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Articles

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Redress in Europe and the Trap under the CESL

Abstract: While redress in chains of contracts is addressed by Directive 1999/44 (Consumer Sales Directive) and the Member States' national laws implementing the former, the European Commission proposal for a Common European Sales Law (CESL) does not provide for any redress safeguards. Rather, it appears that the CESL overlooked the issue. Considering that the CESL is an opt-in instrument and that its primary goal is to protect and encourage small and medium sized companies (SME) to make the most out of the internal market, the CESL's non-approach to the redress issue may prove to be a significant hindrance to an opt-in. After setting out the context of liability in chains of contracts and assessing the potential approaches to it, the article discusses the specific problems of redress in cross-border cases before examining more closely the CESL's approach to redress scenarios and possible solutions to the problem. The examination of the redress issue as a matter of substantive law is supplemented by an excursus on the procedural safeguards of redress in cross-border cases.

Résumé: Alors que la question des recours dans les chaînes de contrats est traitée par la directive 1999/44 sur certains aspects de la vente et des garanties des biens de consommation ainsi que par les droits nationaux transposant cette directive, la proposition de règlement sur un droit commun européen de la vente de la commission européenne n'énonce aucune garantie pour ces recours. Il apparaît au contraire que le projet de règlement européen sur la vente ait oublié cette question. Étant donné que le projet de règlement européen sur la vente est un instrument optionnel et que son but initial était de protéger et d'encourager les petites et moyennes entreprises, et de tirer le meilleur parti du marché intérieur, le fait que le projet de règlement n'ait pas traité de cette question des recours pourrait se révéler un obstacle important à la décision d'opter pour ces règles. Après avoir posé le contexte de la responsabilité dans les chaînes de contrats et évalué les différentes approches possibles, cet article aborde les problèmes spécifiques de ces recours dans les cas trans-frontières avant d'examiner plus précisément l'approche du projet de règlement s'agissant des différents recours et des solutions possibles à ce problème. L'analyse de cette question des recours comme une problématique de droit substantiel est

renforcée par l'examen des garanties procédurales de ces recours dans les cas trans-frontières.

Zusammenfassung: Während der Regress in Lieferketten sowohl von der Richtlinie 1999/44 (Verbrauchsgüterkaufrichtlinie) als auch den nationalen Umsetzungen geregelt wird, enthält der Vorschlag der Europäischen Kommission für ein Gemeinsames Europäisches Kaufrecht (GEKR) keinerlei Regresssicherungen. Es scheint, dass die Kommission das Problem schlicht übersehen hat. Berücksichtigt man, dass das GEKR von einem opt in der Parteien abhängt und dass das vordringliche Ziel des GEKR darin besteht, kleine und mittlere Unternehmen (KMU) zu schützen und dazu beizutragen, dass diese die Möglichkeiten des Binnenmarktes durch grenzüberschreitenden Handel nutzen, könnte sich die Regelungslücke des GEKR im Hinblick auf den Regress als schwerwiegendes Hindernis für eine Wahl des GEKR erweisen. Die Autoren erörtern zunächst den Kontext des Regresses in Lieferketten und bewerten die möglichen Lösungsmodelle. Sie gehen anschließend auf die spezifischen Probleme des Regresses in grenzüberschreitenden Fällen ein, untersuchen die Problematik des Regresses bei Geltung des GEKR und erörtern mögliche Lösungen. Den Abschluss bildet ein Exkurs zu den prozessualen Sicherungen des Regresses in grenzüberschreitenden Fällen.

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I Introduction

On 11 October 2011, the European Commission proposed a Regulation on a Common European Sales Law.[1] It consists of an Explanatory Memorandum (EM), the provisions of the proposed Regulation (RP) and a Common European Sales Law forming the Regulation's Annex I (CESL). The Commission proposal was preceded by a Green Paper of 1 July 2010[2] and a Feasibility Study of 3 May 2011 drafted by a

1 Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law COM(2011) 635 final.

2 COM(2010) 348 final; for comments and criticism see *inter alia* Max Planck Institute for Comparative and International Private Law (J. Basedow, G. Christandl, W. Doralt *et al*), 'Policy Options for Progress Towards a European Contract Law – Comments on the issues raised in the

Commission-appointed Expert Group (FS)[3] which also prepared the draft CESL for the Commission's proposal (whereas the RP was drafted by the Commission alone).

With its proposal, the Commission aims to assist consumers and businesses in realizing 'the most out of the market', ie the internal market, at a time when Europe is facing serious economic headwinds.[4] Many doubts have, however, been expressed whether the Commission proposal is capable of achieving this goal. These doubts concern more generally the question whether a uniform law is really needed and – if one assumes that – more specifically the quality of the proposal. In particular, the lack of a preceding discussion about the scope, structure and content of a uniform contract law and the small amount of time provided for the drafting process led to the fear that the quality of the resulting instrument would be poor.[5]

The purpose of this paper is to scrutinize the Commission's proposal with regard to a specific problem that is both practically relevant and technically sophisticated: the final seller's right of redress. Which party in a chain of supply contracts shall be ultimately liable in case of a non-performance of the final seller/supplier[6] towards the final buyer and how is this liability systematically construed? Special attention will be given to the situation of small and medium-

Green Paper from the Commission of 1 July 2010, COM(2010) 348 final' *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)* 75 (2011) 371; for further submissions during the consultation following the Green Paper see http://ec.europa.eu/justice/news/consulting_public/news_consulting_0052_en.htm (last visited 4 December 2012).

3 A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback at http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf (last visited 4 December 2012).

4 EM, 2–4; recitals 1–6 RP; see also the responsible Commissioner's and the European Parliament rapporteur's view in V. Reding and D. Wallis, 'A proper common sales law for Europe's common market' *The Guardian* (London, 9 October 2011) at http://www.guardian.co.uk/commentisfree/2011/oct/09/proper-common-sales-law-europe (last visited 4 December 2012).

5 For criticism regarding the CESL's drafting process see H. Eidenmüller, N. Jansen, E.-M. Kieninger, G. Wagner and R. Zimmermann, 'Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht' *JuristenZeitung (JZ)* 2012, 269; W. Doralt, 'Strukturelle Schwächen in der Europäisierung des Privatrechts – Eine Prozessanalyse der jüngeren Entwicklungen' (2011) 75 *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)* 260; S. Grundmann, 'The Structure of the DCFR – Which Approach for Today's Contract Law?' (2008) 5 *European Review of Contract Law* 225; G. Wagner and R. Zimmermann, 'Vorwort' (2012) 212 *Archiv für die civilistische Praxis (AcP)* 467, 471 summarizing the position of the majority of the members of the German Association of Teachers of Private Law (*Zivilrechtslehrervereinigung*).

6 In the course of this article references to the final seller and the sale of goods apply equally to the final supplier and supply of digital content.

sized enterprises (SME).[7] First, it will often be an SME who is the final seller contracting with a consumer.[8] This corresponds with the Commission's repeatedly expressed purpose of the CESL to enable particularly SME to make full use of the internal market by engaging in cross border trade and expanding into new Member States' markets.[9] Second, the issue of redress is of paramount importance to SME who may not be in a bargaining position to impose their own redress mechanism towards their contractual partners down the supply chain. In that respect, as an opt-in instrument, the CESL competes with the national sales laws.[10] When it comes to the decision whether to opt in to the CESL or not, the parties will carefully examine the way redress is dealt with by the CESL versus the national laws at their disposal. We will therefore give an overview of how the redress problem is addressed in Europe and examine whether the CESL provides acceptable solutions.

Our analysis of the redress issue will proceed as follows: after setting out the context of liability in chains of contracts (II) and assessing the potential approaches to it (III), we will discuss the specific problems of redress in cross-border cases (IV) before examining more closely the CESL's approach to redress constellations (V). The examination of the redress issue as a matter of substantive law will be supplemented by an excursus on the procedural safeguards of redress in cross-border cases (VI).

II Context of Liability in Chains of Contracts

1 The Liability Scenario in Chains of Contracts

For the purpose of illustrating the liability scenario in chains of contracts we may consider the case of a contract for sale and/or related services between a final buyer being a consumer and a final seller/service provider[11] who – in relation to the sale – purchases the goods from a third party, the intermediary, and – in

7 For a definition of SME, see art 7(2) RP.

8 Generally, more than 99 % of all European businesses are SME, see http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/index_en.htm (last visited 4 December 2012).

9 See in particular the EM, 1–4.

10 T. Ackermann, 'Das Gemeinsame Europäische Kaufrecht – eine sinnvolle Option für B2B-Geschäfte?', in O. Remien, S. Herrler and P. Limmer (eds), *Gemeinsames Europäisches Kaufrecht für die EU?* (Munich: C H Beck, 2012) 49, paras 3–4.

