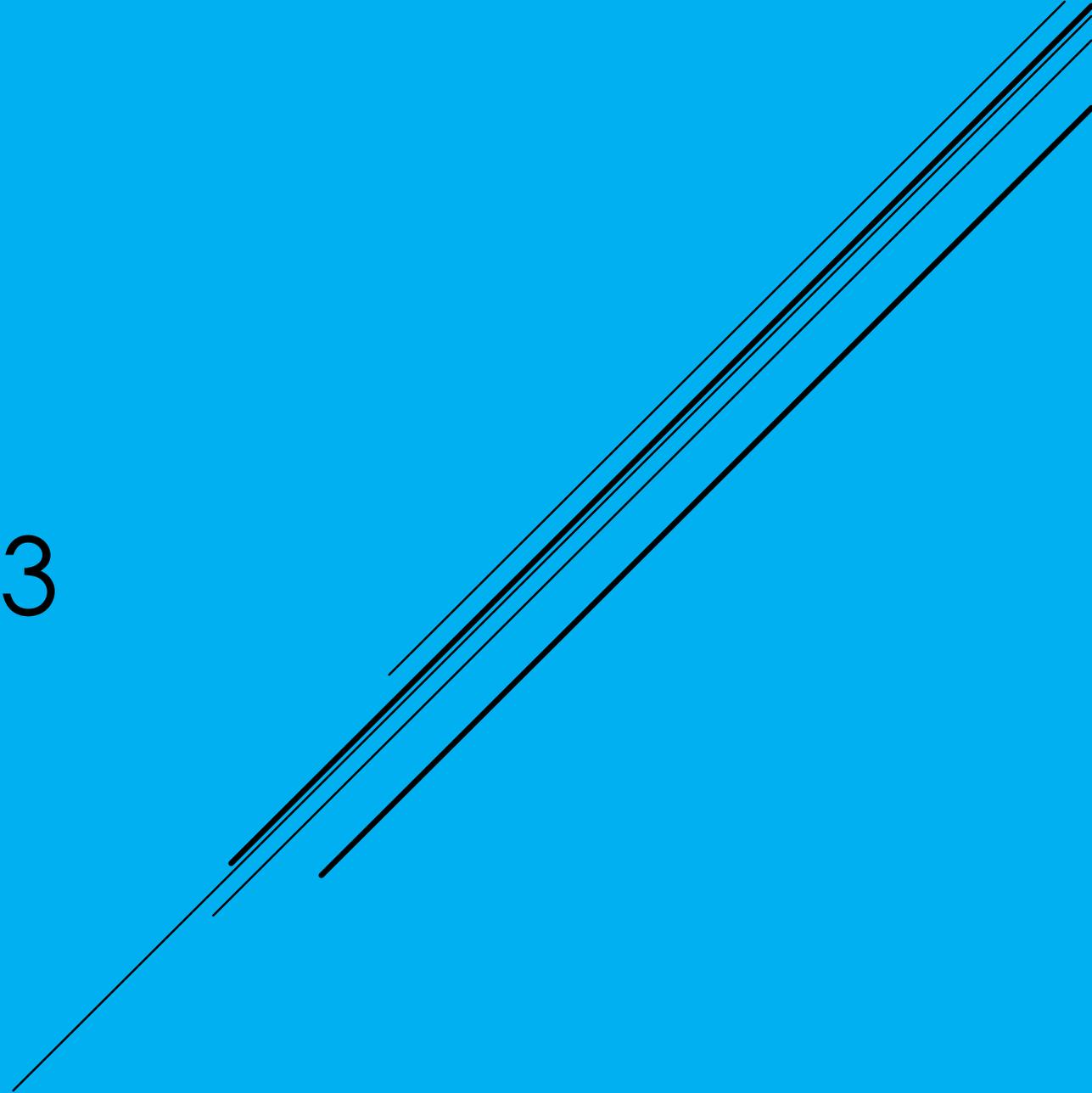
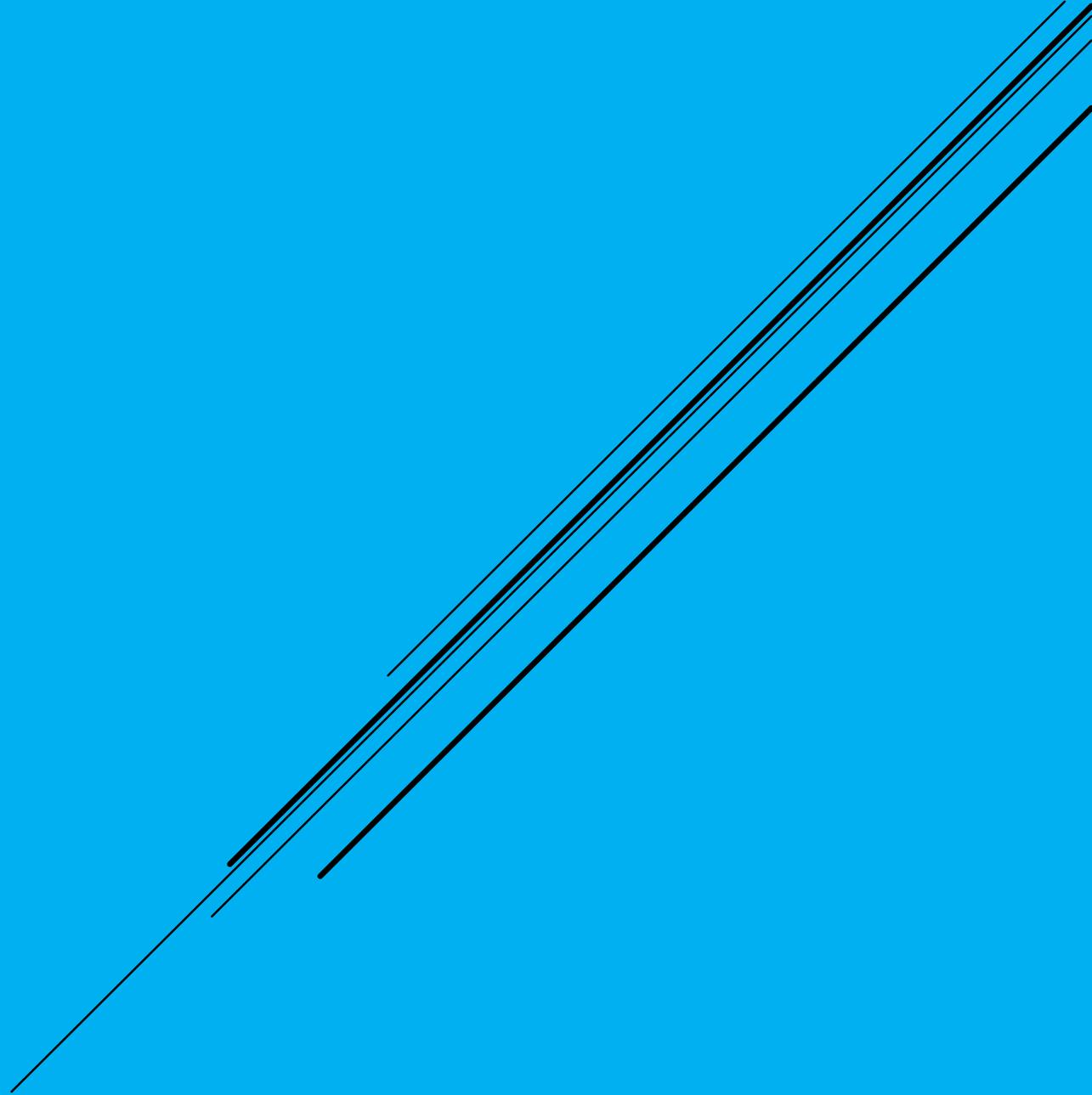


