THE ITALIAN IMPLEMENTATION OF THE SALE OF GOODS DIRECTIVE: ANOTHER NAIL IN THE COFFIN OF A GENERAL SALES LAW?

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This paper highlights the three most significant changes to the Italian Consumer Code following the implementation of the Sale of Goods Directive and contrasts them with the rules applicable to sales contracts under the Italian Civil Code. The core thesis is that the combined effect of these modifications further distances consumer law from the general law of obligations. As a result, the trend towards the fragmentation of Italian sales law, based on the status of the contracting parties, is consolidated. By assessing the advantages and disadvantages of this fragmentation and relying on the concept of "coherence", defined as consistency in the application of principles and policies, the paper further concludes that the current state of affairs is both unjustifiable and undesirable. Consequently, a modernisation of domestic law of obligations – aimed at reconciling these divergent sources – is overdue.

Key words: seller's liability; remedies for lack of conformity; obligation to notify; divergence between consumer law and general sales law; internal coherence

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1. INTRODUCTION

Italy complied with its obligation to implement the new Sale of Goods Directive (SGD)[1] in November 2021 by amending the existing Consumer Code (*Codice del consumo*[2], c. cons.). On balance, the statutory changes were minimal, and only a few provisions were substantially affected. However, this does not mean that the reform was inconsequential. Indeed, the implementation of the SGD resulted in a further push towards an autonomous sub-system to govern consumer contracts of sale, separate from – if not, opposed to – the general law applicable to contracts under the Italian Civil Code (*Codice civile*[3], c. c.).

To address this topic, this paper will focus on three key innovations recently introduced:[4]

i) The new condition for excluding lack of conformity by the seller.

ii) The repeal of the previous obligation to notify the seller of any lack of conformity.

iii) The displacement of the general law of remedies for consumer contracts.

The combined effect of these modifications further distances consumer law from the general law of obligations, thereby intensifying the fragmentation of Italian sales law. This is the undesirable by-product of the implementation of supranational law. Nonetheless, attempts to pursue international harmonisation have often led jurists to overlook the risks of fragmentation and downplay the importance of internal coherence within national legal systems. This paper seeks to reverse this tendency, arguing for modernising the national law of obligations by reconciling it with EU (and other international) legal rules.

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1 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, Official Journal, L 136, 22 May 2019.

2 Legislative Decree (*Decreto Legislativo*) of 6 September 2005, no. 206, last amended by the Act (*Legge*) of 30 December 2023, no. 214.

3 Royal Decree (*Regio Decreto*) of 16 March 1942, no. 262, last amended by the Act (*Legge*) of 8 August 2024, no. 112.

4 De Franceschi, A., *Italian Consumer Law after the Transposition of Directives (EU) 2019/770 and 2019/771*, EuCML – Journal of European Consumer and Market Law, *vol.* 11, no. 2, 2022, pp. 72–76.

2. SOMETHING NEW, SOMETHING OLD: CONSUMER CODE V CIVIL CODE

2.1. Excluding lack of conformity

The first case study concerns the exclusion of a lack of conformity when the buyer had or could have had knowledge of the defect.

Previously, consumer law was aligned with the general law in excluding liability for any defect that the consumer – at the time of the conclusion of the contract – knew or should have reasonably been aware of.[5] This rule implements the principle of *caveat emptor* (i.e., buyer beware) by imposing a standard of diligence upon the buyer, at least insofar as they were able to ascertain, without undue burden, the existence of defects in the goods sold.

Conversely, the new Article 130 c. cons. implements *verbatim* Article 7(5) SGD and requires a separate and express acceptance of the lack of conformity by the informed consumer to exclude liability.[6] Accordingly, the duty now falls upon the seller to disclose the existence of any defects or be held liable for them. In the absence of case law on this point, the provision remains difficult to interpret, as it is not clear how the consumer's acceptance is supposed to take place or the degree of precision required from the seller.[7] While the SGD

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[5] *Cf.* Article 1491 c. c. ("[no warranty is due] if at the time of the contract the buyer knew of the defects; likewise, it is not due if the defects were readily ascertainable") and former Article 129(3) c. cons. ("[no lack of conformity] if, at the time the contract was concluded, the consumer was aware of the defect [or] could not have been unaware of it using ordinary diligence"). An apparent difference was that Article 1491 c. c., contrary to former Article 129(3) c. cons., explicitly provides an exception when the seller declares that the goods are free from defects. However, this divergence was set aside by pointing out that, if the seller gives assurances for their products, the ordinary diligence does not require any further inquiry (Ferrante, E., *La vendita nell'unità del sistema ordinamentale: i modelli italo-europei e internazionali*, Edizioni Scientifiche Italiane, Napoli, 2019, p. 276).