11 In the course of this article, reference to the seller/supplier includes the service provider since by definition in art 2(m) RP the service provider is identical with the seller as a related service is only such a service that is provided by the seller of the goods or supplier of digital content.

relation to the related service – subcontracts the actual performance of the service to a third party. In this case, there is no contractual relationship between the final buyer and the third party. Instead, there is a chain of contracts: one contract between the final buyer and the final seller and at least one more between the final seller and a third party supplier of goods and/or services. If this third party does not produce the goods or perform the services (or parts of it) itself, but acts as an intermediary, the chain will continue further via intermediaries up to the manufacturer of the goods or to the actual service provider. The issue of liability amongst the parties to the chain of contracts arises once there is an instance of non-performance by the final seller towards the final buyer due to a non-performance of a third party in the contractual supply chain towards its contractual partner. In the most important redress scenario, the manufacturer/actual service provider or an intermediary[12] delivered non-conforming goods or rendered non-conforming services.

2 The Asymmetry Problem of Liability in Chains of Contracts

The problem of liability in chains of contracts is the asymmetry of the B2C and B2B relationships along the chain with regard to liability towards the respective contractual partner. While the final contract of the chain will regularly be a consumer sale triggering mandatory consumer protection rights and remedies, the other contracts up the chain will regularly be B2B relationships lacking any protective elements to the benefit of the final seller and further intermediaries up the chain. Even Directive 93/13 (Unfair Contract Terms Directive)[13] does not apply to B2B contracts so that exemptions of liability may be imposed by the stronger party in a virtually unrestricted manner.[14] As a result, the final seller at the swivel point of B2C to B2B relationships is in a delicate sandwich position. As the last link in the chain of distribution, he is mandatorily liable to the consumer for the sold goods' or rendered services' non-conformity although the goods or services

12 Non-conformity caused by an intermediary may occur in particular in cases of sales contracts: While the sold goods may have left the manufacturing site without any defects, non-conformity may be caused by an intermediary due to inappropriate handling or packaging of the goods.

13 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJEC* 1993 L 95/29.

14 The (even though limited) control of standard contract terms in B2B relationships under German law (§ 310(1) German Civil Code (*Bürgerliches Gesetzbuch*): standard of fairness and reasonableness in the light of practices and customs in the respective business dealings) is internationally rather an exception.

were already defective when supplied by the manufacturer/actual service provider or an intermediary. In turn, unless he is in a bargaining position so as to impose standard term or individual redress safeguards towards his supplier,[15] he will not be able to pass on liability to the party along the chain of contracts that is responsible for the goods' or services' non-conformity. In particular, SME will regularly not be in a position to impose such redress safeguards upon their suppliers. On the contrary, the European Commission assumes that SME 'generally' have to agree to the law of their business partner.[16] If they are, however, not in a position to impose the applicable law *vis-à-vis* their suppliers, they may not impose any redress safeguards either.

In the course of drafting a redress safeguard in Article 4 Directive 1999/44 (Consumer Sales Directive),[17] the European Commission summarized the final seller's sandwich position quite neatly as follows:

'This situation may also create an injustice in that the entire liability for defects ultimately resulting from an act of commission or omission on the part of another party falls upon the final sellers.' Therefore, 'it is also necessary to include a provision granting the final seller the right to pursue remedies against those responsible'.[18]

III Approaches to Liability in Chains of Contracts

1 The Basic Distinction of Contractual Recourse versus Direct Liability

Generally, there are two ways of approaching liability amongst the three or more persons involved in a chain of sale or service contracts: contractual recourse versus direct liability.

Recourse consists of contractual claims along the chain of contracts. Each party has to have recourse with its contractual partner. If none of the parties in the chain has excluded liability, it is passed on to the party in the supply chain that is responsible for the non-performance that has occurred. Direct liability, in

15 For standard contract terms, see D. Staudenmeyer, 'Der Kommissionsvorschlag für eine Verordnung zum Gemeinsamen Europäischen Kaufrecht' *Neue Juristische Wochenschrift (NJW)* 2011, 3491, 3492.

16 EM, 3.

17 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, *OJEC* 1999 L 171/12.

18 See COM(95) 520 final, art 3, para 5.

contrast, consists of a self-standing, contractual or non-contractual claim against the party in the contractual chain that is responsible for the non-performance (in the context of defective goods or services regularly the manufacturer or service subcontractor actually performing the services), bypassing any other parties of the chain. The direct claim may lie with the final seller or even with the final buyer; in the latter case, the final seller is entirely out of the liability dispute as in the case of (non-contractual) product liability.

2 The Approach of Directive 1999/44

Article 4 Directive 1999/44 (Consumer Sales Directive) provides for a redress safeguard throughout the EU by ensuring that the final seller is awarded remedies against the person or persons liable in the contractual chain. The high level of consumer protection intended by the Consumer Sales Directive should not come at the expense of the innocent final seller.[19] The parties to the redress claim, the available action and the conditions to exercise it are, however, left to the national laws of the Member States.[20] This leaves considerable room to the Member States how to arrange for redress[21] and seems to accommodate any solution from a direct claim by the final buyer (*a maiore ad minus* since it appears to be most advantageous for the final seller since he is not held liable) or the final seller to safeguards for the recourse actions along the chain of contracts.

However, the protection granted by Article 4 is limited. The provision does not require a mandatory redress safeguard, so that its national implementations

19 A. Dutta, 'Der europäische Letztverkäuferregress bei grenzüberschreitenden Absatzketten im Binnenmarkt' *Zeitschrift für das gesamte Handelsrecht (ZHR)* 171 (2007) 79; for a detailed account of the policy considerations behind art 4, see M. Bridge, in C. Bianca and S. Grundmann (eds), *EU Sales Directive – Commentary* (Leuven/Oxford: Intersentia, 2002) art 4, para 7.

20 Art 4 Consumer Sales Directive is headed 'Right of redress' and reads as follows: 'Where the final seller is liable to the consumer because of a lack of conformity resulting from an act or omission by the producer, a previous seller in the same chain of contracts or any other intermediary, the final seller shall be entitled to pursue remedies against the person or persons liable in the contractual chain. The person or persons liable against whom the final seller may pursue remedies, together with the relevant actions and conditions of exercise, shall be determined by national law.'

21 S. Lorenz, 'Unternehmerregress im Verbrauchsgüterkauf und Internationales Privatrecht – Zum internationalen Anwendungsbereich der §§ 478, 479 BGB', in H.-P. Mansel (ed), *Festschrift for Erik Jayme* (Munich: Sellier, 2004) 533.

may be excluded by agreement between the parties.[22] Recital 9, sentences 3 and 4 of the Consumer Sales Directive explicitly emphasize freedom of contract in B2B relationships. Nevertheless, some Member States implemented a mandatory redress mechanism so as to ensure effective redress regardless of the parties' bargaining power.[23] The reason for this approach is that final retailers are considered to be 'generally weaker'[24] and that it will often be an SME who is the final retailer.[25] In any event, final retailers are in need of redress safeguards when they are in the weaker bargaining position; in these circumstances, however, non-mandatory redress safeguards will be of little help.

In this context it is interesting to note the change of the Commission's view during the preparation of the Consumer Sales Directive. In its Green Paper on Guarantees for Consumer Goods and After Sale Services of 1993 preceding the Directive, the Commission favoured a direct claim.[26] In its proposal for the Directive of 1995, however, the Commission did no longer suggest a direct claim but provided for a uniform redress safeguard.[27] While the Directive took over the uniform redress safeguard with minor modifications, its review clause, Article 12, explicitly mentions that the review shall examine 'the case for introducing the producer's direct liability and, if appropriate, shall be accompanied by proposals.' In a Communication to the Council and Parliament in 2007, the Commission

22 The non-mandatory character of the final seller's remedies can be concluded *e contrario* art 7 (1) Consumer Sales Directive.

23 See § 478(4) German Civil Code (*Bürgerliches Gesetzbuch*) and art 7:25(2) Dutch Civil Code (*Burgerlijk Wetboek*), for further details on the national implementations see III 3.

24 BT-Drucks 14/6040, 249.

25 For a critical assessment of the necessity of protective measures for SME, see the contribution to the consultation on the feasibility study by Clifford Chance LLP, 'Memorandum to the European Commission' 7–8.

26 COM(93) 509 final, 87.

27 See COM(95) 520 final, art 3 para 5 of the proposed Directive; K.A. von Sachsen Gessaphe, 'Der Rückgriff des Letztverkäufers – neues europäisches und deutsches Kaufrecht' (2001) *Recht der internationalen Wirtschaft (RIW)* 721, 726 assumes that this turn away from a direct action was due to a lack of competence of the EU to regulate such private law matters – such concerns might not apply to an optional instrument; M. Lehmann, 'Informationsverantwortung und Gewährleistung für Werbeangaben beim Verbrauchsgüterkauf' *JuristenZeitung (JZ)* 2000, 280, 291; H. Beale and G. Howells, 'EC Harmonisation of Consumer Sales Law – A missed opportunity?' (1997) 12 *Journal of Contract Law* 21, 40 suspect that the Commission took the view that most Member States were not ready for such a radical break with their traditional understanding of privity of contract.

explicitly refrained from introducing a direct claim since it did not see sufficient evidence for its necessity for the proper functioning of the internal market.[28]

We note merely in passing that Directive 2011/83 (Consumer Rights Directive)[29] does not contain any redress safeguard comparable to that of Article 4 Consumer Sales Directive. While this is understandable given the reduced substantive scope of the Directive as finally adopted, even earlier drafts which covered the consumer sales scenario did not provide for a redress safeguard.[30]

3 The Member States' Different Approaches

The national laws of the Member States differ in their approach to liability.

a) France

French law traditionally provides for a direct contractual[31] claim (*action directe*) of a creditor against the debtors of his debtor, ie a creditor may directly pursue an action against the person(s) liable to his debtor.[32] Accordingly, in the case of a chain of sale contracts, the final buyer (regardless whether he is a consumer) has a direct claim against the parties up the chain of contracts bypassing the final seller with the parties of the supply chain being liable as joint debtors.[33] The final buyer

28 See Communication from the Commission to the Council and the European Parliament on the implementation 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 including analysis of the case for introducing direct producers' liability, COM(2007) 210 final, 10 *et seq* (Part II).

