

# **THE WEBER/PUTZ ‘PROPORTIONALITY PRINCIPLE’: DETERMINING SUBSEQUENT PERFORMANCE ANEW?**

Thomas Hoffmann\*

*Summary: Although the European Court of Justice rendered its Weber/Putz judgment as long ago as three years, the turmoil since then in both academia and practice has not abated. Indeed, the significance of the ‘proportionality principle’ for European contract law can hardly be overestimated, as the ECJ basically established by this judgment, with or without intent, a doctrine of general strict liability in contract law, which so far has only existed in but a few European legal systems beyond common law. This paper compares the reception of the Weber/Putz decision in a major Western European legal system (Germany) with the approach of a minor Central European legal system (Estonia), also taking into account the judgment’s impact on the future development of European contract law.*

## **1. Introduction**

The ‘proportionality principle’, as it was developed on 16 June 2011 by the European Court of Justice (ECJ) on the interpretation of Article 3 of Directive 1999/44 (hereinafter: the Directive)<sup>1</sup> in its joint decisions ECJ C-65/09 and C-87/09 (*Weber/Putz*),<sup>2</sup> has caused considerable turmoil in jurisprudence as well as in legal practice.<sup>3</sup> The judgment’s extensive impact derives not only from the central function of the ‘Consumer-Goods-Directive’ for the harmonisation of European contract law,<sup>4</sup> but also from the commonness of the issue featured in the case in daily contract prac-

---

\* Thomas Hoffmann, Dr iur, LLM, DAAD Lecturer in Law, Faculty of Law, Tartu University, Estonia.

<sup>1</sup> 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 [1999] OJ L171/12.

<sup>2</sup> Joined Cases C-65/09 and C-78/09 *Gebr Weber GmbH v Jürgen Wittmer and Ingrid Putz v Medianess Electronics GmbH*, Judgment of the Court of Justice (First Chamber) of 16 June 2011.

<sup>3</sup> See eg K Purnhagen, ‘Zur Auslegung der Nacherfüllungsverpflichtung – Ein Paukenschlag aus Luxemburg’ (2011) *EuZW*, 626; S Lorenz, ‘Ein- und Ausbaurverpflichtung des Verkäufers bei der kaufrechtlichen Nacherfüllung’ (2011) *NJW*, 2241.

<sup>4</sup> See eg A Johnston, ‘Spillovers from EU Law into National Law: (Un)intended Consequences for Private Law Relationships’ in D Leczykiewicz and S Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart Publishing 2013); A Johnston and H Unberath, ‘Joined Cases C-65/09 and C-78/09’ (2012) 49 *CML Rev* 793.

tice. Just recently,<sup>5</sup> the German Bundesgerichtshof (BGH) endeavoured a second time<sup>6</sup> to implement the reasoning of *Weber/Putz* into the German framework of law of obligations, and other Member States at present face similar challenges.

After elucidating the facts of the cases and their legal background, this paper discusses the approach taken by the ECJ and draws conclusions for the implementation of the ECJ's reasoning in European contract law.

## 2. Facts of the case

The ECJ judgment is a preliminary ruling according to Article 234 TFEU sought by the BGH on 14 January 2009 according to Article 267 TFEU by the First Instance Lower Court (Amtsgericht) Schorndorf on 25 February 2009.<sup>7</sup> In both cases, the purchasers had bought goods (floor tiles and a dishwasher respectively) which were delivered and installed in their homes before they turned out to be defective. In both cases, the seller merely owed the delivery of the goods, and the removal of the defective goods and the re-installation of new goods were considerably more expensive than the value of the tiles and the dishwasher themselves.

As repair in both cases was not possible, neither of the sellers objected to their duty to deliver anew and free of charge. However, in the cases at hand, the buyers claimed additional reimbursement of the costs of removal and reinstallation (*Weber*) and the complete restitution of the contractual price after rescission (*Putz*) from the sellers.

## 3. Legal background

Against this background, the BGH sought a preliminary ruling of the question whether

1. it is against the Directive if national law states that the seller may refuse the demanded form of subsequent performance (here replacement) if this form of performance causes costs which are disproportionate to the value of the contract-conform good and, if this approach is indeed against the Directive, whether

---

<sup>5</sup> 17 October 2012, VII ZR 226/11, commented on by M Jaensch, 'Der Umfang der kaufrechtlichen Nacherfüllung' (2012) NJW, 1025.

