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# **CJEU rules that consumer guarantees do not apply where goods sold were incidental to supply contract**

*Mrs Heike Schottelius v. Mr Falk Seifert*  
*Case C-247/16*

**Article by David Bowden**

### Executive speed read summary

A German couple contracted with a tradesman to install a new swimming pool at their house. After installation, there were problems with its cleaning system, filtration system and pump. They asked the supplier to sort out the snagging but their pleas fell on deaf ears. In the end the husband and his friend sorted out the defects. The wife then demanded reimbursement of the cost of the defective parts. She brought a court claim for these claiming that the parts were covered by the German law which implemented the EU Consumer Guarantees Directive. The German court referred to the Court of Justice of the EU a question as to whether this Directive applied or not. The CJEU ruled that there is no definition of 'contracts of sale' in the Directive. However to fall within the Directive's scope any goods installed would have to be manufactured or produced by the seller. Where there is a lack of conformity resulting from incorrect installation of the consumer goods where installation formed part of the contract of sale, then to be covered by the Directive then the supply of services must be 'ancillary' to the sale. Although the supplier sold various goods necessary to renovate the swimming pool, it was clear that the swimming pool installation was the main subject of the contract with the sale of the parts being 'merely ancillary' by comparison. Although the case will go back to the German court, the CJEU ruling means that the consumers will not be able to recover the cost of replacing defective parts in her swimming pool from the tradesman that installed the defective parts originally.

*Mrs Heike Schottelius v. Mr Falk Seifert*

*The Government of the Republic of Germany and the European Commission intervening*

*Case C 247/16*

*7 September 2017*

*Court of Justice of the European Union, 10<sup>th</sup> Chamber (Judges Maria Berger, Borg Barthet and Levits. Advocate General Saugmandsgaard Øe)*

### **What are the facts?**

In 2011 Mr & Mrs Schottelius engaged Mr Seifert to install a swimming pool at their house. After it was installed, there were problems with the cleaning system, filtration system and pump. Mrs Schottelius instructed an expert who said the defects were serious and in breach of building control. She asked Mr Seifert to fix the problems but he failed to do so. In the end her husband and one of his friends fixed the problems. Mrs Schottelius then brought a court action to recover the expenses she incurred in the remedial works.

### **What does the Consumer Guarantees Directive say?**

The relevant parts of the Consumer Guarantees Directive ('CGD') 1999/44/EC are these.

- **Article 1** – 'consumer' means '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' and 'seller' means 'any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession'.
- **Article 2** – deals with 'Conformity with the contract' and says '1. The seller must deliver goods to the consumer which are in conformity with the contract of sale' and '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'.
- **Article 3** – deals with 'Rights of the consumer' and 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.....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...'

### **Are there any recitals in the Consumer Guarantees Directive of relevance?**

There are a number of recitals to the CGD that are also relevant. These are:

- **Recital 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 noncontractual liability'

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- **Recital 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’*
- **Recital 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’*

**What happened in the German courts?**

The Hanover Regional Court was not supportive of the consumer’s claim. Its concern was that Mrs Schottelius had not set out an explicit deadline to Mr Seifert to fix the problems. There was a complication because Mr Schottelius had assigned all the rights in the land and swimming pool to his wife. The German Court took the view that the notice given to Mr Seifert was not valid under German domestic law because at the time he gave it he no longer held any interest in the affected land. The reference for a preliminary ruling was lodged at CJEU on 29 April 2016. A hearing took place on 7 September 2017 at which both sides, the European Commission and the Advocate General made oral submissions.

**What were the terms of reference to the CJEU?**

The court in German referred this question to the CJEU:

*‘Can a principle of EU consumer law be derived from the second indent of Article 3[(5)] 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 1 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 completed the remedy within a reasonable time, and there is no requirement in that respect that a period of time for removing the defect 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?’*

**Are there any special provisions in German Law?**

The CGD was transposed into German law by means of the Law on the modernisation of the law of obligations of 26 November 2001 which made amendments to the German Civil Code. This broadly copied out the CGD and its provisions are not replicated in this piece.

**What did the CJEU decide were the issues raised by the referred question?**

The CJEU broke it down to these 4 issues:

- Scope of the CGD,
- Uniform application of EU law,
- Was the swimming pool installation a contract for sale or not?
- Could the CGD be given an expansive interpretation or not?

**What did the CJEU rule was the scope of the CGD?**

The CJEU noted that the CGD did not define what were or were not ‘contracts of sale’. The CJEU said the Directive’s objective was to ‘approximate the laws, regulations and administrative provisions’ of EU member states and that it only applied to ‘contracts of sale entered into between a professional seller and a consumer-purchaser’.

**What did the CJEU rule on the uniform application of EU law?**

The CJEU said that where a provision in EU law makes no reference to the law of member states with regard to a particular concept, then 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’. For ‘contract of sale’ in the CGD this meant that it was ‘designating an autonomous concept of EU law which must be interpreted in a uniform manner’ throughout the EU.

**Did the CJEU rule that the swimming pool installation was a contract for sale or not?**

The CJEU started by noting that the CGD 'sets out explicitly the contracts that involve a supply of services which are capable of being deemed to be equivalent to contracts of sale' but 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'.

However the CJEU noted that Article 1(4) of the CGD meant that 'a contract whose subject is the sale of an asset that must first be manufactured or produced by the seller' to fall within the scope of the directive. Going on the CJEU looked at Article 2(5) which 'deems a lack of conformity resulting from incorrect installation of the consumer goods to be equivalent to lack of conformity of the goods' if installation 'forms part of the contract of sale of those goods'. Concluding on this issue the CJEU ruled that 'in order for those categories of contract involving a supply of services to be classified as 'contracts of sale' within' the CGD then 'the supply of services must be ancillary to the sale'.

**Did the CJEU manage to give the CGD an expansive interpretation?**

No.

The CJEU referred to these 3 documents:

- The UN Vienna Convention on Contract for the International Sale of Goods date 11 April 1980,
- The European Commission explanatory memorandum in COM (95) 520 final which accompanied the draft CGD dated 23 August 1996, and
- The report of the rapporteur in the European Parliament at 1<sup>st</sup> reading.

The CJEU noted that the CGD's aim was to take into account 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'. Applying this concept to the facts of this case, the CJEU noted that whilst 'the contractor did indeed sell them various goods necessary to renovate that swimming pool, such as, for example, a filtration system featuring a pump' but that nevertheless it was clear that the installation of the swimming pool was the 'principal subject of that contract' and that the sale of the goods were 'merely ancillary by comparison with that provision of services'.

Concluding on this issue the CJEU ruled that the swimming pool installation contract could not be 'classified as a contract for the 'supply of consumer goods to be manufactured or produced' within the meaning of Article 1(4)' of the CGD because the 'goods required for the renovation of the swimming pool in question did not have to be either manufactured or produced by the contractor'. For this reason the CJEU ruled that a swimming pool installation contract did 'not constitute a 'contract of sale' within the meaning of Directive 1999/44' and did not fall within the CGD's scope.

**What will happen next with this case?**

The CJEU found that it did not have jurisdiction to answer the referred question. Although the case will go back to the German court, it had already indicated it would refuse it for other grounds. If so, this would mean that the consumer would not be able to recover the cost of replacing defective parts in her swimming pool from the tradesman that installed it.

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