HYPOTHETICAL N. 3

Consumer sales

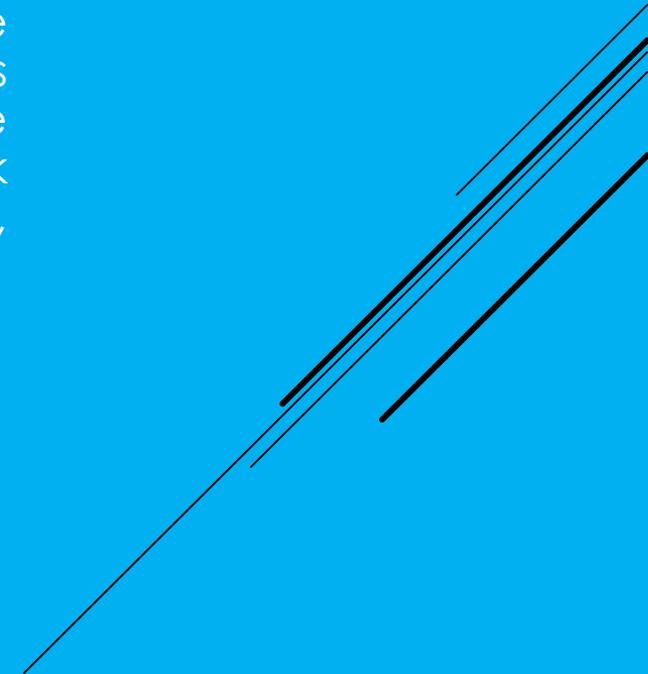


STEP I



- ▶ Mr Johnson concluded a sales agreement concerning an armchair for his flat for 1.500 EUR. The furniture was manufactured accordingly to the special requirements of the buyer, who wanted to make it functional for his elderly mother. After delivery it occurred that the furniture does not comply with specification provided by the buyer and does not fit for the intended purpose. Bringing the furniture into conformity with the contract would require its substantial reconstruction and would cost 1.000 EUR.
- ▶ The buyer demanded repair of the good to the state conforming with the specification, alternatively delivery of a new one. The seller declined this claim, indicating that costs of repair or replacement would be disproportionate for him, taking into account the value of materials and work in construction of the original furniture. The consumer sued the seller, claiming repair, alternatively replacement of the good.