[6] Article 130(4) c. cons.: "[no lack of conformity] if, at the time of conclusion of the contract, the consumer was specifically informed that a particular characteristic of the goods deviated from the objective requirements for conformity […] and the consumer expressly and separately accepted that deviation at the time of conclusion of the contract."

[7] Specifically, the main debate is whether a declaration in the accepted general terms and conditions of the seller suffices (see Bugatti, L., *EU Consumer Sale Law and the Challenges of the Digital Age: An Italian Perspective*, Opinio Juris in Comparatione, *vol.* 1, no. 1, 2022, p. 175; Graf von Westphalen, F., *Some Thoughts on the Proposed*

aimed to improve the consumer's position, several authors have questioned the soundness of this provision.[8]

Nevertheless, for the purposes of this work, it is sufficient to point out that the different rules reflect contrasting rationales: the traditional rule focuses on the reasonable care of the buyer, whereas the new provision focuses primarily on the seller's obligation to disclose, requiring them to draw the buyer's attention to all possible lacks of conformity. Additionally, even when the buyer is plainly aware of the defect, the derogation from the conformity requirements does not depend directly on the buyer's knowledge but stems from the separate act of express acceptance.[9]

2.2. Duty to notify the seller

Another relevant change is the removal of the duty to notify the seller of any lack of conformity.

The previous rule for consumers required notification to be made within two months after the date the defect became detectable by the consumer; if notification did not occur, the buyer lost their right to claim remedies for the breach.[10]

In this matter, the SGD decided to not pursue harmonisation and, on the contrary, left the choice whether to maintain, extend, or remove this requirement to the individual Member States.[11] Italy, therefore, could have simply confirmed its pre-existing rule, but the Italian legislature opted instead to repeal the

Directive on Certain Aspects Concerning Contracts for the Sales of Goods, EuCML – Journal of European Consumer and Market Law, *vol.* 7, no. 2, 2018, p. 70).

8 Van Gool, E.; Michel, A., *The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis*, EuCML – Journal of European Consumer and Market Law, *vol.* 10, no. 4, 2021, p. 141. Some authors, on the contrary, approved the novelty as the implicit admission that the consumer and the seller can – freely and without abuses – opt out of the objective requirements for conformity (see Girolami, M., *La conformità del bene al contratto di vendita: criteri "soggettivi" e criteri "oggettivi"*, in: De Cristofaro, G. (ed.), *La nuova disciplina della vendita mobiliare nel codice del consumo: La direttiva (UE) 2019/771 relativa ai contratti per la fornitura di cose mobili stipulati da professionisti con consumatori ed il suo recepimento nel diritto italiano (d.lgs. 4 novembre 2021, n. 170)*, Giappichelli, Torino, 2022, pp. 78–81).

9 *Cf.* Pagliantini, S., *Contratti di vendita di beni: armonizzazione massima, parziale e temperata della dir. ue 2019/771*, Giurisprudenza italiana, *vol.* 172, no. 1, 2020, p. 220 (arguing that the solution adopted is formalistic).

10 Former Article 132(2) c. cons.

11 Article 12 SGD.

obligation for consumers to notify altogether. After the reform, a consumer has a claim for lack of conformity subject solely to the statutory limitation period.[12]

The choice is surprising when compared to the general law, which imposes a short period of eight days to notify the defect once it becomes discoverable.[13] The Italian Civil Code lays down one of the most restrictive rules in Europe, to the extent that some scholars claim that the provision could be regarded as unconstitutional given the unreasonable restrictions it places on the buyer's rights.[14]

The new rule is undoubtedly more favourable for consumers but – again – this comes at a cost. Firstly, the absence of a duty to notify is prone to abuse by unscrupulous consumers and may result in unnecessary delays and inconveniences.[15] Secondly, and more fundamentally, the choice to repeal the obligation to notify in consumer contracts, leaving untouched the provisions for non-consumer contracts, marks an additional, diametrical difference between the two sub-systems.

2.3. Remedies for the buyer

The third example concerns the remedies available to the buyer in the case of a latent defect.

