescinded the contract of sale and is, in the action in the main proceedings, seeking reimbursement of the purchase price against return of the defective dishwasher.

17. According to the referring court, a purchaser may, pursuant to the relevant provisions of the BGB, terminate the contract and demand reimbursement of the purchase price if the product delivered is defective and the purchaser has, to no avail, given the seller an effective period of time for subsequent performance, unless this is, exceptionally, unnecessary, for example where the seller seriously and definitively refuses to perform its contractual obligations.

18. The purchaser will, however, have validly given the seller the required period of time for subsequent performance only if he demanded solely that to which he was entitled, failing which termination of the contract is ruled out, subject to certain exceptions which are not applicable in the present case.

19. The resolution of the present case thus depends, in the view of the referring court, upon whether Ms Putz was entitled to

20. In that regard, the referring court points out that under German law, in particular Paragraph 439(1) BGB, the seller is not, as part of subsequent delivery, required to install the product free from defects or to bear the corresponding costs irrespective of liability, even where the purchaser, before the discovery of the defect, properly installed and connected the defective product in a separate unit.

21. It is, however, a matter of dispute under German law whether in the context of subsequent delivery the seller is, in such a situation, required to disconnect the defective product or to bear the corresponding costs irrespective of fault. Contrary to what has so far been the predominant view, the Bundesgerichtshof appears to consider now that such a claim by the purchaser may be possible – solely – on the basis of an interpretation of the relevant national provisions in conformity with the Directive, which is why that court has referred that question, in Case C-65/09, to the Court of Justice.

22. Since that question will perhaps not be answered by the Court, as the Bundesgerichtshof had made it dependent upon the

reply to another question referred, the Amtsgericht Schorndorf also raises that issue in the present case.

IV — Legal analysis⁴

23. Against that background, the Amtsgericht, as the court of last instance in this case, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

A — Preliminary remarks

(1) Are the provisions 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 to be interpreted as precluding a national statutory provision under which a seller, in the event that it has restored a consumer product to conformity with a contract of sale by way of replacement, does not have to pay the costs of the installation, in a particular unit, of the subsequently delivered product, in the case where the consumer has, in a manner consistent with its nature and purpose, installed the consumer product not in conformity, if installation was not originally a contractual requirement?

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

(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 a seller, in the event that it has restored a consumer product to conformity with a contract of sale by way of replacement, has to pay the costs of disconnection, from a particular unit, of the contractually defective consumer product, in the case where the consumer has properly installed the consumer product?

25. As is apparent not only from the submissions of the parties to the present proceedings, the various national legal rules of the Member States in this area, although

⁴ — As the issues raised in the present case are, except for the aspect of the installation of the substitute product in conformity, essentially similar to those raised under the second question referred in *Weber*, cited in footnote 3, the appraisal in the present Opinion corresponds *mutatis mutandis* to that in points 43 to 67 of my Opinion in *Weber*. Likewise, for the sake of completeness and readability, I also include in this Opinion the, slightly modified, preliminary remarks of that Opinion.

providing in many cases, in their practical application, for similar results and comparable levels of legal protection, in fact differ – in any event in their traditional, pre-harmonisation versions – significantly from each other.⁵ Those divergences concern not only the details of the legal concepts, conditions and definitions used, but also, at a more general level, the schemes of remedies as such, that is both the forms of remedies provided for in case of breach of contract and the relationship and hierarchy between those remedies, the role of damages in or in connection with those schemes as well as the delimitation between contractual and non-contractual claims that may arise upon the delivery of goods not in conformity.

the legal literature within one and the same legal system as to the buyer's actual rights and their legal basis.

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

28. In that regard, it is important to note, on the one hand, that, as is stated in recital 1 in the preamble to the Directive and as the Court rightly emphasised in *Quelle*, the Directive is intended to ensure a high level of consumer protection.⁶

26. In addition, as the information provided by the Amtsgericht shows, when it comes to specific problems related to lack of conformity and its consequences, such as the question of the liability of the seller for the costs of removing the goods not in conformity or installing the substitute goods free from defects, there remain uncertainties and divergences in

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

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

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

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

31. In the light of the objective of the Directive to strengthen consumer protection, an affirmative answer to this question may appear appropriate. It is, however, not that simple. Like any developed legal system governing the rights and obligations of the buyer and seller arising upon defective performance, the scheme of remedies under the Directive may not simply favour either the consumer or the

seller, but must instead seek to strike a fair balance between their respective interests.⁷

32. That being said, by its two questions, which it is appropriate to examine together, the referring court is essentially asking whether the provisions of Article 3(2) and (3) of the Directive are to be interpreted as meaning that where a consumer product, such as the dishwasher at issue, which has been properly installed and connected by the consumer, is brought into conformity by way of replacement, the seller must bear the costs of disconnecting/removing the defective product and of installing/connecting the product free from defects, if under the contract of sale concerned the seller was not obliged to install the purchased product.