FACTS



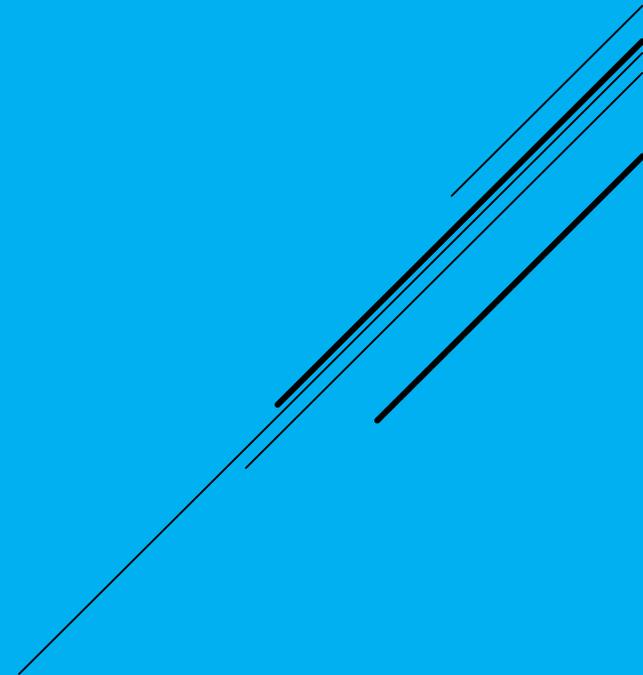
Article 3 (99/44/EC Directive)

Rights of the consumer

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replacement**, in accordance with paragraph 3, or to have **an appropriate reduction made in the price or the contract rescinded** with regard to those goods, in accordance with paragraphs 5 and 6.

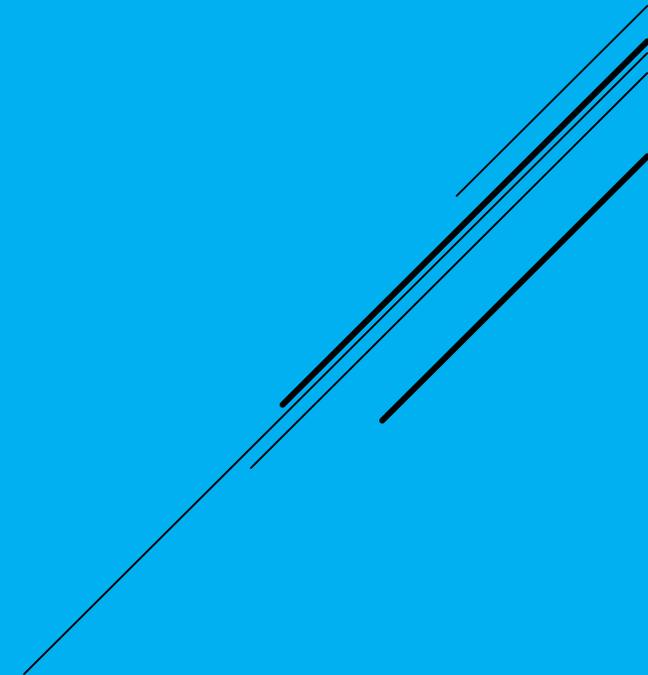
3. In the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, **unless this is impossible or disproportionate**.

LEGAL BASIS



- ▶ What are the criteria upon which the domestic court should ascertain that the buyer claimed the proper remedy? In particular, what is the particular understanding of the criterion of (dis)proportionality, set forth in Article 3 (3) of the 99/44/EC Directive? Should it be regarded as an “absolute” (i.e. referring to the general economic criteria and market specificity) or as a “relative” lack of proportionality (i.e. based on comparison between the costs of alternative remedies)?

DISCUSSION



► CJEU, *Weber&Putz* decision

“[A]lthough **the first subparagraph of Article 3(3)** is, in principle, formulated in a manner which is sufficiently broad to cover cases of **absolute lack of proportionality**, **the second subparagraph of Article 3(3)** defines the term ‘disproportionate’ **exclusively in relation to the other remedy, thus limiting it to cases of relative lack of proportionality**. Furthermore, it is clear from the wording and purpose of Article 3(3) of the Directive that it refers to two remedies provided for in the first place, namely the repair or replacement of the goods not in conformity.” (para. 73)

SUGGESTIONS FROM CJEU

- ▶ Is it possible for a judge to carry out the test of proportionality, as set forth in Article 3 (2) of the 99/44/EC Directive, on her own motion? If yes, what is the relevance of the parties statements made in the proceedings? In particular, is the judge obliged – in the light of the right to be heard, embedded in Article 47 CFREU – to ask the seller to take a standpoint, if the particular remedy complies the requirement of proportionality? Who shall provide evidence about (dis)proportionality of sought remedies?

DISCUSSION

- ▶ No direct suggestions in the CJEU case-law, but:
 - the general requirement of proportionality in consumer sales law
(see *Weber&Putz*)
 - *ex officio* powers in consumer sales
(see generally *Duarte Hueros*)
 - right to be heard as a procedural guarantee in consumer law
(see *Biuro Podróży Partner*)

SUGGESTIONS FROM CJEU

- ▶ If a remedy of the first sequence occurs impossible or disproportionate, can a judge, acting *ex officio*:
 - a) adjudicate another remedy from the first sequence (e.g. replacement instead of repair);
 - b) adjudicate a remedy from the second sequence (e.g. price reduction instead of replacement or repair claimed originally by a buyer);
 - c) allow the parties to present their views about the possible use of an alternative remedy and eventually revise the original claim opting for another remedy;
 - d) reject the original claim with a view on the possibility that the consumer files an alternative remedy in another cause of action without this being banned by rules of *res judicata*? Does national procedural law oppose to any of the above options?