In essence, the Italian Civil Code follows the traditional Roman model centred on the aedilitian actions.[16] These are available when the defect makes the goods unfit for their intended use or when it substantially decreases their

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[12] According to Article 133(3) c. cons., the limitation period is twenty-six months from the delivery in the case of defects not fraudulently concealed by the seller. However, if the defects were fraudulently concealed, the limitation period applicable remains rather unclear (see Faccioli, M., *La durata della responsabilità del venditore e la prescrizione dei diritti del consumatore*, in: De Cristofaro, G. (ed.), *La nuova disciplina della vendita mobiliare nel codice del consumo: La direttiva (UE) 2019/771 relativa ai contratti per la fornitura di cose mobili stipulati da professionisti con consumatori ed il suo recepimento nel diritto italiano (d.lgs. 4 novembre 2021, n. 170)*, Giappichelli, Torino, 2022, p. 398).

[13] Article 1495(1) c. c. No notice is required if the seller has acknowledged the existence of the defect or concealed it (Article 1495(2) c. c. and former Article 132(2) c. cons.).

[14] Ferrante, E., *Thirty Years of CISG: International Sales, 'Italian Style'*, Italian Law Journal, *vol.* 5, no. 1, 2019, pp. 127–128.

[15] Faccioli, *op. cit.* (fn. 12), pp. 411–413.

[16] For the historical evolution of the seller's liability for latent defects in civilian systems, see Zimmermann, R., *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford University Press, Oxford – New York, 1996, pp. 305–337.

value.[17] Alternatively, they are also available in cases where the goods lack an essential or promised quality.[18] In such cases, the buyer has a choice between the reduction of the purchase price (*actio aestimatoria* or *quanti minoris*) or the termination of the contract (*actio redhibitoria*).[19]

Additionally, if the goods delivered are significantly different from the ones promised (*aliud pro alio*), another action for terminating the agreement – recognised by judicial precedents but not explicitly addressed in the Civil Code – is available to the buyer.[20] This action is more advantageous to the buyer since it is not subject to the same time limits laid down for the aedilitian actions: neither the duty to notify[21] nor the shortened limitation period of one year after delivery laid down by Article 1490(3) c. c. apply.[22]

Finally, it is unclear whether the remedies of repair and replacement of defective goods are available in a claim under the Civil Code. Although several scholars have argued in favour of these remedies based on the general action to compel specific performance[23], the case law of the Italian Supreme Court is firmly against their admissibility.[24]

In contrast, the Consumer Code provides for a unitary notion of conformity, currently embracing both subjective and objective requirements[25], whereby every lack of conformity results in an actionable breach.[26]

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17 Article 1490(1) c. c.

18 Article 1497 c. c.

19 Article 1492(1) c. c.

20 Cass. civ., sez. I (First Chamber of the Italian Court of Cassation), judgment of 5 February 2016, no. 2313 (*aliud pro alio* cases are those in which the goods delivered belong to an entirely different kind or when they lack the qualities necessary to fulfil their natural economic and social function).

21 See above in Section 2.2. In fact, the doctrine of *aliud pro alio* was primarily created to allow a deserving buyer to escape the draconian duty to notify within eight days set out in the Civil Code (Ferrante, *op. cit.* (fn. 5), p. 297).

22 The only limit is the ordinary ten-year limitation period applicable to all contractual actions pursuant to Article 2946 c. c.

23 Rubino, D., *La compravendita*, 3rd edn, Giuffrè, Milano, 1971, pp. 825–826 (only when the seller is at fault); Giorgianni, M., *L'inadempimento: corso di diritto civile*, 3rd edn., Giuffrè, Milano, 1975, p. 75 Ferrante, *op. cit.* (fn. 5), p. 328.

24 Cass. civ. SS. UU. (Joint Chambers of the Italian Court of Cassation), judgment of 13 November 2012, no. 19702.

25 Articles 6–7 SGD, implemented by Article 129 c. cons.

26 Girolami, *op. cit.* (fn. 8), p. 65.

The remedies available to a consumer include both repair and replacement, alongside the more traditional remedies of termination and price reduction.[27] All these actions are subject to the same time limits, and, moreover, specific performance is generally preferred, insofar as it is possible and reasonable according to the circumstances.[28]

Given the non-negligible differences between the domestic and the European remedial regimes, the crux of the issue is the interplay between the two. Under the former Article 135 of the Consumer Code, the consumer special provisions did "not exclude or limit the rights attributed to the consumer by other rules of the legal system". This wording sparked a lively academic debate, with numerous commentators favouring the view that allowed consumers to pursue remedies under the Civil Code too, if more advantageous.[29] Hence, the consumer could cherry-pick between the two sub-systems, either using their status as a consumer or relying on their entitlements as an ordinary buyer. For example, they could avoid the hierarchy of remedies set out in the Consumer Code by resorting immediately to the aedilitian actions or use the *aliud pro alio* action to terminate the contract even outside the time limits applicable to sales contracts under the Consumer Code.

