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AG Wahl on 99/44 Directive: if it looks like the right place, it is the right place (C-52/18)

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Recent developments in European Consumer Law

TUESDAY, 15 JANUARY 2019

[AG Wahl on 99/44 Directive: if it looks like the right place, it is the right place \(C-52/18\).](#)

Today, AG Wahl delivered his opinion in case [C-52/18](#), concerning the 1999 directive on consumer Sales and associated guarantees (1999/44/EC). The Directive harmonises the remedies available to consumers in case goods they have bought turn out to be of disappointing quality, by making sellers liable for the good's non-conformity. In contrast to more recent instalments in EU consumerist legislation, the 1999 Directive mainly addressed high street sales. The huge growth of e-commerce over the past decade has, then, if anything caused less trouble so far than one may have expected.

However, in the case at stake, the limits of the Directive in the field of online sales are highlighted - even though the contract in this case had been concluded over the phone... According to the Directive's article 3.3,

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.

The article is mute on where the repair should take place. Article 3.4 is clear that remedies should be effected free of charge, including without requiring the consumer to incur shipping costs. But what if the consumer were able to return the goods in person?

The dispute before the Court of Justice concerns a large party tent. The dispute before the concerned German court hinged on whether the consumer should have brought the allegedly non-conform good to the seller's premises, or whether making the tent available at his own home was sufficient.

AG Wahl first considers whether the question of where the tent should be made available is covered by the requirement that remedies be offered free of charge. While the answer to this question is not an obvious one, the AG considers the two alternative requirements - that the remedy take place within reasonable time and without significant inconvenience for the consumer - to

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offer more promising interpretive avenues.

In essence, AG Wahl uses the two requirements to build one larger argument: **the appropriate place for offering the goods is the one that, in the circumstances of a given case, allows for timely repair or replacement, without significant inconvenience for the consumer.** It follows that it will be for the courts invested with a specific dispute to ascertain whether, in that case, the consumer could be required to do more than make the good available at their home.

In particular, the AG notes, the question mainly arises

for goods purchased by distance selling. In the case where the consumer bought the goods at the seller's place of business and, moreover, the goods do not require specific installation, it can, to my mind, be assumed that the making available of the goods at the seller's place of business does not constitute any significant inconvenience to the consumer.

Besides the fact that this last consideration may be openly in contrast with the substance of Weber and Putz, the very broad interpretive exercise carried out by AG Wahl seems less straightforward than, for instance, the alternative option of considering the question to be included in the "free of charge" requirement. The AG seems to be more keen on preserving the balance of rights and duties that he considers to be the aim of the Directive (see the remarks at paras 34-45) than on carrying out rigorous interpretation. Admittedly, however, the results of the more straightforward avenue suggested above would be very far reaching - perhaps exceedingly so.

The answer suggested by the AG here, additionally, seems to open up to a great degree of uncertainty. This may not be a big problem for national courts, who may well be used to working with open norms, but may not be a particularly desirable state of things from the point of view of harmonisation. One more consideration to be taken into account in the process of recasting the 1999 Directive. Unless, of course, the Court will come up with an answer that avoids the shortcoming of both the avenues discussed. As usual, stay tuned!

Posted by [Candida Leone](#) at 18:42



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