DISCUSSION

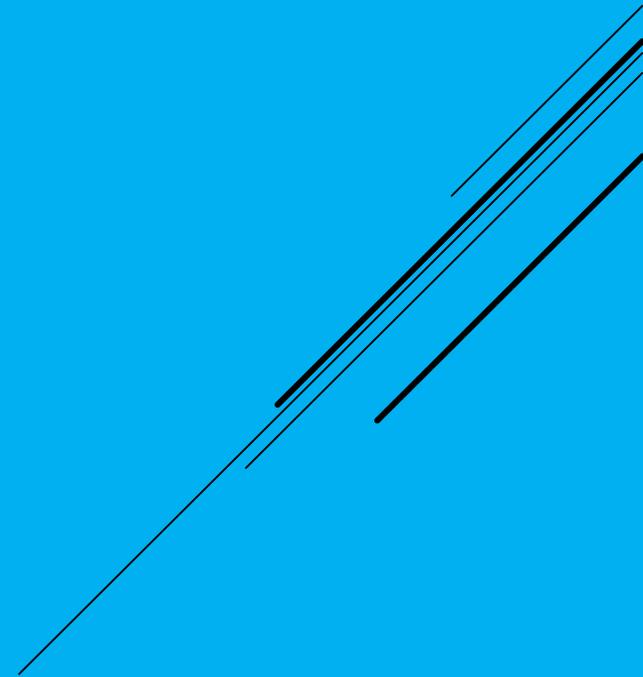
► CJEU, *Duarte Hueros*

“Directive 1999/44 must be interpreted as precluding legislation [...] which **does not allow the national court hearing the dispute to grant of its own motion an appropriate reduction in the price of goods** which are the subject of a contract of sale in the case where a consumer who is entitled to such a reduction brings proceedings which are limited to seeking only rescission of that contract and such rescission cannot be granted because the lack of conformity in those goods is minor, even though that consumer is not entitled to refine his initial application or to bring a fresh action to that end.”
(para. 43)

SUGGESTIONS FROM CJEU

- ▶ If a judge makes a choice between the remedies, what is the relevance of Article 47 of the Charter? In particular, what impact on the choice may have the right to effective judicial remedy set forth in this provision?