This conclusion is no longer acceptable in light of the goal of maximum harmonisation pursued by the SGD.[30] Indeed, according to the new Article 135-*septies* of the Consumer Code, rules other than those in consumer legislation cannot be applied "to ensure to the consumer a different level of protection". The provision has been correctly interpreted as preventing the consumer from resorting to the general law of obligations, thus confining them – for better or worse – to the remedies enshrined in the Consumer Code.[31]

In this way, the remedial regime envisaged by the EU legislature is secured for consumer contracts across the entire internal market. Nonetheless, this also entails the displacement of the general law of remedies for consumer contracts. Since both the remedies available and the rules governing the buyer's choice

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[27] Article 135-*bis*(1) c. cons.

[28] Article 135-*bis*(3) and (4) c. cons. This is the so-called hierarchy of remedies.

[29] Luminoso, A., *La compravendita*, 8th edn, Giappichelli, Torino, 2015, p. 412; Ferrante, E., *La direttiva 19/771/UE in materia di vendita al consumo: primi appunti*, in: D'Angelo, A.; Roppo, V. (eds.), *Annuario del contratto 2018*, Giappichelli, Torino, 2019, pp. 43–44.

[30] Article 4 SGD. On the debate between minimum and maximum harmonisation in EU private law, see Miller, L., *The Emergence of EU Contract Law: Exploring Europeanization*, Oxford University Press, Oxford – New York, 2011, pp. 81–88.

[31] De Franceschi, *op. cit.* (fn. 4), p. 72.

differ, the result is a noticeable separation of remedial regimes for consumer and non-consumer contracts.

3. A FRAGMENTED SALES LAW

At this stage, it is possible to draw some preliminary conclusions regarding the impact of EU consumer law on Italian contract law.

The quest for systematisation of the law has been a pursuit of European legal science for the last few centuries. In private law, this goal was largely achieved by the end of the 19th century during the age of codification when the elegance of codes, the authority of nation-states, and the sophistication of legal scholarship encapsulated a general framework for private law obligations.[32] By doing so, national laws managed to provide a comprehensive law of sales that, in turn, fitted logically within the general contract law and the unitary regime for civil obligations.

This centripetal process has been challenged by the centrifugal force of EU law, particularly in the field of consumer law. By providing a scattered but substantial body of rules applicable only to certain transactions, European legislation has created a transversal area of law unified (or at least harmonised) at a supranational level, but with little or no regard for the underlying domestic legal systems. The consequence is the partitioning of the general law of obligations into two sub-systems.[33]

Against this backdrop, the implementation of the SGD has dealt a further, perhaps fatal, blow to the idea of a general sales law. Despite being the culmination of a long-standing process[34], the new rules have magnified and solidified the

[32] Letto-Vanamo, P., *Fragmentation and Coherence of Law – a Historical Approach*, in: Letto-Vanamo, P.; Smits, J. (eds.), *Coherence and Fragmentation in European Private Law*, Sellier European Law Publishers, Munich, 2012, pp. 165–167, 170–172. Common law countries underwent a similar process of systematisation at a later stage (Smits, J., *Coherence and Fragmentation in the Law of Contract*, in: Letto-Vanamo, P.; Smits, J. (eds.), *Coherence and Fragmentation in European Private Law*, Sellier European Law Publishers, Munich, 2012, pp. 11–12).

[33] Hesselink, M. W., *The New European Private Law: Essays on the Future of Private Law*, Kluwer Law International, The Hague – London – Boston, 2002, pp. 37–38; Smits, *op. cit.* (fn. 32), pp. 14–16.

[34] An example is Article 20 of the 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

trend toward fragmentation in Italian law. On the one hand, the European-driven consumer legislation has emerged as a largely independent body with its own set of buyer-friendly rules and a fully-fledged set of remedies. On the other hand, the Roman-inspired general law continues to govern consumer-to-consumer as well as business-to-business sales contracts.