29 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, *OJEC* 2011 L 304/64.

30 For further details see T. Tacou, 'Verbraucherschutz auf hohem Niveau oder Mogelpackung? – Der Vorschlag für eine Richtlinie über Rechte der Verbraucher' *Zeitschrift für Rechtspolitik (ZRP)* 2009, 140, 143.

31 So jedenfalls für die *action directe* bei kaufvertraglichen Lieferketten seit Cass civ 1re, Bull civ 1979 I, n° 241.

32 The *action directe* dates back to the 19th century; see from French case law eg Cass civ Sirey 1820, I, 213; Cass civ Sirey 1886, I, 149; see Ch. Jamin, *La notion d'action directe* (Paris: LGDJ, 1991) para 15–64.

33 Cass civ 3e, Bull civ 1990 III, n° 72; Cass com, Bull civ 1972 IV, n° 144 (both decisions concerned damages claims); Cass civ 1re, Bull civ 2010 I, n° 119 (concerning termination), for an instructive

may therefore choose whether to have recourse with the final seller as his contractual partner (*action récursoire*) and[34]/or whether to pursue a direct claim against any other person up the chain of contracts (*action directe*).[35] If he does not make use of the direct claim but rather has recourse with the final seller, the final seller may himself make use of the *action directe* against further members of the supply chain. The dogmatic reasoning underlying the *action directe* is problematic and disputed amongst French scholars; the French courts regularly neglect it.[36] The prevailing view appears to be the *théorie de l'accessoire*. According to this theory the remedies relating to the sold goods' non-conformity are attached to the goods as an accessory which passes with the goods down the contractual chain to the final buyer.[37] This has important consequences on the content of the remedies pursued by way of the *action directe*. In the case of a damages claim, the grounds for the claim and potential limitations are governed by the contractual relationship of the defendant with his contractual partner in the chain of contracts while the damages are assessed by reference to the plaintiff.[38] In case of a termination of the contract, the defendant's obligation to return the contract price is limited to the price he received from his contractual partner in the chain of contracts.[39] Accordingly, reduction of the contract price is calculated on the basis of the price paid to the defendant by its contractual partner. Furthermore, in relation to all remedies the defendant can invoke any defence, particularly a limitation or exemption of liability, based on the contract with his contractual partner.[40] It is currently

overview see P. Malaurie, L. Aynès and P.-Y. Gautier, *Les Contrats Spèciaux* (5th ed, Paris: Defrénois, 2011) para 416; for a short account in German see H.J. Sonnenberger and R. Dammann, *Französisches Handels- und Wirtschaftsrecht* (3rd ed, Frankfurt: Recht & Wirtschaft, 2008) para VI 5 and 63 *et seq*.

34 In case of a cumulative action the final seller and the third party are also joint debtors.

35 S. Rohlfing-Dijoux, 'Umsetzungsüberlegungen in Frankreich', in S. Grundmann, D. Medicus and W. Rolland (eds), *Europäisches Kaufgewährleistungsrecht* (Cologne *et al*: Heymann, 2000) 158.

36 For a detailed account of the differing views in France see, eg, Malaurie, Aynès and Gautier, n 33 above, para 419; Jamin, n 32 above, paras 223–330; S. Salewski, *Der Verkäuferregress im deutsch-französischen Rechtsvergleich* (Tübingen: Mohr Siebeck, 2011) 185–190; S. Schulz, *Die französische action directe* (Frankfurt: Peter Lang, 1999) 28–106.

37 Ch. Aubry, Ch. Rau and É. Bartin, *Cours de droit civil français d'après la méthode de Zachariæ*, vol 2 (6th ed, Paris: Librairie Marchal & Billard, 1935) § 176 no 1; G. Cornu, 'Action rédhibitoire du sous-acquéreur contre le vendeur originaire dans les ventes successives' (1973) *Revue trimestrielle de droit civile (RTD civ)* 582–583; Malaurie, Aynès and Gautier, n 33 above, para 419 also point into that direction.

38 Cass com, Bull civ 2010 IV, n° 100; Cass civ 1re, Bull civ 2010 I, n° 119.

39 Cass com, Bull civ 1998 IV, n° 61.

40 Cass civ 1re, Bull civ 1995 I, n° 249; Cass com, Bull civ 2010 IV, n° 100.

unsettled whether caps on liability or exemptions of liability contained in the contract between the plaintiff and his contractual partner (hence usually between final buyer and final seller) affect the *action directe*. According to recent case law this appears not to be the case, so that there is no *double limite* but merely a *simple limite* to the *action directe*.[41] Whether the *action directe* is limited to chains of *sales* contracts is not entirely clear. Taking into account the *théorie de l'accessoire* as the *action directe's* dogmatic foundation, it was suggested that all contracts in the chain[42] or at least the first contract at the bottom of the chain with a manufacturer have to be contracts providing for a transfer of ownership to which the remedies are an accessory.[43] This covers sales contracts as well as contracts for work and labour or work and materials. Whether contracts (including subcontracts) for the provision of services of an intangible nature give rise to a contractual *action directe* is unclear;[44] otherwise and in any event, however, a non-contractual *action directe* would lie. As a result of its contractual nature, the *action directe* as a damages claim covers the performance interest as well as the integrity interest of the plaintiff, ie damage associated with the sold goods' non-conformity as well as damage to persons or other property than the sold goods. To implement Article 4 Consumer Sales Directive, the French legislature enacted Article 211–14 *Code de la Consommation*. It is, however, rather cryptic and incomplete[45] by simply stating that the final seller may have recourse against all parties of the chain of sale contracts up to the manufacturer according to the principles of the *Code civil*.[46] In particular, it is unclear, whether the specific remedies of the consumer under Articles 211–4 to 13 *Code de la Consommation* implementing the Consumer Sales Directive may be pursued by the consumer directly against the manufacturer.[47]

41 In that direction Cass civ 3ème, Bull civ 2005 III, n° 222; Cass com, Bull civ 2010 IV, n° 100.

42 Salewski, n 36 above, 190.

43 See Cass ass plèn, 1986 Grands arrêts, n° 266; for further considerations on the issue see P. Klima, 'Produzentenhaftung aus Vertrag in Frankreich' *Recht der internationalen Wirtschaft (RIW)* 1987, 307, 311; M. Beaumart, *Haftung in Absatzketten im französischen Recht und im europäischen Zuständigkeitsrecht* (Berlin: Duncker & Humblot, 1999) 81–84.

44 See eg Cass civ 1re, Bull civ 1988 I, n° 69 which concerned the loss of diapositives at a subcontractor but was formulated in very general terms regarding the contractual nature of the *action directe*.

45 See A. Bénabent, *Les contrats spéciaux civils et commerciaux* (7th ed, Paris: Montchrestien, 2006) para 234–14 who suggests extending the provision to recourse by the final buyer and besides recourse to an *action directe*.

46 For a detailed discussion of this provision and its relationship to the traditional routes of French law see Salewski, n 36 above, 132–218.

47 O. Gaut and I. Maria, 'Réflexion sur la transmission éventuelle des actions en garantie de conformité' (2008) *Juris-Classeur périodique (La Semaine Juridique), édition générale (JCP G)* I 109, 15 (differentiating between non-conformity that already existed when the manufacturer trans-

b) Italy

Under Italian law, the final buyer has no direct claim against any member of the chain of contracts apart from his contractual partner. However the final seller in a consumer sale is granted a non-mandatory direct claim against the party in the chain of contracts that is eventually liable for the non-conformity of the goods sold by the final seller.[48]

c) Spain

Spanish law pursues a more limited approach in granting the consumer as final buyer a mandatory direct claim against the manufacturer, if a claim against the final seller is impossible or would constitute an unacceptable burden. The direct claim is, however, limited to the remedies of repair and replacement.[49]

d) Netherlands

Dutch law does not provide for any direct claim. Instead, it provides for recourse safeguards in favour of the final seller of a consumer sales contract.[50] The seller has a recourse claim for damages against his professional supplier including the costs of defence and so has the supplier against his supplier down to the party in the chain of contracts responsible for the non-conformity of the sold goods. The claim is mandatory.[51] It does not lie, however, if the final seller knew or ought to have been aware of the non-conformity or if the non-conformity occurred after delivery of the goods to him, and the damages are limited if non-conformity rests on representations made by him towards the consumer.

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ferred the goods into the chain of contract and non-conformity caused at a later stage); Salewski, n 36 above, 211–213 (rejecting any application of the *action directe* to the remedies under the *Code de Consommation*).