<sup>6</sup> A first decision interpreting the reasoning of *Weber/Putz* was issued on 21 December 2012, VRR ZR 07/08.

<sup>7</sup> Case *Gebrüder Weber GmbH v Jürgen Wittmer*, Bundesgerichtshof (the German Supreme Court) case number C-65/09 and *Ingrid Putz v Medianess Electronics GmbH*, Amtsgericht Schorndorf (Schorndorf County Court) case number C-87/09.

2. the seller will be obliged to bear the costs of removal of the defective good, if the good was installed according to its contractual purposes.

### 3.1 Question 1

The 'national law' the BGH refers to in its first question is section 439 III BGB<sup>8</sup> – regulating cure under German law<sup>9</sup> – which states that

Without prejudice to section 275 (2) and (3), the seller may refuse to provide the kind of cure chosen by the buyer, if this cure is possible only at disproportionate expense. In this connection, account must be taken in particular, without limitation, of the value of the thing when free of defects (...).

Section 439 BGB, drafted in the course of the major reform of the German law of obligations in 2002 as an implementation of Article 3 of the Directive, is doctrinally seen as a 'modification of the original claim for performance'.<sup>10</sup> The BGH had traditionally taken this origin into account, focusing merely on the extent of the original claim – which in these cases according to the contract did not include installation, waiving all eventual further claims for removal or installation.<sup>11</sup>

Therefore, in the first question at hand, the BGH did not raise the issue of an eventual duty for removal/reinstallation at all, but merely intended to determine where the calculation of proportionality should be attached. In this point, section 439 paragraph III BGB does not accord to Article 3 paragraph III of the Directive, which states:

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

In other words, should the seller also be entitled to refuse the demanded kind of subsequent performance due to disproportionate costs, taking into account the value of the thing when free of defects (absolute proportionality, as foreseen by the BGB), or may he do so also if these

<sup>8</sup> Bürgerliches Gesetzbuch, ie the German Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [*Bundesgesetzblatt*] I page 42, 2909; 2003 I page 738), last amended by Article 1 of the statute of 27 July 2011 (Federal Law Gazette I, 1600).

<sup>9</sup> Defining the scope of cure according to sec 439 BGB has probably been 'one of the most extensively discussed topics in German private law in recent years' (Johnston and Unberath (n 4) 795, footnote 9).

<sup>10</sup> S Augenhöfer, C Appenzeller and V Holm, 'Nacherfüllungsort und Aus- und Einbaukosten' (2011) JuS, 681.

<sup>11</sup> BGH, decisions of 15 July 2008 (NJW 2008 2837) and of 13 April 2013 (NJW 2011, 2278), both commented on by Faust, JuS 2008, 933-936 and JuS 2011, 744-748.

costs are disproportionate when compared just to other forms of remedies (relative proportionality, Article 3 III of the Directive)?

Generally, section 439 paragraph III BGB has been doctrinally rather well settled in German law. According to the government's statement<sup>12</sup> on the draft of section 439 paragraph III BGB, the provision was intended as a specification or 'light version' of economic impossibility regulated in section 275 paragraph II BGB, which just required weaker criteria to be applied. Based on this approach, German legal literature<sup>13</sup> distributed a clear doctrinal location to section 439, supposing that both section 275 paragraph II BGB and section 439 paragraph III BGB are 'structurally comparable'.<sup>14</sup>

However, returning to the Directive, section 349 paragraph III BGB had already been claimed for quite some time to be incompatible by legal literature,<sup>15</sup> mainly based on the structural argument, as the Directive does not provide a right of refusal to the seller because of absolute lack of proportionality, but only due to impossibility.<sup>16</sup>

### 3.2 Question 2

At first sight, the German approach appears to be rather complex: under German law, costs for removal/installation, as both elements are not part of the original obligations of a sales contract, can generally only be claimed as damage apart from performance according to section 280 paragraph I, section 437 variant number 3 BGB. But as liability under section 280 paragraph I BGB requires fault, the seller may only be liable if he with intent or negligence knew or ought to have known about the mistake – which generally will not be the case, as the defect is usually caused by the producer, and there is no seller's duty to examine the goods before sale.<sup>17</sup>

There is therefore no claim according to section 280 paragraph I in conjunction with section 437 no 3 BGB, but the buyer may still eventually claim costs as damage resulting from denied performance (section 281 paragraph II variant number 1 and/or section 323 paragraph II variant number 1 BGB) (ie based on rescission), if removal/installation are

<sup>12</sup> Bundestags-Drucksache 17/6040, 232.