Furthermore, a third sub-system applicable to many transnational business-to-business contracts must be taken into account: the United Nations Convention on Contracts for the International Sale of Goods (CISG).[35] The CISG sets out uniform rules for transnational commercial contracts, thus constituting an additional supranational source, and it may be regarded as a middle-ground approach between the other two systems described above. As a matter of fact, its provisions inspired much of the EU consumer legislation on sales contracts[36], but, since it is designed to apply only to business-to-business contracts, its rules tend to be more balanced and, consequently, less pro-buyer. For example, contrary to the Consumer Code, the CISG provides for a duty to notify the seller in cases of a lack of conformity. However, unlike the Civil Code, the time limit is more generous for the buyer, and, in any event, it is not a fixed number of days but rather a "reasonable time", to be assessed according to the nature of the contract and the circumstances of the case.[37]

As a result, the general framework for sales contracts – built through centuries of legal evolution and enshrined in the Civil Code – has now been replaced by three largely autonomous sub-systems that govern contracts of sale based on the personal status of the contracting parties: consumers, businesses dealing nationally, or businesses dealing internationally. In doing so, Italian private law has followed a path not unusual in modern legal systems, which are increasingly characterised by fragmentation.[38]

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the European Parliament and of the Council, Official Journal, L 304, 22 November 2011, implemented by Article 63 c. cons. This provides that the risk of loss of or damage to the goods passes to the consumer only from the moment they have acquired physical possession of the goods themselves; a consequential difference from the general rule enshrined in Article 1465 c. c., according to which the passing of the risk generally occurs upon the conclusion of the contract.

35 United Nations Treaty Series, *vol.* 1489, 1996; adopted on 11 April 1980; entered into force on 1 January 1988; ratified by Italy with the Act (*Legge*) of 11 December 1985, no. 765. Its scope of application is laid down in Articles 1–3 CISG.

36 Ferrante, *op. cit.* (fn. 14), pp. 93–95.

37 Article 39 CISG.

38 Smits, J.; Letto-Vanamo, P., *Introduction*, in: Letto-Vanamo, P.; Smits, J. (eds.), *Coherence and Fragmentation in European Private Law*, Sellier European Law Publishers,

4. FRAGMENTATION AND (IN)COHERENCE

The analysis must now move beyond a descriptive account of the law to offer a normative assessment of the evolution outlined. The question is: is the present state of things desirable and justifiable?

Fragmentation *per se* entails several problems for a legal system. The more a system is unified, the more its rules are predictable and easy to systematise. On the contrary, fragmentation leads to complexity because the rules of the legal system are more difficult to apply – both for its subjects and for legal professionals – due to the increased costs of finding and processing them. Nevertheless, fragmentation may be desirable because different rules may be needed to address different problems. The aspiration for unification cannot be pursued without taking into account the demands for fairness stemming from reality and the impossibility of encapsulating all disparate cases into a theoretical general framework.

In sum, the optimal degree of fragmentation depends on a delicate trade-off between – on the one hand – simplicity and predictability and – on the other hand – a casuistic approach able to resolve legal disputes according to the peculiar nature of the relationship in question and the features of the parties involved. It is virtually impossible to draw a clear and universal line in this matter given the dissimilar cultural and historical backgrounds of the many legal systems in the world, or even in Europe alone.

Therefore, I suggest that a stronger benchmark is whether fragmentation hinders the coherence of the legal system. However, the notion is problematic as, regrettably, the topic remains understudied in private law theory. Coherence, in fact, is a difficult and contested concept given that authors and courts alike have used the word in different contexts to mean different things.[39] For the present purposes, this paper adopts a definition of coherence adopted from the work of Andrew Fell which, it is argued, has promising potential in the analysis of private law.[40]

Munich, 2012, p. 1 ("One of the most important characteristics of today's private law is that it is fragmented.").

[39] Kennedy, D., *Thoughts on Coherence, Social Values and National Tradition in Private Law*, in: Hesselink, M. W. (ed.), *The Politics of a European Civil Code*, Kluwer Law International, The Hague, 2006, pp. 10–19; Miller, *op. cit.* (fn. 30), p. 176; Smits, *op. cit.* (fn. 32), p. 9.

[40] Fell, A., *The Concept of Coherence in Australian Private Law*, Melbourne University Law Review, *vol.* 41, no. 3, 2018, pp. 1180–1187. See also Fell, A., *Corrective Justice,*

Coherence is defined as consistency in the application of principles and policies. The idea is that when a legal rule is formulated by the relevant authority, the said rule reflects a conscious choice between all the competing interests at play. For the legal system to remain coherent with itself, the choice made must be applied consistently.[41] Accordingly, a different rule is justifiable only if it is based on different normative reasons or considerations. In other words, departing from a rule is permissible provided that – and to the extent that – there is a "good reason" that alters the balance in favour of a different regulation in that situation.