48 Art 131 Italian Consumer Protection Act (*Codice del Consumo*).

49 Art 124 Spanish Consumer Protection Act (*Texto Refundido de la Ley General para la Defensa de los Consumidores y Usuarios*).

50 Art 7:25 Dutch Civil Code (*Burgerlijk Wetboek*).

51 Art 7:25(2) Dutch Civil Code (*Burgerlijk Wetboek*).

e) Germany

German law equally does not grant a direct claim, but provides for safeguards of the final seller's remedies (and one new remedy) *vis-à-vis* his supplier in case of a consumer sale of a new product.[52] First, if the final seller had to take back the non-conforming product or if the consumer has reduced the price, the final seller's remedies *vis-à-vis* his supplier do not require setting a deadline for replacement or repair. Second, the final seller can claim expenses he incurred for replacing or repairing the sold goods. Third, the six months' term of a reversed burden of proof regarding non-conformity of the sold goods does not start with the passing of risk to the final seller but instead with the passing of risk to the buying consumer. The foregoing recourse rules are mandatory in that deviations to the detriment of the final seller agreed upon before a notification of the non-conformity to the final seller's supplier are void, unless the final seller is granted an equivalent compensation. These rules apply to all intermediaries of the chain of contracts. In view of these numerous safeguards, German law can be said to be quite advantageous for the final seller.

f) Austria

Austrian law pursues yet another approach.[53] First, it relieves the final seller of the standard prescription period (two years in case of tangible goods) with regard to the recourse action against his supplier. Instead, it sets a new prescription period of five years for the recourse claim. However, within the additional three years, the final seller has to bring the recourse action within two months after having met his remedy obligations towards the buyer. Second, Austrian law provides for a cap of the recourse claim in the amount of the expenses actually incurred by the final seller towards the consumer. The rules apply equally to further parties up the chain of contracts, but are all of a non-mandatory nature.

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52 §§ 478, 479 German Civil Code (*Bürgerliches Gesetzbuch*); for a detailed account see T. Tröger, 'Voraussetzungen des Verkäuferregresses im BGB' *Archiv für die civilistische Praxis (AcP)* 204 (2004) 115; Salewski, n 36 above, 57–111.

53 § 933b Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch*); for a detailed analysis see W. Faber, 'Der Rückgriff des Letztverkäufers nach § 933b ABGB: Österreichisches Recht als Alternative für Exportgeschäfte?' (2004) 4 *Internationales Handelsrecht (IHR)* 177.

g) United Kingdom and Ireland

The laws of the United Kingdom and Ireland neither provide for a direct action nor for recourse safeguards. The parties are therefore referred to recourse claims along the contractual chain with all its impediments and potential imbalances. It appears questionable whether this lack of any special redress mechanism meets the Directive's postulate. Since the final seller will regularly not be able to curtail the consumer's rights and remedies at all due to their mandatory nature, a third party supplier may – depending on the respective bargaining power – be able to impose a broad exemption from liability in the B2B supply contract, leaving the final seller in effect without the possibility of an effective redress.[54]

h) Review of the Consumer Sales Directive

In its Communication to the Council and the European Parliament of 2007, the Commission took note of the different approaches by the Member States, particularly with regard to a direct claim. Based on this diversity and the very divergent views on a direct claim EU-wide as well as the lack of sufficient evidence that a direct claim is necessary to foster the internal market, the Commission refrained from introducing such direct claim.[55]

4 Comparison with Non-Contractual Product Liability

On the basis of the national implementations[56] of Directive 85/374 (Product Liability Directive),[57] all Member States' laws provide for a direct, non-contractual

54 The (even though limited) control of standard contract terms in B2B relationships under German law (§ 310(1) German Civil Code: standard of fairness and reasonableness in the light of practices and customs in the respective business dealings) is internationally rather an exception.

55 Communication from the Commission to the Council and the European Parliament on the implementation 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 including analysis of the case for introducing direct producers' liability, COM(2007) 210 final, 10 *et seq* (Part II).

56 See, eg, in Germany the provisions of the Product Liability Act (*Produkthaftungsgesetz*), in France art 1386–1 to 1386–18 French Civil code (*Code civil*), in England Part I of the Consumer Protection Act 1987.

57 Directive 85/374/EEC of the Council of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective

strict liability damages claim against the producer[58] for violation of absolute rights such as personal property and integrity by a defective product (integrity interest).[59] It lies in addition to direct, fault-based damages claims against the producer on the basis of the general law of delict under most Member States' laws even though these claims are regularly adapted to the peculiarities of product liability by case law. In Germany, for instance, the law of delict has been adapted by reversing the burden of proof for fault (the defendant has to prove absence of fault)[60] and in England by inferences of negligence, partly under the principle of *res ipsa loquitur*.[61]

From the perspective of the final buyer as the injured person,[62] the Directive's direct, strict liability claim for damages has closed a major gap of the product liability regimes under the Member States' national laws.

Contractual recourse claims for damages as well as claims under the general law of delict will – depending on the way they are adapted to the specific scenario in product liability cases – regularly fail for lack of fault on the part of the final seller. This covers damages claims for loss associated with the performance as well as the integrity interest. Since the performance interest, hence loss associated with the contractual non-performance, ie the sold good's non-conformity in particular, is regularly well protected by the other buyer's remedies such as repair and replacement, reduction of price and termination of contract, damages are the only viable remedy to protect and compensate the integrity interest, ie violation of absolute rights such as person and property.

This liability gap along the chain of contracts under the recourse approach and the weakness of damages claims under the general law of delict (depending on its modifications in case of product liability) are the rationale behind the Directive's direct strict liability claim. It also remedies, however, a major defect of the French *action directe*. which covers damages in relation to both the perfor-

products, *OJEC* L 210/29 as amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 1985/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, *OJEC* L 141/20.

58 Defined in art 3, Dir 85/374 (reaching far beyond the manufacturer).

59 Defined in art 2, Dir 85/374.

60 See, eg, Supreme Court *(Bundesgerichtshof) Official Reports (BGHZ)* 116, 104; Supreme Court *Neue Juristische Wochenschrift (NJW)* 1999, 1028.

61 See W.V.H. Rogers, *Winfield and Jolowicz on Tort* (17th ed, London: Sweet & Maxwell, 2006) para 10–6; S. Whittaker, *Liability for Products* (Oxford: Oxford University Press, 2005) 208–210.

62 The strict, non-contractual (*sic!*) liability claim under the Product Liability Directive lies with any injured person, even if not linked to the producer by a chain of contract.

mance and the integrity interest *vis-à-vis* the manufacturer,[63] since the Directive's liability is strict and since the manufacturer cannot raise defences arising from the contract with his contractual partner. Hence, while the final buyer may pursue a damages claim in relation to the performance interest under the contractual *action directe*, he will base his claim on the implementation of the Directive as far as the integrity interest is concerned.

However, as justified as the direct product liability claim may appear, it gives rise to an imbalance of liability resulting from defective goods. While the integrity interest of the parties to the chain of contracts as well as third parties is effectively protected via a direct (strict liability) claim against the manufacturer, the performance interest of any party along the chain of contracts is currently in most Member States not supported by a direct claim against the manufacturer who will usually be eventually responsible for the good's non-conformity.[64]

5 Assessment of the Different Approaches

While recourse *vis-à-vis* the respective contractual partner is the natural way of passing on liability along a chain of contracts considering the privity of contractual relationships, a direct claim is an additional option that requires statutory or judicial intervention.

a) The Case for a Direct Claim by the Final Buyer

From an economic viewpoint, a direct claim by the final buyer against the party along the chain of contracts that is responsible for the sold goods' non-conformity appears to be the most effective solution. Goods distributed via intermediaries are regularly intended to be sold on via a chain of contracts to the final buyer. Hence, the manufacturer or any other intermediary along the chain of contracts modifying the sold goods is aware of the fact that defects will materialize *vis-à-vis* the final buyer. Liability towards the final buyer would therefore not come as a surprise despite the fact that the manufacturer or intermediary has no contractual relationship with him. Furthermore, direct liability appears appropriate as a matter of principle. It bypasses those parties along the chain of contracts that merely

63 See in particular Cass ass plèn, 1986 Grands arrêts, n° 266; Cass civ 1re, Bull civ 2003 I, n° 18; furthermore Whittaker, n 61 above, 27–29 and 95–98.

64 The Commission stresses this imbalance itself in its Green Paper on consumer guarantees, COM(93) 509 final, 87.

passed on the defect that already existed when they took over the goods. In doing so it allocates liability directly to the party of the chain of contracts that would be eventually responsible under the final recourse claim and avoids problems of insolvency along the chain of contracts. Several claims inflicting time and costs are replaced by a single action.[65] Last, but not least, the person that is eventually liable for the defect, ie the manufacturer or a modifying intermediary, appears to be the cheapest cost avoider, particularly when considering the remedies of repair and replacement.

b) The Downsides of a Contractual Direct Claim

However, apart from the problem how to construe a contractual direct claim, disregarding privity of contract raises practical problems with regard to the goods' conformity and remedies for their non-conformity.