<sup>13</sup> Eg H-P Westermann in MünchKomm-BGB, 5 Aufl (2008), sec 439 para 13.

<sup>14</sup> F Faust, *Ersatz der Ausbaurkosten bei der Ersatzlieferung; absolute Unverhältnismäßigkeit der Nacherfüllung*, JuS 2009, 472.

<sup>15</sup> F Faust in Bamberger/Roth (commentary to BGB), BeckOK-BGB, Ed 20 (1 February 2007) § 439 para 53ff.

<sup>16</sup> See eg M Jaensch, 'Die Störung der Nacherfüllung im Kaufrecht', Jura 2005, 653, para 57.

<sup>17</sup> S Lorenz, 'Die Reichweite der kaufrechtlichen Nacherfüllungspflicht durch Neulieferung' (2009) NJW, 1633.

owed within subsequence performance, or, in other words, if they are subject to cure according to section 439 BGB. In fact, it boils down again to the question of how the scope of the seller's obligation to cure a defect of goods should be determined.

The relationship set up by the BGH between the two questions is at first sight not entirely clear. Indeed, the question of whether there is at all a duty to remove/re-install arises prior to issues of the subsequent proportionality of such duties. In fact, it has been assumed that the BGH, which had waived any right at least for re-installation in its *Parkettstäbe* decision<sup>18</sup> of 15 July 2008, did not intend to raise the issue again so soon after having put an (interim) end to a rather controversial discussion<sup>19</sup> in Germany. In *Parkettstäbe*, it deviated from its former reasoning developed in the *Dachziegel* decision<sup>20</sup> (which granted at least the right to the removal of the defective goods) in a doctrinally rather controversial way, as it stipulated the seller's duty to remove in cases of a 'special interest' of the buyer therein.<sup>21</sup> Taking these matters into account, Amtsgericht Schorndorf doubted the compatibility of the German juridical practice and referred the question to the ECJ – shortly after the BGH itself had extended<sup>22</sup> its reference to the ECJ by question No. 2.

The Directive itself does not provide clear instructions to settle these alleged claims; it states in Article 3 paragraphs 2 and 3 as follows:

- 2) In the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement, in accordance with paragraph 3, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods, in accordance with paragraphs 5 and 6.
- 3) In the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate.

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

- the value the goods would have if there were no lack of conformity,
- the significance of the lack of conformity, and
- whether the alternative remedy could be completed without significant inconvenience to the consumer.

<sup>18</sup> BGHZ 177, 224 para 15; NJW 2008, 2837.

<sup>19</sup> On the whole issue, see eg S Lorenz (n 17) 1633.

<sup>20</sup> BGHZ 87, 104, reported in NJW 1983, 1479.

<sup>21</sup> See critical evaluation and further links at F Faust (n 14) 471.

<sup>22</sup> BGH, decision of 14 January 2009, JZ 2009, 310.

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

#### **4. The reasoning of the ECJ**

##### **4.1 Opinion of Advocate General Mazák**

The approach taken by Advocate General Mazák tried to balance the interests of both parties, initially stating that consumer law was not so simple that categorically granting extensive consumer rights would automatically lead to fair (and consumer-friendly) results.<sup>23</sup> Concerning the eventual duty to remove/install, he concluded, since a literal interpretation of 'replacement' did not resolve the matter, that a claim based on performance could not include the duty to provide more than it was 'originally owed under the contract', ie the transfer of property in the sold good. Any further claim aiming at the restitution of the buyer's general situation prior to defective delivery would not correspond with the buyer's interest in proper performance, but rather refer to his integrity interests and should therefore be classified as damages rather than (subsequent) performance.<sup>24</sup> Damages, however, were usually granted only upon further requirements as remoteness, causation or fault – criteria which were not provided by the Directive. Therefore, neither removal nor installation was included in the seller's duties according to the Directive.

Concerning proportionality, Mazák agreed with prior German jurisdiction that the seller may also refuse the demanded kind of performance due to absolute disproportionality, as otherwise the seller may face unacceptable cases of hardship if the costs of subsequent performance considerably exceed the value of the delivered good.<sup>25</sup>

##### **4.2 The ECJ's decision**

The ECJ, however, did not follow Mazák's opinion in either point, stipulating with regard to question 2 that the Directive imposed an obligation on the seller to remove the defective good and install the new good at his own expense, even if (as is usually the case) the purchase contract did not include any installation duties, reasoning frankly that the replacement of non-conforming goods by the buyer would lead to additional expenses for the buyer, which would contradict the Directive in so far as the remedy for the buyer must be 'free of charge' (Article 3 paragraph 2).