Against this backdrop, there may be situations where further fragmentation in the law is defensible on the grounds of coherence because different and relevant normative reasons suggest a dissimilar outcome from the general law. A stark example is contracts of employment: while they considerably diverge from the rules otherwise applicable to contracts in general, the deviations are regarded as appropriate in light of the unequal bargaining power in the employer-employee relationship.[42] On the other hand, special rules for contracts concluded with red-headed people would result in incoherence as hair colour is not an additional reason justifying different legal treatment in the eyes of current social values and beliefs; it does not have any normative leverage.[43]

The notion of coherence advanced is particularly helpful since, while allowing for a pluralist view of private law, it offers several advantages. Firstly, within the inherent limits of fragmentation itself, coherence maximises the intelligibility and predictability of legal rules. As a matter of fact, rationally justifiable rules are easier to digest and apply than rules without any logical connections.[44] Secondly, it enables a principled development of the law. Indeed, reasoning by analogy and deductive legal reasoning to fill gaps should only be possible if the balance of principles and policies is applied consistently across the legal system to justify

Coherence, and Kantian Right, University of Toronto Law Journal, *vol*. 70, no. 1, 2020, pp. 40–63.

41 Fell, *The Concept of Coherence*, *op. cit.* (fn. 40), p. 1186 ("What consistency requires is that the law not give effect to inconsistent judgments about the *relative weight* of the same reasons.").

42 Cabrelli, D., *Employment Law: A Very Short Introduction*, Oxford University Press, Oxford – New York, 2022, p. 80.

43 Fell, *The Concept of Coherence*, *op. cit.* (fn. 40), pp. 1185–1186.

44 Amaya, A., *The Tapestry of Reason: An Inquiry into the Nature of Coherence and its Role in Legal Argument*, Hart Publishing, Oxford – Portland, 2015, p. 541.

extending legal rules to cases with the same normative considerations.[45] Lastly, coherence entails support for the principles of justice and equality because it ensures that substantially similar cases are treated alike.[46] Coherence, therefore, is an important value for the legal system that ought to be preserved.[47]

The concept developed so far can now be applied to consumer contract law. Are different consumer rules a consequence of their distinct normative foundations? To maintain coherence, these rules must be explained based on the features that characterise consumers and that differentiate them from any other buyers. It is submitted that these are their lack of relevant information in the market and the asymmetry of power that does not allow for a real and meaningful negotiation to take place.[48]

Some rules may be explained on this basis, especially those pertaining to the formation of the contract and its content. In fact, it is at the negotiation stage that the unequal power and knowledge between consumers and professionals becomes more apparent. From this point of view, the specific provisions governing the control of unfair terms in consumer contracts[49] are a coherent departure from general contract law because they rely on these normative considerations.

But other rules cannot. Let us take the law of remedies as an example. Contract remedies reflect the response of the legal system following a breach; they shape the way the legal system protects the innocent party's interest in the performance and are informed by the general principles of contract law and public policy considerations in that jurisdiction.[50] With this in mind, it is hardly justifiable that the remedies available for breaches of sales contracts may differ

45 Lacking a coherence-based reasoning, jurist-made law "is a sham and […] judges merely hide an exercise of pure power behind a semantic smoke-screen" (Birks, P., *Equity in the Modern Law: An Exercise in Taxonomy*, University of Western Australia Law Review, *vol*. 26, no. 1, 1996, p. 52).

46 Dworkin, R., *Law's Empire*, The Belknap Press of Harvard University Press, Cambridge, 1986, p. 180; Smits, *op. cit.* (fn. 32), p. 10.

47 Some scholars, however, have manifested scepticism towards the idea contemporary private law should be coherent. See Miller, *op. cit.* (fn. 30), pp. 176–78; Smits, *op. cit.* (fn. 32), pp. 22–23.

48 CJEU, *ERSTE Bank Hungary Zrt v Attila Sugár*, Case C32/14, ECLI:EU:C:2015:637, para. 39; CJEU, *Ernst Georg Radlinger and Helena Radlingerová v Finway a.s.*, Case C-377/14, ECLI:EU:C:2016:283, para. 63.

49 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21. 4. 1993, implemented by Articles 33–38 c. cons.

50 Jiménez, F., *Rethinking Contract Remedies*, Arizona State Law Journal, *vol*. 53, no. 4, 2021, p. 1153.

based on the consumer status of one of the parties. If the legal system adopts the rule that repair and replacement should be available since – as a form of specific performance – they are more apt to protect the buyer's expectation interest, then this choice should be applied to all contracts of sales. Likewise, if the legal system accepts that the latter remedies should have precedence, then this ought to be reflected in the general law too. Nothing is unique about consumer law here and the features that the law ascribes to consumers do not add or change the balance of reasons. Therefore, the difference can only result in incoherence and disharmony.