Non-conformity relates to a specific contract, ie to the quantity, quality and description required by the contract, but not to goods as such. It is the individual contract that sets the standard for conformity. Even the sale of non-individual mass production goods such as that of a smartphone or a frying pan is governed by the individual contract's terms on conformity, not by the goods themselves. This may be illustrated by goods distributed by the manufacturer as defective goods (eg goods with slight defects that do not affect the goods' function such as missed threads in a bed linen) but sold by the final seller as non-defective goods. Conformity of such goods must not be assessed by reference to the description of the goods by the manufacturer since this relates to the goods in the standard, non-defective condition. Rather, conformity has to be assessed by reference to the contract of the manufacturer with his contractual partner.[66] For instance, conformity of a despatch of iPhones distributed by Apple as slightly defective ones, ie with scratches on the back, slight pixel errors of the display or a minor bug in the software, cannot be assessed by reference to the iPhone as described by Apple or its retailers on their homepages or other marketing devices relating to the standard, non-defective iPhone since this is not what Apple sold and released into the distribution chain. Other considerations may apply in the standard case of the sale of allegedly non-defective goods. Regardless of the individual contract of the manufacturer with his contractual partner, one may simply look at the fitness for the purpose for which goods of the same kind are ordinarily used or at advertise-

65 Bridge, n 19 above, para 23.

66 Tröger, n 52 above, 119.

ments and statements of the manufacturer on the packaging or in the manual.[67] Under the CESL, however, such an approach appears problematic at least with regard to advertisements or marketing statements of the manufacturer since a direct claim would circumvent the asymmetry created by Article 69(3) CESL. While pre-contractual statements are regarded as statements by the final seller *vis-à-vis* the consumer regarding the goods' conformity, so that a deviation from the pre-contractual statements would trigger liability in the B2C relationship between final seller and consumer, recourse might fail since Article 69(3) CESL does not apply to the B2B relationship between the final seller and the manufacturer or other intermediaries. Whether this asymmetry makes sense and whether it produces satisfactory results, is another matter.[68] One may well argue that Article 69(3) CESL should also apply to B2B contracts so as to achieve congruent liability which could then arguably be pursued by way of a direct claim.

Remedies for non-conformity of the sold goods regularly build upon the exchange of goods and price between the parties to a contract. A direct claim, however, makes them available where no contract, and therefore no exchange, exists. While this may work in relation to the buyer's remedies of repair and replacement, a direct claim poses difficulties with regard to other remedies.[69] Whose contracts' limitations of liability apply? More generally and with regard to any remedy the crucial question appears to be: which contract governs the available remedies and the extent of liability pursued by way of the direct claim? Is it the one between the final buyer (often a consumer) and the final seller or the one between the person held to be liable and his contractual partner along the chain of contracts?

Overall, reference to the contract concluded by the third party defendant with its contractual partner both with regard to the goods' non-conformity and the remedies for non-conformity appears to be a sensible solution. The direct claim is a privilege disregarding privity of contract. As a trade-off in order to balance the interests of the parties along the chain of contracts, it comes at the price of having to accept the defendant's contractual arrangements with its direct contractual partner. If the potential plaintiff is not willing to accept them or if reference to the alien contract renders the exercise of the respective remedy under a direct claim unattractive, eg due to a wide-ranging limitation of liability or a very low contract price to be returned, he is free to refrain from a direct claim and to pursue a recourse claim against his contractual partner instead.

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67 Salewski, n 36 above, 312.

68 For a detailed analysis of this problem see V 5 c.

69 See above the discussion of the French *action directe* at III 3 a.

At the same time, however, reference to the defendant's contract with his contractual partner reflects the dilemma of the direct claim. While a contractual claim shall lie where no contract exists, the existence and content of the claim are largely based on an alien contractual relationship since the direct claim cannot negate the fact that there is a chain of contracts, the final buyer's contract being only the last element of that chain. The direct claim approach is torn between procedural efficiency and privity of contract, trying to combine both. Consequently, the final buyer has to assess carefully in the light of the circumstances of the individual case whether to pursue his remedies against the final seller as his contractual partner or against any other person along the contractual chain.

Particularly for a consumer as final buyer, it may be more favourable not to make use of the direct claim but to pursue his remedies against the final seller as his contractual partner. Otherwise he foregoes substantial consumer protection, particularly such as that implemented in the Member States' laws on the basis of the Consumer Sales Directive, by subjecting the content of the remedies to an alien contract which will regularly be a B2B contract open to broad-ranging modifications and/or limitations of liability. Hence, the gift of the direct claim may turn out to be a poisoned one for consumers. As long as the final seller is still solvent, consumers are regularly better off by pursuing their remedies against him. In contrast, a direct claim could be more attractive for the final seller or other parties of the contractual chain since they do not forego a whole mandatory protection standard such as that afforded to consumers.

IV Specific Problems of Redress in Cross-Border Cases

Any approach to liability for non-conformity in chains of contracts faces special problems in cross-border cases which are neither addressed by Article 4 Consumer Sales Directive nor by any of its national implementations.

1 Recourse Safeguards

Recourse safeguards only operate if they are contained in the law governing the contractual relationship between the respective parties of the recourse claim. Depending on the parties' bargaining power, parties along the chain may be able to dispose of (non-mandatory) recourse safeguards or even impose a law that does not contain any recourse safeguards such as many Non-Member State laws

(eg Swiss law) or the CISG.[70] However, even if the law governing the respective contract provides for recourse safeguards, incongruence with the law governing the foregoing contract down the contractual chain leads to the problem that the recourse safeguard may make reference to the exercise of remedies by the final buyer *vis-à-vis* the final seller that do not exist under the law applicable to the contract between them. Hence, concurrence of the applicable laws is preferable as soon as the recourse safeguard links the recourse remedies to the exercise of specific remedies and to rules applying to such remedies (such as the burden of proof or the limitation period) in the foregoing contract down the contractual chain – a need that is less pressing amongst Member States' laws since the remedies are usually at least similar in relation to consumers, being based on the Consumer Sales Directive.[71] Besides the remedial link, however, concurrence of the law applicable to the contracts along the supply chain may be preferable for a variety of other reasons depending on the laws involved. Even if the remedies as such are the same, their content, such as the heads and calculation of damages, may differ. Furthermore, the possibility to exclude or at least limit liability may vary, to give just a few examples for diverging substantive laws' consequences on redress. Last, but not least, in case of incongruent laws the law governing one contract may provide for recourse while the law governing the other contracts of the chain of contracts may provide for a direct claim.[72]

Hence, the recourse approach faces fundamental difficulties in cross-border cases. Due to the principle of party autonomy, which is nearly unrestricted in B2B relationships, a truly satisfactory recourse along the contractual chain appears hardly attainable in a world of different laws, even if the relevant rules of private international law are harmonized as is the case under Regulation 593/2008 (Rome I)[73] and Regulation 864/2007 (Rome II).[74] In a world of potentially conflicting laws applying to the different contracts of the chain, one may rather only achieve a more appropriate, even if not yet satisfactory solution, by at least enabling the final seller to choose the same applicable law in relation to both contracts concluded by him – the contract with the customer and the contract with the supplier.

70 See on the problems associated with the lack of any redress safeguards in the CISG eg Lorenz, n 21 above, 543–545; Dutta, n 19 above, 86–91.

71 See art 3 Consumer Sales Directive.

72 On this issue see, in particular, Dutta, n 19 above, 99–103.

73 Regulation (EC) no 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJEC* 2008 L 177/6.

74 Regulation (EC) no 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), *OJEC* 2007 L 199/40.

The foregoing considerations do not only apply to the approach of national laws but also to the CESL, regardless of its nature as a 2nd or 28th regime.[75] With regard to the issue of liability in chains of contracts, the opt-in choice of the CESL does not differ from the private international law choice of a national law. Under both scenarios the stronger party may circumvent the respective recourse safeguards by not choosing the respective law. Only a uniform law which would apply *eo ipso* and not be subject to the parties choice could close this escape door.

2 Direct Claim

Despite the uncertainties of qualification under the national conflict of laws rules in the past,[76] it is now clear that under Regulation 593/2008 (Rome I) and Regulation 864/2007 (Rome II) as a uniform European regime of private international law requiring autonomous qualification, any *action directe*, whether under national law of a contractual or non-contractual nature, has to be characterised as a non-contractual claim for the purposes of private international law. Although the European Court of Justice (ECJ)[77] has so far only had the opportunity to determine the characterisation issue for the purposes of jurisdiction under Regulation 44/2001 (Brussels I),[78] the same considerations have to apply with regard to characterisation under the Rome I and Rome II Regulations for the purposes of private international law.[79] Hence, the issue whether a direct claim lies, be it of a con-

75 On this matter see M. Fornasier, '»28.« versus »2. Regime« – Kollisionsrechtliche Aspekte eines optionalen europäischen Vertragsrechts' (2012) 76 *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)* 401; A. Stadler, 'Anwendungsvoraussetzungen und Anwendungsbereich des Common European Sales Law' (2012) 212 *Archiv für die civilistische Praxis (AcP)* 473, 475–483; M. Stürner, 'Kollisionsrecht und Optionales Instrument: Aspekte einer noch ungeklärten Beziehung' *Zeitschrift für Gemeinschaftsprivatrecht (GPR)* 2011, 236.