B — *Main arguments of the parties*

33. In the present proceedings, observations have been submitted by the Austrian, German, Belgian and Spanish Governments and by the Commission. The Austrian and German Governments as well as the Commission were also represented at the hearing on 25 February 2010.

⁷ — See, for a reference to the protection afforded also to the seller’s financial interests under the Directive, *Quelle*, cited in footnote 6, paragraph 42.

34. The Austrian, German and Belgian Governments maintain that in a case such as the present, in any event where installation is not part of the contract, the seller is, under Article 3 of the Directive, when replacing the defective product, required to bear neither the costs of removing that product nor those of having the new product free from defects installed. Both questions referred should therefore be answered in the negative.

35. Arguing, essentially, along the same lines, those governments submit that, pursuant to Article 2(1) of the Directive, the seller is liable to deliver the goods in conformity with the contract. Accordingly, in the case of a lack of conformity, which is to be assessed at the time of delivery, the seller is, according to Article 3(2) and (3) of the Directive, required to bring the defective goods into conformity, that is, in the case of replacement, to deliver goods free from defects. His obligations cannot be extended beyond that such as to comprise also, as is suggested in the present case, disconnecting the defective product and installing the new product free from defects. The case may be different if installation of the purchased product is also part of the contractual obligations agreed upon between the seller and the consumer.

36. The Belgian Government specifies, however, that the seller is required to bear the costs of transport of the product not in conformity.

37. The Austrian and German Governments emphasise, furthermore, that the use which a consumer makes of a product after delivery is, even if it is in conformity with the nature and purpose of the product, difficult for the seller to foresee, so that the costs of removing a defective product and those of installing the new product free from defects may vary widely from case to case, depending on the will of the consumer. In any event, damage incurred as a result of the use of the defective product at issue, such as costs arising from removal and installation, may give rise to a claim by the consumer under national rules on contractual or non-contractual liability.

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

39. The Commission and the Spanish Government, by contrast, contend that in the case of replacement of a product not in conformity the seller must, according to Article 3(3) of the Directive, also bear the costs of removing the defective product from its place of installation and of installing the new product free from defects. They therefore suggest that the questions referred be answered in the affirmative.

40. The Commission argues that the repair or replacement to which the consumer is entitled under Article 3(3) of the Directive refers necessarily to the product not in conformity in the state and environment at the time when the lack of conformity occurs. It follows that if the product not in conformity has been, in a manner consistent with its nature and purpose, incorporated into or connected to another thing, the product not in conformity constitutes, in that state, the object of repair or replacement. Thus, the consumer must, by means of the product's replacement, be put into a situation in which he would have been if a product free from defects had been delivered to him, which means that, if necessary, the product not in conformity has to be removed and the product free from defects installed.

41. That interpretation is also corroborated by the use of the word 'replacement' in Article 3(2) and (3) of the Directive.

42. Concurring, essentially, with the view taken by the Commission, the Spanish Government submits that Article 3 of the Directive and the high level of consumer protection it is intended to confer require the seller to bear the costs at issue, which were caused by the fact that he did not deliver the product in conformity with the contract. Otherwise, the consumer would, without being at fault, have to bear those costs twice and suffer serious damage.

43. Finally, in the view of the Spanish Government, that interpretation finds support in the obligation imposed on the seller under Article 3(3) and (4) of the Directive to replace the defective product free of charge and without any significant inconvenience for the consumer.

C — Appraisal

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

45. While in some language versions of the Directive, such as the English ('replacement') and French ('remplacement'), the corresponding terms used may, in principle, be understood as connoting also the removal/disconnection of the defective product and the installation of the product free from defects by which it is replaced, other versions, including the German ('Ersatzlieferung') and Slovak ('sa ... nahradí'), appear to support a somewhat narrower definition, referring to replacement-delivery or delivery of a replacement product rather than to the whole course of action that may, technically, result in the replacement of the defective product.

46. However, a contextual or systematic reading of Article 3 of the Directive rather lends support, in my view, to an understanding of the seller's liability which does not cover the costs of removing/disconnecting the product not in conformity or, even less, of installing the substitute product free from defects, in any event in a case where installation was not part of the contract of sale concerned.