DISCUSSION

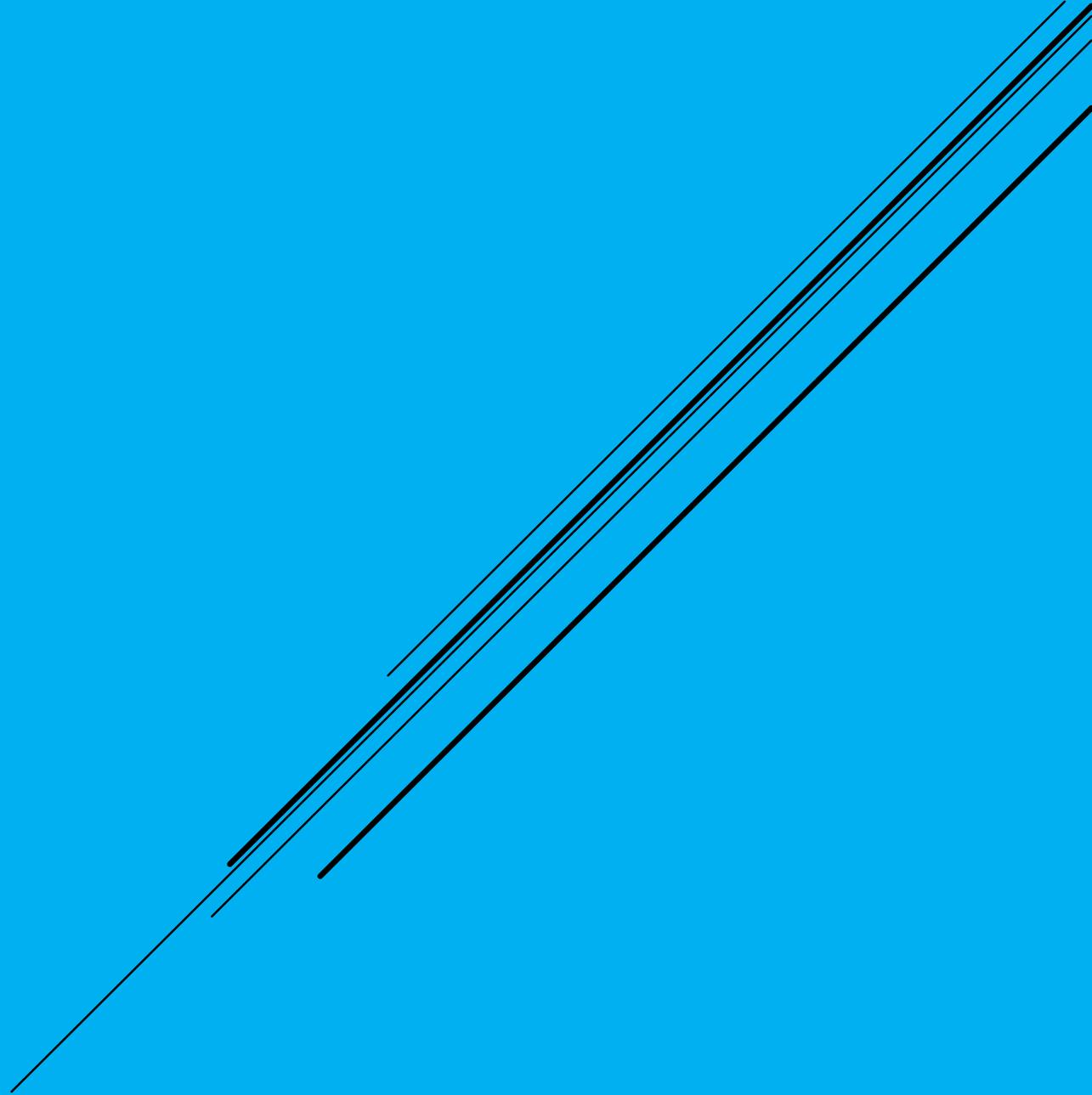


► CJEU, *Duarte Hueros*

“[I]t must be held that such procedural rules are liable to undermine the **effectiveness of the consumer protection** intended by the European Union legislature in so far as they **do not allow the national court to recognise of its motion the right of the consumer to obtain an appropriate reduction in the price of the goods, even though that consumer is not entitled to refine his initial application or to bring a fresh action to that end.**” (*para. 39*)

SUGGESTIONS FROM CJEU

STEP II



- ▶ Mr Johnson concluded a sales agreement concerning an armchair for his flat for 1.500 EUR. The furniture was manufactured accordingly to the special requirements of the buyer, who wanted to make it functional for his elderly mother, **and delivered on 3 May 2014**. Subsequently, **in August 2014, numerous ruptures started to appear in the armchair's frame, threatening that in the course of time the entire furniture will collapse**.
- ▶ The buyer demanded repair of the good to the state conforming with the specification, alternatively delivery of a new one. The seller claimed in response that **the defect resulted from the natural weakness of a wood that happens from time to time and cannot be verified ex ante**. Therefore, the defect of a good remains beyond his scope of liability – and consumer did not evidence any other cause of non-conformity. The consumer sued the seller, claiming repair, alternatively replacement of the good.

FACTS – VARIATION

Article 5 (99/44/EC Directive)

Time limits

1. The seller shall be held liable under Article 3 where the lack of conformity becomes apparent within two years as from delivery of the goods. If, under national legislation, the rights laid down in Article 3(2) are subject to a limitation period, that period shall not expire within a period of two years from the time of delivery.

[...]

3. Unless proved otherwise, any lack of conformity which **becomes apparent within six months of delivery of the goods** shall **be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.**

LEGAL BASIS

- ▶ What is the allocation of the burden of proof in the case of non-conformity? What facts should be evidenced by a consumer? In particular, should the consumer provide evidence of the cause of non-conformity?
- ▶ Does it make a difference whether the non-conformity appears within the first six months or beyond? Is the allocation in question affected by the right to effective remedy in the meaning of Article 47 CFREU?
- ▶ If so, what are the consequences for the domestic court? Is there any possible tension, in this respect, between national procedural rules and the right to an effective protection for the consumer?

DISCUSSION

► CJEU, *Faber*

“If the lack of conformity has become apparent within six months of delivery of the goods, Article 5(3) of Directive 199/44 relaxes the burden of proof which is borne by the consumer by providing that the lack of conformity is presumed to have existed at the time of delivery.

In order to benefit from that relaxation the consumer must nevertheless furnish evidence of certain facts.

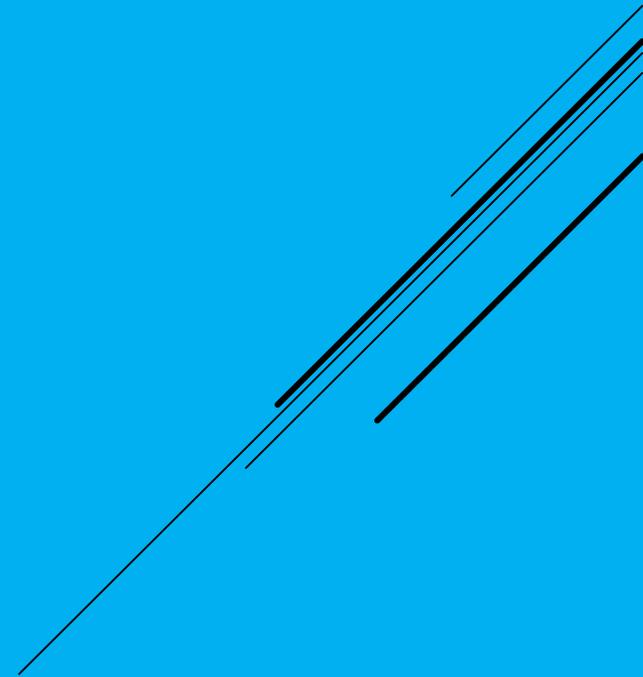
In the first place, the consumer must allege and furnish evidence that the goods sold are not in conformity with the relevant contract in so far as, for example, they do not have the qualities agreed on in that contract or even are not fit for the purpose which that type of goods is normally expected to have. The consumer is required to prove only that the lack of conformity exists. He is not required to prove the cause of that lack of conformity or to establish that its origin is attributable to the seller.