76 See F. Leclerc, 'Les chaînes de contrats en droit international privé' (1995) *Journal du droit international, fondée par E. Clunet (Clunet)* 272; J. Bauerreis, *Das französische Rechtsinstitut der action directe und seine Bedeutung in internationalen Vertragsketten* (Berlin: Duncker & Humblot, 2001) 292–323 (from the perspective of French private international law) and 354–358 (from the perspective of German private international law) who qualified an *action directe* in relation to the performance interest as contractual from the perspective of both French and German private international law.

77 Case 26/91 *Handte* [1992] ECR I-3967 (CJEU); case 51/97 *Réunion européenne* [1998] ECR I-6511 (CJEU).

78 Council Regulation (EC) no 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJEC* 2001 L 12/1.

79 M. Illmer, 'The New European Private International Law of Product Liability – Steering Through Troubled Waters' (2009) 73 *Rabels Zeitschrift für ausländisches und internationales*

tractual or non-contractual nature from the perspective of the respective national law, is not governed by the law applicable to any of the contracts of the chain but by the law determined by Article 5 of Regulation 864/2007 (Rome II). As a result, such a direct claim would be subject to a single national law regardless of the laws governing the contractual relationships along the chain of contracts. Furthermore, being of a non-contractual nature the claim would not be affected by a choice of the CISG or any national Non-Member State law in any of the contracts of the chain.

In the light of these considerations the Commission is well-advised to reconsider its position not to introduce a direct claim for the purposes of redress of the final seller, which was taken in the Communication regarding the review of the Consumer Sales Directive in 2007. However, even with regard to the situation under the CESL, the CESL itself would not be the suitable vehicle to introduce such a claim. A national judge faced with a direct claim would determine the applicable law according to Article 5 of Regulation 864/2007 (Rome II), which could only designate a state law but hardly the CESL, the latter being tied to a contractual opt-in. Since national laws differ in that regard, harmonization by way of a Directive is required. In addition to Directive 85/374 (Product Liability Directive) or in the course of reviewing and reforming it, one could therefore introduce a direct damages claim by the final seller against the manufacturer for loss associated with the non-conformity of the goods. Although not mandated by considerations of private international law, it appears preferable to introduce a non-contractual direct damages claim for a variety of reasons.[80] It avoids the systematic and dogmatic weakness of a contractual construction demonstrated by the unsatisfactory discussion in France and it avoids reference to the contract of the manufacturer with his contractual partner (which some French authors, however, even avoid under the French contractual direct claim with regard to damages). The trade-off would be a limitation on damages for the loss that the final seller incurred due to the remedies pursued by the consumer towards him, which strikes a fair balance of the interests of the final seller in effective redress and of the manufacturer or other responsible intermediary in respecting privity of contract. To compensate the final seller for his loss associated with the product's

Privatrecht (RabelsZ) 269, 281; A. Spickhoff, 'Die Produkthaftung im Europäischen Kollisions- und Zivilverfahrensrecht', in D. Baetge, J. von Hein and M. von Hinden (eds), *Die richtige Ordnung, Festschrift for Jan Kropholler* (Tübingen: Mohr Siebeck, 2008) 671, 679; J. Kropholler and J. von Hein, *Europäisches Zivilprozessrecht* (9th ed, Frankfurt: Recht und Wirtschaft, 2011) art 5 EuGVO para 16; Salewski, n 36 above, 176–180.

80 Forcefully in that regard Dutta, n 19 above, 94–99; see also Salewski, n 36 above, 36–37 and 310–313.

non-conformity caused by the manufacturer does not constitute an undue burden for the manufacturer who intends distribution to consumers but merely leaves that to other traders instead of doing it himself.

V Redress under the CESL

We will now turn to the crucial question whether the CESL's approach to liability encourages or discourages businesses, in particular SME, to opt in to the CESL? In other words, does the CESL, in the way it addresses the liability issue, achieve its goal of supporting SME in undertaking cross-border trade and expanding into new Member States' markets?

1 Chains of Contracts under the CESL

Unless the final seller manufactures the sold goods and actually performs the related service(s) himself, chains of contracts for the supply of the sold goods and/or related service(s) will inevitably occur under the CESL. Taking into account that the most common CESL scenarios are business to consumer (B2C and SME2C) contracts, particularly in the e-commerce sector, and that by definition in Article 2(m) RP only the final seller is eligible as service provider under the CESL and that the CESL's territorial scope is limited to cross-border scenarios,[81] contracts – particularly consumer contracts – potentially governed by the CESL will regularly form the final part of a chain of contracts.

The final seller as the consumer's contractual partner will rarely be the manufacturer or actual provider of services. Rather, final sellers will regularly be traders that purchase the goods from the manufacturer or an intermediary in the supply chain.[82] Likewise, aiming to offer goods and related services as a package of a one-stop-shop for the consumer they will regularly subcontract the actual performance of the related service(s) to specialists located in the Member State where the service is to be performed. Particularly for SME, subcontracting will often be the only realistic way to offer related services, but even the big online

81 It should be noted, however, that according to art 13(a) RP the Member States have an option to extend the territorial scope to purely domestic cases.

82 In contrast, supply of digital content involves intermediaries less frequently and contracts along a supply chain, since suppliers of digital content distribute their products more often directly – and preferably online – to consumers.

player Amazon and the furniture manufacturer Ikea offer installation and assembly services via third party subcontractors.

Furthermore, chains of contracts may simply occur due to the corporate structure of the corporate entities involved in the transaction. If the final seller is a separate legal entity in relation to the manufacturer, a chain of contracts will occur, even if both are subsidiaries of the same parent company or otherwise form part of a corporate holding structure.

These issues are particularly pertinent in e-commerce and inherent in the vast majority of the sale contracts potentially governed by the CESL.[83] Thus, redress issues will regularly arise in the case of the final seller's non-performance to the seller.

Against this background, the way the CESL handles liability amongst the parties to a chain of contracts will determine to a large extent whether the CESL can operate satisfactorily in a practical reality that is far more complex than isolated bilateral contractual relationships.

2 The Sandwich Position of the Final Seller under the CESL

The sandwich position of the final seller, as set out above,[84] is even aggravated under the CESL considering that its level of consumer protection is, according to the Commission, presumed to be higher than under any national law and given that the CESL is intended to be used by SME in particular, which are said to be potentially in a weaker position *vis-à-vis* their contractual partners up the chain of contracts.[85] The unfair contract terms control 'light' in B2B transactions under Article 86 CESL will hardly ever catch a limitation or exemption of liability between traders along the chain of contracts, so that protection regarding redress is in effect nearly as weak as under Directive 93/13 (Unfair Contract Terms Directive).

3 The CESL's (Non-)Approach

The CESL ignores the redress issue despite the fact that according to recital 26 RP it should cover the 'full life cycle' of sales contracts, particularly those entered

83 Recitals 2 and 26 RP.

84 See II 2.

85 Staudenmeyer, n 15 above, 3497.

into online. In particular and in contrast to most national laws,[86] the CESL does not grant any mandatory or even non-mandatory recourse safeguards or a direct claim.

As set out above, this is partly due to the specific problems of redress in cross-border cases, which largely apply as well to the CESL being an opt in-instrument that is incapable of dealing with third party scenarios.[87] The latter is even acknowledged by the CESL in recital 20 which states that the 'Common European Sales Law should not cover any related contracts by which the buyer acquires goods ... from a third party', since 'this would not be appropriate because the third party is not part of the agreement between the contracting parties to use the rules of the CESL.' Hence, parties further up the chain of contracts that have not opted in to the CESL cannot be subjected to it and its redress safeguards if they existed.

This does not, however, release the Commission from addressing the redress issue under the CESL. First, the CESL may well provide for redress safeguards to operate in cases where all contracts along the chain are subjected to the CESL by the respective parties' opt in. Second, while it may be difficult to protect the final seller by way of contractual recourse safeguards, a direct, non-contractual damages claim could serve as a solution in cases where the contractual recourse approach does not work, hence particularly those cases where the contract between the parties to the redress is not governed by the CESL.[88]

4 Redress under the CESL's (Non-)Approach

Having addressed the specific cross-border problems of redress and its implications for the CESL above, we will now turn to those cases where all contracts along the chain or at least the contract between the parties to the redress are subjected to the CESL by the respective parties' opt in. For those cases the CESL could well provide for redress safeguards and we will now illustrate the consequences of its failure to do so. This will be done with a special focus on SME as final sellers, and with an eye on German law, which can be considered to be SME-friendly.[89]

86 See III 3 a.

87 B. Gsell, 'Der Verordnungsentwurf für ein Gemeinsames Europäisches Kaufrecht und die Problematik seiner Lücken', in Remien, Herrler and Limmer (eds), n 10 above, 145 para 32.

88 See in greater detail IV 2.

89 See III 3 e.

For the purpose of illustrating the failure of the CESL to provide for redress safeguards we will use the following hypothetical examples of a common CESL case.