---

<sup>23</sup> Case C-65/09 (*Weber*), Opinion of AG Mazák, para 30.

<sup>24</sup> Case C-87/09 (*Putz*), Opinion of AG Mazák, paras 56-57.

<sup>25</sup> Case C-65/09 (*Weber*), Opinion of AG Mazák, para 85.

The court admits that neither removal nor installation was mentioned in paragraph 4, which just refers to costs of ‘postage, labour and materials’, but argues, as pointed out in the *Quelle* decision,<sup>26</sup> that ‘this list is illustrative, not exhaustive’.<sup>27</sup> Furthermore, a wide interpretation would be necessary to meet the Directive’s objective of ‘ensuring a high level of consumer protection’. The seller would be protected by ‘prescription and the possibility of redress against the producer’.<sup>28</sup> The central legal issue also raised by Mazák – the differentiation between damage due to denied subsequent performance and (fault-based) damages apart from performance – was omitted completely by the ECJ.<sup>29</sup>

Concerning proportionality, the court first differentiated between Article 3 paragraph 3 sentences 1 and 2: while sentence 1 (‘the consumer may require the seller to repair the goods (...) unless this is impossible or disproportionate’) would also include absolute proportionality, sentence 2 (‘A remedy shall be deemed to be disproportionate if it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable’) was restricted to relative proportionality, as the wording directly refers to ‘other remedies’. Anyhow, sentence 3 of the same paragraph would ‘nevertheless allow effective protection of the legitimate financial interests of the seller’<sup>30</sup> by granting him the right to ‘reduce – ie not to refuse – the reimbursement ‘to an amount proportionate to the value the goods would have if there were no lack of conformity and the significance of the lack of conformity (...)’,<sup>31</sup> if the reimbursement is not ‘rendered devoid of substance’.<sup>32</sup> In other words, the court first decided explicitly that absolute proportionality cannot be seen as defence, ie that a respective national regulation (such as section 439 paragraph III sentence 3 BGB) is not compatible, but that on the other hand the seller’s legitimate financial interests may under certain conditions deserve protection anyway, which comes in fact very close to the concept of absolute proportionality.<sup>33</sup>

This reasoning implies the following: at first, the court restricts the buyer’s claim to reimbursement, implying that the buyer has merely a right to recover cure costs, instead of being entitled to demand the dealer to effect the cure himself, an approach which contradicts, for example, German law, where (subsequent) performance generally has priority. A

---

<sup>26</sup> Case C-404/06 [2008] para 31.

<sup>27</sup> Joined Cases C-65/09 and C-87/09 [2011] para 50.

<sup>28</sup> *ibid* para 58.

<sup>29</sup> *Lorenz* (n 3) 2243.

<sup>30</sup> Joined Cases C-65/09 and C-87/09 [2011] para 73.

<sup>31</sup> *ibid* para 74.

<sup>32</sup> *ibid* para 76.

<sup>33</sup> According to Johnston and Unberath (n 4), the court’s reasoning is ‘nothing short of perplexing’ 804; see also C Faust, ‘Kaufrecht: Reichweite des Anspruchs auf Ersatzlieferung’ (2011) *Jus*, 744.

striking point as well is that in this context the ECJ introduces criteria determined by quantity, not quality: the seller is not granted a defence, which would directly protect him from disproportionate claims to remove/install, but he is, independently of the payment duty claimed by the buyer, granted a separate right to proportionally limit this subsequent duty to cover expenses for removal/installation which arose for the buyer.

Besides, the limitation stipulated by the court does not apply for the replacement itself; this right is left 'intact': in other words, for the repair of a defective good, merely relative proportionality will be applied.