In the second place, the consumer must prove that the lack of conformity in question became apparent, that is to say, became physically apparent, within six months of delivery of the goods.” (*para. 68-71*)

SUGGESTIONS FROM CJEU

- ▶ Can the seller oppose to the consumer's request, claiming that the non-conformity effects from natural causes, beyond human's control? Is it up to the consumer, in such a case, to prove that non-conformity had another cause or was controllable?

DISCUSSION



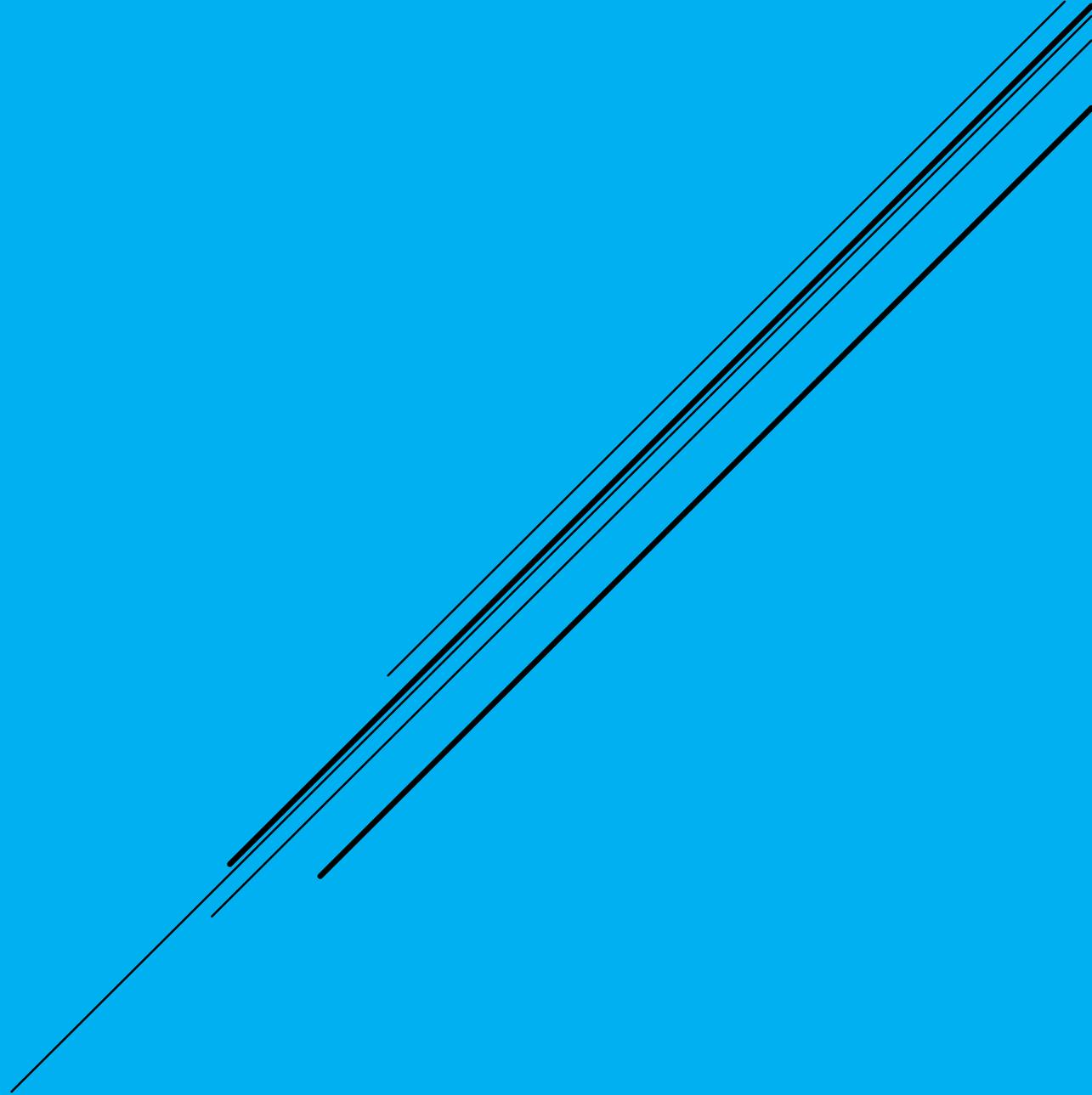
► CJEU, *Faber*

“It is therefore for the professional seller to provide, as the case may be, evidence that the lack of conformity did not exist at the time of delivery of the goods, by establishing that the cause or origin of that lack of conformity is to be found in an act or omission which took place after that delivery.

