

CONSUMER LAW AS AN INSTANCE OF THE LAW OF DIVERSITY

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INTRODUCTION

Western legal tradition is centered on the notion of individual rights, and one of its founding principles is the principle of equality. Yet, in the last few decades there has been a growing pressure to recognize diversity, which is often linked to a significant increase in the pluralistic elements of the societies regulated. This means that new legal instruments and mechanisms must be devised in order to handle diversity, which often implies a shift from a merely formal conception of equality to what is often termed “substantive equality.” This term refers to the conception of equality as a reflection of the relevant differences that characterize individuals as members of a larger social group.

This process of recognizing diversity as a relevant legal factor causes tensions with existing legal rules in a variety of fields. The rules in these fields must be revised and amended in order to develop differentiated standards. This means that the legal framework becomes more complex since different sets of rules must be created. There is a need to devise rules that are tailored to the context and mirror in an effective way the relevant social and economic differences that characterize the society in which they apply. Consequently, this new “law of diversity” must have a dynamic character and must be able to adjust to the context in which it applies as well as to changes in the relevant context.

I. THE ROLE OF DIVERSITY IN PRIVATE LAW

Traditionally, private law has been considered as the sphere pertaining to legal relationships among equal individuals, characterized by equal rights and powers. This concept of equality, the result of a long development with roots in the legal philosophy of natural law and the Enlightenment, is still one of the cornerstones of private law. It is central to the fundamental division between private and public law in spite of the fact that the distinction between the two is increasingly blurring. It must be underlined that the definition of private law and its relation to other areas of law, particularly public law, vary across different epochs and legal traditions.¹

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1. *See generally* KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 2–8 (Tony Weir trans., 3d ed. Clarendon Press 1998) (explaining the concept of comparative law and

For example, the common law and civil law systems have traditionally conceptualized private law differently, and although the two systems have recently undergone some convergence, differences between the two persist.²

The Western legal system's traditional vision of private law has been challenged in recent times due to various social and cultural pressures, which have led to the gradual erosion of the dogma of formal equality in order to develop rules that take into account relevant differences.³ The areas that have experienced such a development are numerous and increasing in number (e.g., employment, housing, education, and health). Some lawyers are consequently questioning whether these areas can still be considered as mere exceptions to the general rule, or whether they imply the revision of general concepts and categories.

II. CONSUMER LAW AS AN INSTANCE OF THE LAW OF DIVERSITY

Consumerism is a relatively recent phenomenon. It is linked to the evolution of the mass production of goods and services within developed market economies—the starting point of which is generally traced back to the beginning of the twentieth century.⁴ The rationale for specific regulatory intervention in consumer issues is twofold. First, intervention is justified to correct market failures (i.e., market inefficiencies), which occur when information asymmetries and unequal bargaining power produce suboptimal consumer transactions. Second, consumer protection is often justified on the basis of ethical goals such as the need to protect parties that are usually considered weak (often with a paternalistic approach, implying that regulators know what is best for consumers) or the need to achieve aims connected to distributive justice through the redistribution of wealth from businesses to consumers.

The consumer movement started in the United States at the beginning of the twentieth century, when the existence of strong monopolistic and oligopolistic markets led to the creation of specific agencies, such as the

how it is useful for analyzing both private and public international law).

2. See generally UGO MATTEI, *IL MODELLO DI COMMON LAW* (1996); JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 73 (1969) (explaining the accepted classification of civil law as a subset of private law that “includes only the law of persons (natural and legal), the family, inheritance, property, and obligations”).

3. See generally FROM DISSONANCE TO SENSE: *WELFARE STATE EXPECTATIONS, PRIVATISATION AND PRIVATE LAW* (Thomas Wilhelmsson & Samuli Hurri eds., 1999); LUDWIG RAISER & COSIMO MARCO MAZZONI, *IL COMPITO DEL DIRITTO PRIVATO: SAGGI DI DIRITTO PRIVATO E DI DIRITTO DELL'ECONOMIA DI TRE DECENNI* (Marta Graziadei trans., 1990).

4. GUIDO ALPA, *IL DIRITTO DEI CONSUMATORI* (1999). For a history of consumer protection in the United Kingdom, see GORDON BORRIE, *THE DEVELOPMENT OF CONSUMER LAW AND POLICY: BOLD SPIRITS AND TIMOROUS SOULS* (Hamlyn Trust, Hamlyn Lectures Series No. 36, 1984).

Federal Trade Commission, established in 1914, in order to regulate the market.⁵ Further action was taken in the 1930s after the disastrous events of the Great Depression, but the consumer movement assumed its contemporary features in the 1960s and is linked to a more general trend towards the recognition and protection of individual rights that was characteristic of that time.