Finally, the most essential point is that the ECJ deviated from the explicit principle of the Directive to abstain from damage regulation, which was established mainly due to divergent national approaches: stating that the buyer is entitled to removal and installation by the seller himself (respective of the costs of removal and installation performed through a competitor if the buyer no longer wants this to be performed by the seller), the court introduced in fact a general strict liability for damages resulting from non-performance.<sup>34</sup> Anyhow, in spite of the central significance of this statement, the respective criteria introduced by the court are more than vague; a duty to pay damages is based on conditions implying terms such as 'by their nature', or even 'good faith'. This approach is a considerable challenge to the system of defences, not only those used in most European private law systems, but also within the Directive.<sup>35</sup>

## 5 The impact of the decision on national and European law

Legal practice and legislation will have to decide how the judgment can be implemented in today's European private laws without raising major conflicts with existing structures. Conflicts may arise especially concerning the proportionality principle, which is alien to the text of the Directive itself – a fact which prevented European private law systems from being prepared for this decision by means of prior Directive implementation.

### 5.1 Germany

The BGH, for instance, had to settle this issue just a few months after<sup>36</sup> the ECJ's decision, when it took the reasoning in *Weber/Putz* into

<sup>34</sup> Lorenz (n 3) 2243.

<sup>35</sup> Johnston and Unberath (n 4) 802.

<sup>36</sup> Bundesgerichtshof, Decision of 21 December 2011, case number VIII ZR 70/08, reported in *Neue Juristische Wochenschrift* 2012, 1073.

account as follows:<sup>37</sup> after stating that generally section 439 paragraph III sentence 3 BGB at present is not compatible with the Directive, it conceded that the seller nevertheless deserved protection – an attitude explicitly not required in the given situation by the ECJ, which remarks that Article 3 merely ‘enables account to be taken of [the] economic considerations’ of the seller.<sup>38</sup> The exact doctrinal approach on how this protection should be effected remains unclear; the BGH refers generally to section 440 paragraph I BGB,<sup>39</sup> which grants the buyer the right to rescind from the contract without granting an additional period of performance if the (subsequent) performance ‘cannot reasonably be expected of him’. It must be admitted that section 440 BGB first of all is a defence to the seller, which prompted further explanation by the BGH: the seller would, anyhow, not be entitled to refuse performance unless his (disproportionate) costs were (partly) compensated, but the duty to perform – ie also to remove/install – would prevail, though compensated by an (independent) right to claim partial reimbursement of the costs of removal/installation. The BGH approached the ECJ’s attitude at least indirectly by referring to removal/installation as part of ‘performance’. The rather complex reasoning of the latter part is owed to the intention to keep the decision compatible with the ECJ’s wording in paragraph 76, where it stated that ‘the possibility of making such a reduction’ must not ‘result in the consumer’s right to reimbursement of those costs being effectively rendered devoid of substance’, which a comprehensive defence in the seller’s favour would certainly lead to.

The BGH, in a last step, also determined the amount of reimbursement (removing and/or installing) the seller may claim from the buyer, setting 50% of the value of the goods without defects, which in the case at hand amounted to EUR 600 (at overall removal costs of EUR 5,830.57), admitting that the determination of the general calculation modes in this context were to be developed by the legislator.

## 5.2 Estonia

Estonia’s Supreme Court has not yet decided a respective case after the decision in *Weber/Putz*, but taking into account the structure of section 222 of VÕS,<sup>40</sup> a similar case before Estonian courts would face considerably less collisions than under German law. A comparison

---

<sup>37</sup> See also S Leible and M Müller, ‘Nacherfüllung durch Lieferung einer mangelfreien Sache erfasst Ausbau und Abtransport der mangelhaften Kaufsache’ (2012) LMK, 330321.

<sup>38</sup> Joined Cases C-65/09 and C-87/09 [2011] para 75.

<sup>39</sup> Bundesgerichtshof, Decision of 21 December 2011, VIII ZR 70/08, reported in *Neue Juristische Wochenschrift* 2012, 1073, para 48.

<sup>40</sup> *Võlaõigusseadus*, the Estonian Law of Obligation Act – RT I 2001, 81, 487 (in Estonian). An English version is available at <[www.just.ee/23295](http://www.just.ee/23295)> accessed 29 October 2013.

of the legally relevant passage, stating that the purchaser may demand remedies

(...) if this is possible and does not cause the seller unreasonable costs or unreasonable inconvenience compared to the use of other legal remedies considering, inter alia, the value of the thing, the significance of the lack of conformity and the opportunity for the purchaser to acquire a thing which conforms to the contract from elsewhere without inconvenience (...)

with Article 3 paragraph III sentence 2 of the Directive essentially provides for parallels of the respective determination of proportionality. Section 222 VÖS generally follows the principle of relative proportionality, providing – just like the Directive – in its second clause exemplary ways of determining proportionality.