47. In that regard, Article 3(2) of the Directive lists exhaustively the remedies which are available to the consumer against the seller in the case of a lack of conformity,

namely repair, replacement, price reduction or rescission.

48. More particularly, according to the scheme of remedies under the Directive, the consumer may, in the first place, by means of the performance-oriented remedies of repair or replacement, require the seller to bring the defective goods into conformity. In that way, the original *synallagma* under the contract of sale is restored and the consumer obtains the performance for which he contracted. Serving the main interest of the parties to a contract, that solution is given preference, under the Directive, over price reduction or rescission of the contract.⁸

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

8 — That the Directive imposes such a hierarchy follows clearly from the wording of Article 3(3) of the Directive in connection with recital 11 in the preamble thereto. Cf. also *Quelle*, cited in footnote 6, paragraph 27.

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

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

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

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

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

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

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

57. That latter, more extensive, form of liability would thus require the seller, as the Commission has proposed, to put the consumer into a situation in which he would have found himself at a certain time after delivery if a product free from defects had been delivered to him, that is, in the present case, into a situation where the defective dishwasher which was installed by the consumer is disconnected from the unit concerned and the new dishwasher free from defects installed. That

liability would accordingly, as several parties have observed, extend to facts and circumstances which occurred after the passing of the risk to the consumer, which are therefore dependent on his will and, in particular, the use he makes of the product concerned.

law on damages, subject, however, to the applicable conditions including fault.

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

60. As regards the Directive, however, it should be pointed out in this context, first, that its system of remedies for lack of conformity does not include any claim for damages, unlike, for example, Article 45(1)(b) of the CISG or, in Article 27, the proposal of the Commission for a Directive of the European Parliament and of the Council on consumer rights.¹⁰

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

59. Thus, as the German Government has submitted, costs that are incurred by the consumer in respect of disconnecting a defective product or due to the fact that he has to bear the costs of installation twice, that is in respect of the defective product and again in respect of the substitute product free from defects, may be recoverable under the German

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

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

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

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

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

65. In the light of the foregoing considerations, I am not of the opinion that a right for the consumer to have the seller bear the costs of disconnecting the defective product and the costs of installing the substitute product free from defects may be read into his right, under Article 3(2) and (3) of the Directive, to have the defective product brought into conformity by replacement, if under the contract

of sale the seller was not obliged to install the purchased product.

66. I agree also that that finding is not called into question by the ‘free of charge’ requirement attaching, pursuant to Article 3(2) to (4) of the Directive, to the seller’s obligation to bring the goods into conformity by replacement. That requirement defines the conditions under which the seller must offer and carry out the bringing into conformity owed to the consumer, namely free of charge, but cannot substantially extend the existing remedy itself. Similarly, the ‘without any significant inconvenience’ requirement in Article 3(3), third subparagraph, of the Directive defines how the bringing into conformity is to be brought about, not what it materially entails.

67. In that regard, finally, the present case has to be distinguished from *Quelle*, in which the Court held that the ‘free of charge’ requirement means that the seller cannot make any financial claim in connection with the performance of its obligation to bring into conformity the goods to which the contract relates.¹¹ Accordingly, it concluded, on the basis of further arguments, that the Directive

¹¹ — Cited in footnote 6, paragraph 34.

precludes legislation under which a seller of defective goods may require the consumer to pay compensation for the use of those defective goods until their replacement. The present case is, by contrast, not about a financial claim by the seller to the consumer in connection with replacement, but about whether the consumer can claim as part of the bringing into conformity of the defective product, beyond delivery free of charge of a new product free from defects, the costs of disconnecting/removing the defective product and those of installing the product free from defects delivered in replacement.

68. In the light of the foregoing considerations, the questions referred by the Amtsgericht should be answered to the effect that the provisions of Article 3(2) and (3) of the Directive are to be interpreted as meaning that where a consumer product, such as the dishwasher at issue, which has been, in a manner consistent with its nature and purpose, installed and connected by the consumer, is brought into conformity by way of replacement, the seller is not required to bear the costs of disconnecting/removing the product not in conformity and of installing/connecting the product free from defects, if under the contract of sale concerned the seller was not obliged to install the purchased product.

V — Conclusion

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

The provisions of 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 are to be interpreted as meaning that where a consumer product, such as the dishwasher at issue, which has been, in a manner consistent with its nature and purpose, installed and connected by the consumer, is brought into conformity by way of replacement, the seller is not required to bear the costs of disconnecting/removing the product not in conformity and of installing/connecting the product free from defects, if under the contract of sale concerned the seller was not obliged to install the purchased product.