The final seller, a small enterprise based in a Member State of the EU, sells a washing machine to a consumer in another Member State. The seller has purchased the washing machine from an intermediary. The intermediary, in turn, has purchased the washing machine from the manufacturer. Both manufacturer and intermediary are also resident in different Member States. All parties in this chain have opted in to the CESL.[90]

(a) Ten months after the washing machine's delivery its pump is defective so that the machine does not work anymore.
(b) Three months after delivery of the washing machine to the consumer, he discovers water underneath it and detects that the water hoses behind the back panel of the washing machine are loose.
(c) After delivery the consumer detects a defect and asks the final seller for damages. As the final seller is not prepared to pay any damages, the consumer brings a claim. The court renders judgment only after 2½ years, holding the final seller liable towards the consumer. The final seller now files a recourse damages claim with the intermediary.

a) Qualifications of the Right of Termination

Under scenario (a) above, the consumer terminates the contract under Articles 106(1), 114(2) CESL, as the washing machine does not conform with the contract under Articles 99(2), 100(b) CESL. Article 106(3) CESL clarifies that this right is unqualified and, in particular, not subject to cure by the seller. As between the final seller and the intermediary, the washing machine is also defective, and the final seller has his own contractual claims against the intermediary under Article 106(1) CESL. However, in contrast to the consumer's remedies, the final seller's remedies are not unqualified. It is common between traders to subject the buyer's rights to proper examination and notification of the goods.[91] In addition, according to Article 106(2)(b) CESL, the intermediary has a right to cure *vis-à-vis*

90 In recital 25 RP it is assumed that an opt-in to the CESL implies an opt-out of the CISG; critically on this assumption M.W. Hesselink, 'How to Opt into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation' (2012) 20 *European Review of Private Law* 195.

91 Art 106(2)(a) CESL; with regard to redress constellations U. Magnus, 'Der Regreßanspruch des Letztverkäufers nach der Richtlinie über den Verbrauchsgüterkauf', in J. Basedow (ed), *Privat*

the final seller and the latter may terminate the contract only upon a failure to cure. In the case of a defective pump, for instance, cure is easy and will therefore be undertaken by the intermediary. Hence, the final seller will not be able to pass on the termination of the contract towards him by equally terminating his contract with the intermediary and returning the defective washing machine in return for the contract price. Rather, the final seller is left with a washing machine that has already been repaired and that he may therefore not sell as a new one. The problem is even more obvious in a case where the repair is easily visible for potential buyers.

This situation, in which the final seller has to keep a repaired product, has been best described by the German legislature as 'pointless'.[92] It is for this reason that according to § 478(1) German Civil Code (*Bürgerliches Gesetzbuch*), the final seller is not obliged to grant the intermediary a right to cure, if he had to take back a defective good sold by him to a consumer. In this situation, the final seller is allowed to terminate the contract with his supplier immediately. Unlike § 478(1) German Civil Code (*Bürgerliches Gesetzbuch*), the CESL does not remedy this incongruence by aligning the respective right, even if it is applicable throughout the whole supply chain of contracts.

b) Presumption of Non-Conformity

If, under scenario (b) above, the consumer claims the washing machine's non-conformity in order to exercise any of his remedies under Article 106 CESL, he benefits from the presumption of non-conformity at the time of delivery (as the time when risk passes) under Article 105(2) CESL. The final seller, in turn, does not benefit from this presumption as regards his sale of the washing machine from the intermediary. Rather, he will have to prove that the defect existed when the machine was delivered to him and is not due to transport or other handling by him after delivery.[93] This may – depending on the circumstances of the individual case – be a high burden, especially when the goods have undergone a longer distribution chain or longer transport and storage as it may often be the case in a

law in the international arena: from national conflict rules towards harmonization and unification: Liber amicorum Kurt Siehr (The Hague *et al*: TMC Asser Press *et al*, 2000) 434.

92 BT-Drucks 14/6040, 249.

93 In this case he is also not barred from relying on the lack of conformity under art 121, 122 CESL (providing for examination of the goods and the requirement of notification of the goods' non-conformity) since the defect is of such a hidden nature that it cannot be expected to have been discovered by the final seller (he would have had to remove the back panel!).

cross-border scenario. Again, § 478(3) German Civil Code (*Bürgerliches Gesetzbuch*) remedies the asymmetry of the legal regime governing liability, even beyond the mere existence of the respective remedies, by extending the presumption to the recourse claim which appears to be the only way to ensure the avoidance of the risk of the final seller's bearing all the risk of the good's non-conformity.

c) Prescription

If, under the scenario of example (c) above, the final seller brings his claim only after judgment was rendered against him and if that judgment was not rendered within two years of the detection of the sold good's non-conformity, the redress claim would fail for prescription under Articles 179(1) and 180(1) CESL. It is questionable whether this is a satisfactory result since it seems unreasonable to ask the final seller to file a redress claim before he knows whether he is held liable *vis-à-vis* the consumer. For this reason, several of the implementations of Article 4 Consumer Sales Directive provide for a modification of prescription so as to enable an effective redress and avoid failure of the redress merely due to lapse of time owed to the chain constellation.[94]

5 The Redress Issue as an External Gap?

a) Possible Reasons for the CESL's approach

As shown above, virtually every consumer privilege has the potential of creating a redress trap for the final seller. Having said that and given that redress issues have already been addressed on the European level, particularly by Article 4 Consumer Sales Directive, the CESL's non-approach to the redress issue is somewhat surprising. One possible explanation could be that the redress issue is considered to be an external gap and therefore governed by the applicable national law and its implementation of Article 4 Consumer Sales Directive.

A similar argument has been raised with regard to the CESL's approach to financial services. According to Art 6(2) RP, the CESL may not be used for a sales contract where the business grants the consumer credit in the form of a deferred

94 See, eg, § 479 German Civil Code (*Bürgerliches Gesetzbuch*); § 933b Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch).

payment, loan or other similar financial accommodation. If the contract has such a financial element, the applicable national law governs this contract.[95] At least in Europe, the applicable law on consumer credit is harmonized by the Directive 2008/48/EC (Consumer Credit Directive) and this seems to have been one of the reasons for the exclusion of sale contracts with a financing element.[96] Equally, one could argue that the CESL does not need to provide for redress mechanisms, as the implementations of Article 4 Consumer Sales Directive are in place to fill this gap.

b) External or Internal Gap?

The crucial technical question that needs to be answered in order to apply the national implementations of Article 4 Consumer Sales Directive is whether the redress issue might be regarded as an external gap.

The CESL, like the CISG, distinguishes between internal and external gaps.[97] In accordance with the CISG, drawing from recital 29 RP and Article 4 No 2 CESL, an internal gap is an issue within the scope of the CESL but not expressly settled by it. Such issues 'should be resolved only by interpretation of its rules without recourse to any other law.'[98] In contrast, drawing from recitals 27 and 28 RP, an external gap may be defined as a matter of contract law not addressed by the CESL (recital 27) and matters outside the CESL's scope, in particular outside the remit of contract law (recital 28). Recital 27, which concerns the more problematic part of the definition, lists a number of examples of such external gaps such as legal personality, capacity, illegality or immorality, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law and the law of torts. According to recital 27 these matters are governed by the respective national law determined by virtue of the Rome I and Rome II Regulations or any other applicable conflict of law rule.

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95 Art 46(3) CESL.

96 Critically on this assumption Eidenmüller, Jansen, Kieninger, Wagner and Zimmermann, n 5 above, 275; M. Illmer, 'Related Services in the Commission Proposal for a Common European Sales Law COM(2011) 635 final – Much ado about nothing? –' (2013) *European Review of Private Law* (forthcoming).

97 Staudenmeyer, n 15 above, 3495; Gsell, n 87 above, para 4; M. Gebauer, 'Europäisches Vertragsrecht als Option – der Anwendungsbereich, die Wahl und die Lücken des Optionalen Instruments' *Zeitschrift für Gemeinschaftsprivatrecht (GPR)* 2011, 227, 234–235.

98 Recital 29 RP and with nearly identical wording art 4 no 2 CESL.

Generally, it is difficult to ascertain whether a matter constitutes an external gap.[99] One could argue that, unlike the Consumer Sales Directive, the CESL has no special provisions on redress and therefore does not address this issue. Comparing the redress issue with the matters listed in recital 27 RP and considering that liability and the remedies of the parties are both in the B2C and the B2B context extensively regulated by the CESL it is rather likely that the redress issue is not an external, but rather an internal gap,[100] which may, however, not be resolved satisfactorily by the CESL's own provision as set out above.

c) External Gap and Pre-contractual Statements

However, even if one assumed that the redress issue constituted an external gap, some redress constellations would remain unsolved. This shall be illustrated by another variation of the example provided above. Let us assume the consumer discovers four months after delivery that the washing machine has a lower energy efficiency standard than stated in the manufacturer's advertisement. According to Article 100(f) CESL the goods must possess the qualities and performance capabilities indicated in any pre-contractual statement which forms part of the contract terms by virtue of Article 69 CESL. Article 69 CESL deals with contract terms which are derived from certain pre-contractual statements. The crucial part is Article 69(3) CESL, which states that, where the other party is a consumer, a public statement made by the manufacturer is regarded as being made by the trader, ie the final seller. Therefore, the washing machine does not conform to the description in the contract between the final seller and the consumer. Again, the consumer has the (mandatory and unrestricted) remedies as outlined in Article 106(1) CESL, eg to terminate the contract or to reduce the contract price.