If the seller does not manage to prove to the requisite legal standard that the cause or origin of the lack of conformity lies in circumstances which arose after the delivery of the goods, the presumption laid down in Article 5(3) of Directive 1999/44 enables the consumer to assert the rights which he derives from that directive.” (para. 73-74)

SUGGESTIONS FROM CJEU

STEP III



- ▶ Mr Johnson concluded a sales agreement concerning an armchair for his flat for 1.500 EUR. The furniture was manufactured accordingly to the special requirements of the buyer, who wanted to make it functional for his elderly mother. **After delivery the furniture was installed in the flat by removing a part of parquet and screwing it permanently to the floor.** In the course of time it occurred that the furniture does not comply with specification provided by the buyer and is useless for the intended purpose.
- ▶ The buyer demanded repair of the good to the state conforming with the specification, alternatively delivery of a new one. The seller declined this claim, indicating that costs of repair or replacement would be disproportionate for him, taking into account the value of materials and work in construction of the original furniture. **He claimed also that the costs of replacement exceed beyond economic rationality and therefore this remedy is not available.**
- ▶ The consumer sued the seller, claiming repair, alternatively replacement of the good. The courts, after hearing an expert witness, assessed that **the costs of replacement will amount to 800 EUR**, taking into account the need to uninstall the furniture and make adjustments in the parquet, manufactured from a high-quality wood.

FACTS – VARIATION

Article 3 (99/44/EC Directive)

Rights of the consumer

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.

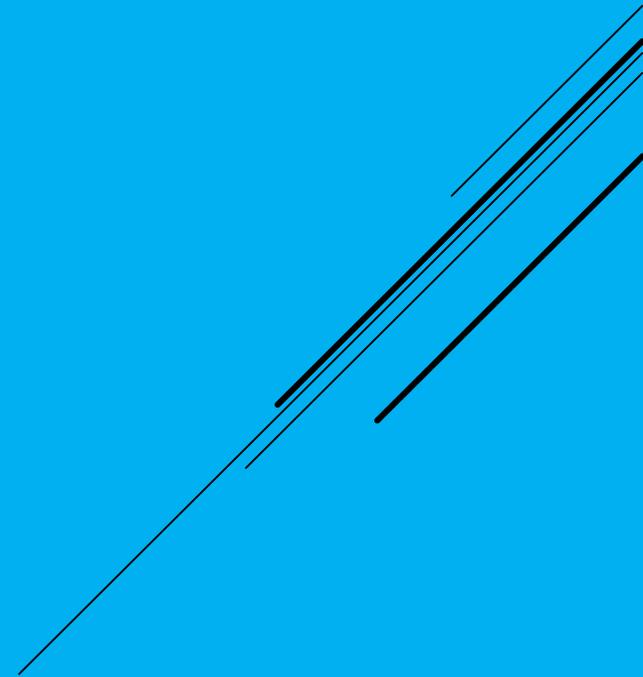
3. In the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case **free of charge**, unless this is impossible or disproportionate.

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.**

LEGAL BASIS

- ▶ Who should bear the costs of replacement of a defective good? Are they, in principle, allocated on the side of the buyer or the seller?

DISCUSSION



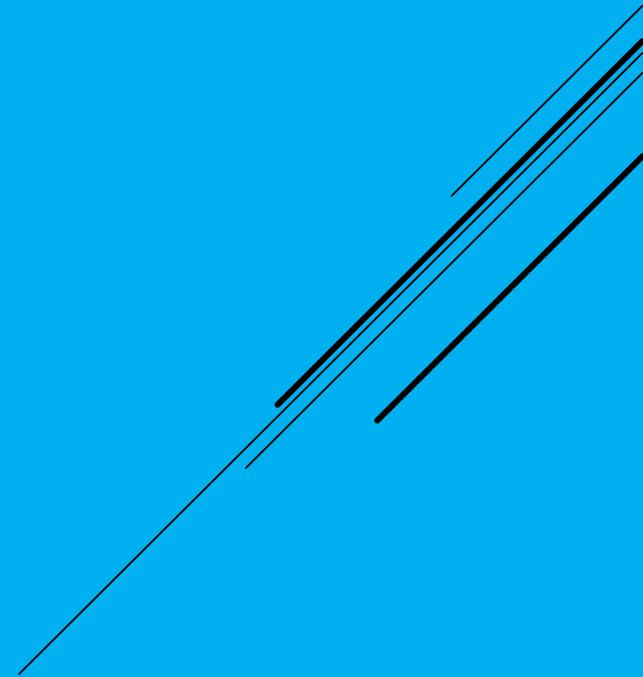
► CJEU, *Weber&Putz*

“Article 3(2) and (3) of the Directive is to be interpreted as meaning that, where consumer goods not in conformity with the contract which were installed in good faith by the consumer in a manner consistent with their nature and purpose, before the defect became apparent, are restored to conformity by way of replacement, **the seller is obliged either himself to remove the goods from where they were installed and to install the replacement goods there or else to bear the cost of that removal and installation of the replacement goods.**” (*para. 62*)

SUGGESTIONS FROM CJEU

- ▶ Can the seller deny repair/replacement only because the costs of replacement are excessive? How are the right to effective remedy (Article 47 CFREU) and the principle of effectiveness relevant for this issue? Does this right contribute to interpretation of the expression “free of charge” in the meaning of Article (4) of the 99/44/EC Directive?