With regards to the ECJ's decision in *Weber/Putz*, Estonia's Obligations Act is compatible with the Directive. The exact determination of the respective seller's reimbursement shares, however, will have to be achieved on a case-by-case basis as well.

### **5.3 The European dimension**

From a general European perspective, the detailed interpretation of a directive by the court – and, concerning the Directive's intention to abstain from the regulation of damages, even contradicting one of its objectives – raises the question of whether under such procedures a regulation would not provide more legal certainty than a directive, and would therefore be the preferable instrument. The decision also touches on European consumer law, as many Member States – among them Germany – have implemented the Directive in their general law of obligations, being applicable for B2C and B2B relationships as well. In fact, the decision has revived initiatives in Germany to re-separate parts of directive-based law again and restrict it to consumers.<sup>41</sup> In German legal literature, the question on how far the respective provisions can be teleologically reduced to consumers, as the motivation of the ECJ was explicitly consumer protection, has been raised numerous times since 2011;<sup>42</sup> the interest in a uniform private law<sup>43</sup> is juxtaposed to the assumed intent of the national legislator, who – in the situation of section 439 BGB – did not classify removal and installation as part of performance, and is therefore

<sup>41</sup> Johnston and Unberath (n 4) 806.

<sup>42</sup> A Weiss, 'Gespalten oder einheitlich? Über die rechtliche Behandlung so genannter Hybridnormen in nationalen Rechtsordnungen' (2012) *EuZW*, 733-737.

<sup>43</sup> Faust (n 33) 748; see also BGH ('Heininger-Decision'), decision of 9 April 2002 - XI ZR 91/99 (München), *NJW* 2002, 1881-1884.

assumed<sup>44</sup> to restrict contradicting ECJ case law as far as possible (ie to B2C relationships).<sup>45</sup> The BGH decided in the above-mentioned decision<sup>46</sup> in favour of a separated interpretation, stating that section 439 paragraph I BGB is interpreted according to the reasoning in *Weber/Putz* exclusively in B2C relationships.

## 6. Conclusion

As mentioned above, the decision has been criticised for its methodological approach.<sup>47</sup> From a consumer protection perspective, it is doubtful whether the proportionality principle – just as the seller's duty to reimburse removal and installation costs – will match the Directive's objective, as consumer protection 'is known to be not for free';<sup>48</sup> the extended liability will rather be priced in by the seller: as far as he cannot pass on these costs to his supplier,<sup>49</sup> he will eventually just raise the prices of his goods in order to cover the risk of paying for the removal or installation of potentially defective goods.

Against this background, the proportionality principle will be seen as an obstacle to keeping European contract law systems internally coherent rather than as a progressive step towards harmonised European private law. To prevent this unintended effect and further deviant ECJ case law in the future, the question should be asked whether it is not rather the European legislator that ought to regulate the very essential elements of contract law. The *Weber/Putz* proportionality principle is probably going to be a lasting source of conflict – concerning a legal question where divergent approaches, which until *Weber/Putz* caused much less controversy than now, will eventually arise concerning the least harmful way of handling the proportionality principle. Further European jurisdiction following the attitude taken by the ECJ in *Weber/Putz* has the potential of endangering acceptance of the initiated path of harmonisation of European law via directives and should therefore be prevented by respective legislative measures by European institutions.

---

<sup>44</sup> Lorenz (n 3) 2244.

<sup>45</sup> S Lorenz, 'Aus- und Wiedereinbaukosten bei der kaufrechtlichen Nacherfüllung zwischen Unternehmern – Zu den Grenzen „richtlinienorientierter“ Auslegung' (2013) NJW 207-209.

<sup>46</sup> Bundesgerichtshof, decision of 17 October 2012, case number VIII ZR 226/11 (OLG Stuttgart), commented on by B Gsell, BGH: 'Reichweite der richtlinienkonformen Auslegung beim Ersatz von Ausbaukosten von mangelhaften Liefergegenständen' in LMK (Lindenmaier-Möhning, Comments on the jurisdiction of the German Supreme Court) 2013, 343739.

<sup>47</sup> Johnston and Unberath (n 4) 801.

<sup>48</sup> Lorenz (n 3) 2243. Lorenz sees the decision as a product of 'consumer romanticism'.

<sup>49</sup> In this context, sections 478, 478 BGB, until now practically rather rarely applied, which grant the seller the right of regress against his supplier, will eventually become more significant.