It is more difficult to draw a conclusion for provisions adopting a more favourable regime as regards the duty to notify and the exclusion of liability when the buyer could know about the defect. The answer depends on the proper rationale for consumer law. If one takes the view that consumer protection implies the most favourable solution for the vulnerable party, who is allowed and expected to take a passive role not only during the conclusion but also during the performance of the agreement, then the differences may be coherent. It is the inability of the consumer to take an active role in protecting their interests that accounts for the relief from the burdens of inquiry and prompt notification. This view, however, reflects a paternalistic approach that infantilises consumers: limiting to such an extent the duty to protect their own interests results in a restricted acknowledgement of their agency.[51]

The preferable view is that, while consumer law corrects the inequalities between agents with different market roles when no meaningful bargain could take place, it does not go as far as legitimising the consumer's idleness and lack of initiative.[52] Accordingly, if consumers are able to attend to their personal

[51] *Cf.* Grochowski, M., *European Consumer Law after the New Deal: A Tryptich*, Yearbook of European Law, *vol.* 39, 2020, p. 414 (arguing, although in a different context, that "the concept […], developed in the 2018/2019 reform of consumer law, is palpably more paternalistic than the traditional concept of consumer protection developed in EU law"). See also Girolami, *op. cit.* (fn. 8), p. 79.

[52] An alternative ground is stressing that consumer protection is not provided (only) for the protection of individuals but (also) for the benefit of market integration (Hesselink, M. W., *Progress in EU Contract Law*, European Review of Contract Law, *vol.* 18, no. 4, 2022, p. 289) and of society as a whole (Grochowski, M., *Does European Contract Law Need a New Concept of Vulnerability?*, EuCML – Journal of European Consumer and Market Law, *vol.* 10, no. 4, 2021, p. 134). However, this seemingly leaves unanswered the question of which features consumers have to justify the diverse legal tratment. Indeed, for the purposes of coherence, what matters is the presence of specific reasons that logically explain the different rules coined, not the ultimate intention of the lawmaker.

interests in the same way as any other buyer, it appears that no normative reason explains the differences between consumer law and general law in these aspects.

Finally, another factor comes into play when discussing the appropriateness of fragmentation in consumer sales contracts. It has been contended that consumers are characterised by information biases and by a weak contractual position vis-à-vis the counterparty. However, the definition of consumer[53] is not always apt to match these features in reality, thus compromising a coherence-based analysis. Even though consumers are singled out for their increased vulnerability in the market, this is not necessarily the case. Consumers may be sophisticated parties with advanced skills in that specific area, provided that they act outside of the course of their business.[54] On the contrary, the European definition of a consumer does not encompass legal persons suffering from the same – or largely similar – deficiencies in terms of information and bargaining power (e.g., small businesses).[55] Although, arguably, some degree of arbitrariness is needed to come up with a clear and workable definition for the scope of application of consumer legislation, the presence of borderline cases should discourage, when unnecessary, the adoption of special rules applicable only to consumers.[56] The risk is increasing opposite outcomes in situations where the factual reality militates for uniform solutions, hence fostering injustice and incoherence.

5. CONCLUSION

It is tempting to look solely at the *inter*-national dimension of European integration, celebrating the harmonisation brought by the SGD across the Member States and its impact on the internal market. It is much more uncomfortable to look at the *intra*-national consequences of this process and assess the disruptive impact on the legal systems affected.

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[53] Art 2(2) SGD, implemented by Article 3(1)(a) c. cons. A consumer is defined as "any natural person who […] is acting for purposes which are outside that person's trade, business, craft or profession".

[54] CJEU, *A.B. and B.B. v Personal Exchange International Limited*, Case C-774/19, ECLI:EU:C:2020:1015, paras. 38–40.

[55] Roppo, V., *From Consumer Contracts to Asymmetric Contracts: A Trend in European Contract Law?*, European Review of Contract Law, *vol.* 5, no. 3, 2009, p. 311 ("[C]onsumers have no exclusive title to legal protection against market asymmetries that create inequality of bargaining power […]; a business may benefit from such legal protection, too.").

[56] *Ibid.*, pp. 342–345.