The question for the final seller is whether under the CESL he can take recourse against his own seller, the intermediary. This is not the case. In their B2B relationship the goods *do* conform to the contract since Article 69(3) CESL is

99 Gsell, n 87 above, para 8.

100 Even under the CISG which does not specifically address B2C relationships, the redress issue is regarded as an internal gap; see F.-J. Schillo, 'UN-Kaufrecht oder BGB? – Die Qual der Wahl beim internationalen Warenkaufvertrag – Vergleichende Hinweise zur Rechtswahl beim Abschluss von Verträgen' *Internationales Handelsrecht (IHR)* 2003, 257, 264; U.P. Gruber, 'Das neue deutsche Zwischenhändler-Schutzrecht – eine Benachteiligung inländischer Hersteller und Großhändler?' *Neue Juristische Wochenschrift (NJW)* 2002, 1180, 1181.

applicable only to B2C-contracts.[101] Article 100(f) and Article 69 CESL 'split' the concept of conformity with regard to the personal scope. This corresponds with the concept in Article 2(d) Consumer Sales Directive and is part of the EU *acquis*. However, non-conformity as between the final seller and the intermediary is a prerequisite for the application of national recourse safeguards such as § 478 BGB.[102] Under German law, this is secured by the fact that the provision on conformity does not differentiate as to the personal scope.[103] Again, this result is surprising, especially as this incongruence constitutes a problem that is already well-known. As early as 1995, Article 4 Consumer Sales Directive was, inter alia, justified by the following consideration:

'This situation may also create an injustice in that the entire liability for defects ultimately resulting from an act of commission or omission on the part of another party falls upon the final sellers. This is notably the case as regards [...] any lack of conformity resulting from the statements referred to in Article 2(2)(b) [manufacturer's advertisement].'[104]

Therefore in this quite common situation, the final seller is also caught in the redress trap.

VI Excursus: Procedural Redress Tools in Cross-Border Cases

Considering redress in an international context, a short excursus shall finally illustrate the procedural redress tools in favour of the final seller and their strengthening in cross-border cases within the EU by Regulation 44/2001 (Brussels I).

The tools of procedural law ensuring effective redress of the final seller vary as between the Member States. Most Member States' civil procedural laws contain rules on third party notice (eg the *Streitverkündung* with its *Interventionswirkung*

101 It should be noted, that even if a Member State's law would be applicable, this redress problem will remain, if the applicable national law's concept of conformity distinguishes between B2B and B2C contracts. For example, in English law, sections 14(2D)–(2F) Sale of Goods Act 1979, which deal with statements of the manufacturer, were inserted to implement the Consumer Sales Directive – but there is no equivalent to these sections for non-consumer contracts.

102 J. Matthes, 'Der Herstellerregress nach § 478 BGB in Allgemeinen Geschäftsbedingungen – ausgewählte Probleme' *Neue Juristische Wochenschrift (NJW)* 2002, 2505, 2506.

103 § 434(1)3 German Civil Code (*Bürgerliches Gesetzbuch*).

104 COM(95) 520 final, 14.

in German procedural law under §§ 68, 74(3) *Zivilprozessordnung* [German Code of Civil Procedure] and similarly the *intervention forcée aux fins de jugement commun* under Articles 66, 331 (2) *Code de procédure civile* [French Code of Civil Procedure]). While liability for non-performance may be determined by one set of proceedings, redress affords filing a second claim potentially before a different court resulting in a second judgment. To increase procedural efficiency regarding time and costs even further, many Member States' laws provide for third party proceedings, ie for the redress claim to be tried in the same proceedings resulting in a judgement against the redress defendant(s). For instance, French law as well as many other Romanistic systems of civil procedure provide for the *intervention forcée aux fins de condemnation* and the special case of an *intervention forcée* in case of a guarantee as the basis for liability, the *appel en garantie*. In case of a recourse claim by the final buyer against the final seller they enable the final seller to force other parties along the chain of contracts, against whom he has a recourse claim or a direct claim, to join the proceedings (who may force others along the chain resulting in an *appel en garantie en cascade*). Beyond the limited effect of a third party notice, ie extending the legal effect of the first recourse claim with regard to liability to further recourse claims, the *intervention forcée aux fins de condemnation* and the *appel en garantie* enable the court seized by the final buyer to render judgment against the person eventually liable in proceedings that were initially only pursued against the final seller. Hence, liability amongst the parties to a chain of contracts may be disposed of comprehensively by a single set of proceedings resulting in the respective judgments. Under English civil procedure, Civil Procedure Rule (CPR) 20.2 even more widely enables any claim for contribution, indemnity or any other remedy against a third party,[105] which also allows the court to dispose of all proceedings regarding liability amongst the parties to the chain of contracts by a single set of proceedings.

Within the European Union, the different procedural redress tools are rendered effective in cross-border cases by the uniform special head of jurisdiction in Article 6 No 2 of Regulation 44/2001 (Brussels I) dealing with jurisdiction in the redress scenario.

According to Article 6 No 2, in third party proceedings under the Romanistic and the English model,[106] the redress claim may be heard before the court

105 For further details on the procedure see A. Zuckerman, *Civil Procedure* (2nd ed, London: Sweet & Maxwell, 2006) paras 3.58–3.60.

106 For an autonomous interpretation see the Jenard Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, *OJEC* 1979 C-59/28, which, however, refers to art 15 and 16 Belgian Code of civil procedure (*Code judiciaire*) which is more or

competent to hear the initial claim, resulting in the respective judgments, even if this court would not be competent for the redress claim if brought in a non-redress-scenario. Hence, the characterisation as a redress claim is the foundation for the court's competence.[107] By pulling together both claims before the same court, a consistent determination of liability for the contractual non-performance is ensured and enforceable titles are produced very efficiently by way of a single set of proceedings.

Article 65 of Regulation 44/2001 (Brussels I) forecloses resort to the jurisdiction under Article 6 No 2 in those countries whose laws do not provide for third party proceedings but merely third party notice.[108] Instead Article 65 affords an international effect to the national instruments of third party notice so that they may trigger effects in foreign redress proceedings if the third party was summoned in the initial proceedings.

Hence, Regulation 44/2001 (Brussels I) facilitates redress by extending the Member States' procedural redress tools to cross-border cases. By merely reinforcing and adapting them to the international context, Article 6 respects the diversity of procedural redress tools as between the Member States, paying due respect to the principle of procedural autonomy. As a result, on the procedural level the EU has found an appropriate way to ensure and support efficient redress in case of chains of contracts.

VII Résumé

A blind eye to redress by the final seller against third parties in the supply chain constitutes a major handicap of the CESL. The sale of goods and the provision of related services do not happen in an isolated cocoon. Goods and services are regularly provided by third – party suppliers and subcontractors. Trade, in particular cross-border trade, implies chains of supply. While larger retailers as final sellers may be able agree on recourse safeguards by way of a commercial

less identical with the French provisions; the Jenard Report was cited with approval by case 51/97, n 77 above, para 28.

107 Internal territorial jurisdiction for the redress claims is regularly also tied to the initial claim, see eg art 333 French Code of civil procedure (*Code de procédure civile*).

108 These are currently Germany, Austria and Hungary but note that under the Commission Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2010) 748 final, art 72 in connection with Annex VIII lists also Estonia, Latvia, Lithuania, Poland and Slovenia for art 6 no 2 not to apply.

solution (eg five percent of orders as free returns by the retailer to the supplier), SME's may not be in a bargaining position to protect themselves to an equivalent extent. As long as the CESL's substantive scope and personal scope do not respond to this practical reality, traders, in particular SME, will regularly refrain from opting in to it.

Taking a broader picture of the CESL, its non-approach to the redress problem just adds to the failure of the CESL to provide for a truly uniform legal regime for traders, which is, according to the Commission, the major, if not the only selling point of CESL.

Vertical uniformity, ie a single legal regime covering all aspects of a sale or related service contract avoiding internal gaps, is not achieved since several practically relevant matters during the life-cycle of a contract are excluded. They are set out in recital 27 by the Commission falsely asserting *e contrario* recital 26 that they are practically irrelevant.

Horizontal uniformity, ie one legal regime covering all contractual relationships along supply chains and the respective redress safeguards, is equally not achieved. While sale contracts along the supply chain may be subjected to the CESL, service contracts may not, and with regard to both types of contract, the CESL does not provide for any redress safeguards even if all contracts along the chain are governed by the CESL.

Against this background, the Commission is well advised to reconsider the redress problem. A possible solution could be to introduce specific mandatory recourse safeguards into the CESL. Preferably, they should not be as general as Article 4 Consumer Sales Directive, but rather be modeled after the recourse safeguards adopted by the Member States in order to implement Article 4. Such recourse safeguards would solve the redress problems in cases where the contract between the parties to the redress as well as the consumer sales contract giving rise to the redress issue are governed by the CESL. At the same time, the Commission should consider introducing, not in the CESL but separately, a direct, non-contractual damages claim by the final seller to answer the redress difficulties in cross-border scenarios irrespective of the law (including the CESL) governing the consumer sales contract at the end of the contractual chain. In order to limit the direct claim to cross-border cases, one could provide for this direct claim to be subsidiary to recourse against the contractual partner.