DISCUSSION



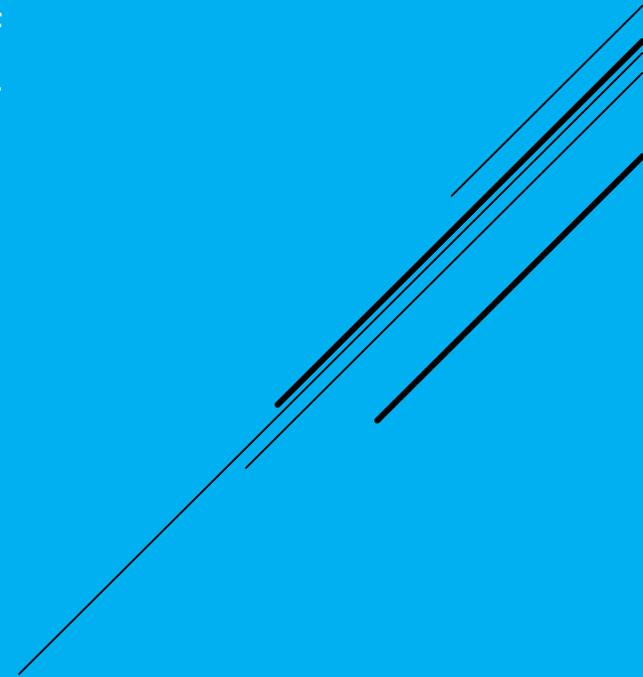
► CJEU, *Weber&Putz*

“Article 3(3) of the Directive must be interpreted as **precluding national legislation from granting the seller the right to refuse to replace goods not in conformity, as the only remedy possible**, on the ground that, because of the obligation to remove the goods from where they were installed and to install the replacement goods there, replacement imposes costs on him which are disproportionate with regard to the value that the goods would have if there were no lack of conformity and to the significance of the lack of conformity.” (para. 78)

SUGGESTIONS FROM CJEU

- ▶ Is it possible to divide the costs of replacement of the good? If so, what are the criteria that ought to be taken into account by a domestic court? Are the principle of effectiveness and Article 47 CFREU relevant?
- ▶ In particular, can the buyer refuse to bear a part of the costs of replacement and have the price reduced or the contract cancelled?

DISCUSSION



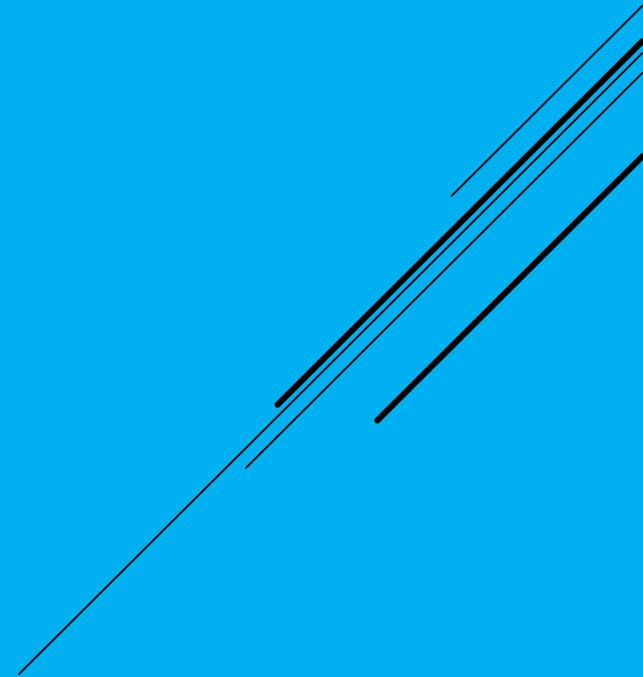
▶ CJEU, *Weber&Putz*

- ▶ “Article 3(3) of the Directive does not preclude the consumer’s right to reimbursement of the cost of removing the defective goods and installing the replacement goods **from being limited, where necessary, to an amount proportionate to the value the goods would have if there were no lack of conformity and the significance of the lack of conformity.** Such limitation leaves intact the consumer’s right to seek replacement of goods not in conformity.” (*para. 74*)
- ▶ “[I]n the event that the right to reimbursement of those costs is reduced, **the consumer should be able to request, instead of replacement of the goods not in conformity, an appropriate price reduction or rescission of the contract,** pursuant to the last indent of Article 3(5) of the Directive, since the fact that a consumer cannot have the defective goods brought into conformity without having to bear part of these costs **constitutes significant inconvenience for the consumer.**” (*para. 77*)

SUGGESTIONS FROM CJEU

- ▶ If the costs are to be shared, how could they be possibly allocated by a court in the particular circumstances of this hypothetical? Would the principle of proportionality influence this apportionment?

DISCUSSION



► CJEU, *Weber&Putz*

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

SUGGESTIONS FROM CJEU