The analysis conducted in this paper has demonstrated that the implementation of the SGD has consolidated and culminated the trend towards fragmentation in Italian private law. The law of sales rests on three largely autonomous sub-systems, which operate according to the status of the contracting parties. The consequences of this process are unfortunate: fragmentation enhances the complexity of the legal system, without being immune from arbitrary provisions that lack a normative explanation to justify their divergence from the general law of obligations. This fragmentation hinders the coherence of the legal system as a whole.[57]

Therefore, considering these shortcomings, the state of the current law is unsatisfactory, and a process of reconciliation is necessary. Returning to an overarching unitary framework is manifestly impossible and, perhaps, even undesirable. Fragmentation is an inescapable feature of contemporary legal systems, caused by the complex political, social, and economic order of modern societies. Yet, this is not a binary issue; it is a question of degree. Fragmentation can be contained, and, in any event, it does not necessarily entail internal incoherence.

How should such an ambitious goal be achieved? Since both the CISG and EU-imposed rules cannot be modified by national legislatures alone, the focus must be, pragmatically, on national sales law. The latter should be brought in line with the former two, following the German example.[58] Hence, internal harmonisation through adaptation of domestic law is the desirable way forward.[59] However, adaptation is a delicate task that requires scrupulous evaluations. Not everything can or should be generalised. As discussed above, some rules are exceptional because they rely on different normative foundations and, even

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[57] Miller, *op. cit.* (fn. 30), p. 77 ("The quest for harmonization at the European level of contract law has clear costs for national internal coherence.").

[58] In 2002, Germany modernised its Civil Code by reforming the domestic rules in light of the supranational sources implemented in the jurisdiction (so-called *Schuldrechtsmodernisierung*). See Schlechtriem, P., *The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe*, Oxford University Comparative Law Forum, no. 2, 2002, https://ouclf.law.ox.ac.uk/the-german-act-to-modernize-the-law-of-obligations-in-the-context-of-common-principles-and-structures-of-the-law-of-obligations-in-europe/ (19 November 2022).

[59] Mańko, R., *EU Competence in Private Law: The Treaty Framework for a European Private Law and Challenges for Coherence*, European Parliamentary Research Service, Brussels, 2015, p. 16 ("The only realistic option for a compromise between EU powers to regulate private law and concerns for its coherence and systemic character is through spontaneous harmonisation.").

when this is not the case, some rules may reflect an unappealing distribution of rights and risks that legislatures may think unwise to extend.

From this perspective, the new directive is a welcomed opportunity. It should be seen as an excellent occasion to reflect on the impact of supranational instruments on national laws, and, in doing so, to question the future of our legal systems. Indeed, despite (or maybe because of) the disorderly incoherence it has brought, its implementation forces jurists to confront fresh trends in the law of sales, acting as the best incentive for modernisation and creative legal thought.[60] A curative poison, one might say.

In this paper, I referred specifically to the Italian situation, but the same conclusions could be extended to several other countries. Indeed, managing complex interactions in a multi-level legal system is the great task all European private law scholars are called to face. Until legislative reforms take place, the task of minimising internal inconsistencies will fall upon legal professionals. Scholars, lawyers, and judges, especially those inclined to look at the transnational dimension of the legal order, can play an important role in guiding and orienting the interpretation of the law, thus favouring spontaneous harmonisation in sales law and beyond.[61]

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60 Miller, *op. cit.* (fn. 30), pp. 104–105.

61 Ferrante, *op. cit.* (fn. 5), p. 25.

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Sažetak

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TALIJANSKA IMPLEMENTACIJA DIREKTIVE O KUPOPRODAJI ROBE: JOŠ JEDAN ČAVAO U LIJESU OPĆEG PRAVA KUPOPRODAJE?

Ovaj rad skreće pozornost na tri najznačajnije promjene u talijanskom Potrošačkom zakoniku nakon implementacije Direktive o kupoprodaji robe i suprotstavlja ih pravilima koja se primjenjuju na ugovore o kupoprodaji prema talijanskom Građanskom zakoniku. Osnovna teza jest da zajednički učinak ovih izmjena dodatno udaljava potrošačko pravo od općeg obveznog prava te time učvršćuje trend fragmentacije talijanskog prava kupoprodaje, temeljene na statusu ugovornih strana. Nadalje, ocjenom prednosti i nedostataka te fragmentacije i osloncem na koncept "koherentnosti", definiran kao dosljednost u primjeni načela i politika, u radu se zaključuje da je trenutačno stanje neopravdano i nepoželjno. Posljedično, modernizacija domaćeg obveznog prava, s ciljem usklađivanja ovih različitih izvora, prijeko je potrebna.

Ključne riječi: odgovornost prodavatelja, pravna sredstva za neusklađenost, obveza obavještavanja, udaljavanje potrošačkog prava i općeg prava kupoprodaje, unutarnja koherentnost

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