During the 1970s consumerism spread to Western Europe and led to the creation of national consumer associations, as well as to the establishment of a number of legal instruments to protect consumer interests, such as administrative and consultative bodies (e.g., ombudsman).⁶ In 1973 the Council of Europe approved a European Charter of Consumers,⁷ and, in 1975, the European Community for the first time recognized the relevance of consumer protection to the operation of the common market in a resolution concerning consumers' rights and interests.⁸ At the time, the European Community lacked specific competence in the field of consumer protection.⁹

The phenomenon of consumerism has been the object of analysis of various social sciences such as economics, sociology, psychology, and law. Their analyses do not always lead to converging assessments and predictions, but they are all relevant in providing a global picture of consumerism.¹⁰ In fact, in order to study a complex phenomenon such as

5. Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (current version at 15 U.S.C. §§ 41–51 (2000)).

6. Incidentally, it must be noted that Italy has been extremely slow in developing a consumer movement and in creating suitable legal instruments. In fact, a significant proportion of the legal changes in the field of consumer law is derived from outside sources, mainly European Community law. ALPA, *supra* note 4, at 10.

7. Eur. Consult. Ass., *On A Consumer Protection Charter*, 25th Sess., Res. No. 543 (1973), available at <http://digbig.com/4gmrj> (containing a list of rights that member states should guarantee, among which the most relevant are the right to advice and protection, the right to compensation for damages, the right to information, and the right to representation).

8. Council Resolution (EC) No. 92/1, Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy, 1975 O.J. (C 92) 1 [hereinafter Council Resolution (EC) No. 92/1]. Resolutions are nonbinding, legal instruments in EC (now EU) law.

9. In 1973 the European Commission also established a Consultative Committee of Consumers, which aimed at providing the EC legal institutions with opinions and documents concerning this field. Commission Decision 73/306, arts. 1–2, 1973 O.J. (L 283) 18, 18 (EC). The committee's structure was changed in 1989, and today it is composed of representatives of national and international consumer organizations, as well as experts in various fields. Moreover, a specific general directorate within the Commission responsible for consumer and health protection was created in 1995. See Horst Reichenbach, *Aufgaben der Generaldirektion XXIV: Verbraucherpolitik und Gesundheitsschutz der Verbraucher*, 6 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 413 (1998) (discussing this general directorate).

10. See KENNETH J. MEIER ET AL., REGULATION AND CONSUMER PROTECTION: POLITICS, BUREAUCRACY, AND ECONOMICS (4th ed. 2002).

consumerism, it is necessary to analyze the values that each society considers paramount, the interests and pressures that individuals have, societies' economic and social structures, and the institutions and organizations that are involved in consumer issues.¹¹

Law has been rather slow in acknowledging consumers as an autonomous category. This belated acknowledgment has implied the abandonment of several principles and assumptions that were embedded in traditional legal concepts and categories (e.g., the principle of formal equality) and the recognition of a collective dimension in relationships that were traditionally considered as merely involving individuals. Yet, the pressures deriving from the features of a mass economy and society have been so strong that they have ultimately led to several significant changes. Today a legal field defined as "consumer law" is recognized, and its importance is increasing. One of the most significant features of this area of law is the strong interdisciplinary approach: not only does it connect legal, social, economic, and political aspects, but it also combines rules pertaining to different areas within the legal framework such as constitutional, administrative, private, and criminal law.

Another relevant aspect of consumer law is the increasing relevance of "soft law," which refers to a wide and diverse body of rules that are legally nonbinding. It comprises mechanisms such as codes of conduct, guidelines, good practices, and alternative dispute resolution (ADR). The specific features of these mechanisms vary significantly from one legal system to the other and from field to field. Yet these areas have in common the crucial problem of defining the scope that self-organization and freedom should have in relation to the need for public control. On the one hand, it is argued that a complex phenomenon such as consumerism cannot be adequately regulated only by "hard" (i.e., binding) law, since legal procedures are often cumbersome, time-consuming, and costly; soft law is

11. "[L]egal processes and organizations matter profoundly . . ." A. Brooke Overby, *An Institutional Analysis of Consumer Law*, 34 VAND. J. TRANSNAT'L L. 1219, 1227 (2001). This is because "a comparative institutional perspective on consumer protection law reveals a wide array of values, political considerations, structural concerns, systems issues, and cultural factors that potentially influence final legal responses to consumer protection issues." *Id.* at 1283. In the new institutional (mainly economic) literature, institutions are defined as the formal and informal rules that determine social interaction (political, economic, legal, etc.), while organizations are the bodies that are in charge of shaping and applying these rules. Institutions and organizations interact and are mutually dependent. See DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3, 107 (1990) (discussing institutions as "the rules of the game in a society" and asserting that "they are the underlying determinant of the long-run performance of economies"); OLIVER E. WILLIAMSON, THE MECHANISMS OF GOVERNANCE 3 (1996) (developing "the argument that many puzzles of economic organization turn on an examination and explication of the mechanisms of ex post governance"). See generally THE THEORY OF INSTITUTIONAL DESIGN (Robert E. Goodin ed., 1996).

often more flexible and expedient. On the other hand, self-regulation runs the risk of abuse, which is particularly likely in an area such as consumer law, where practitioners have developed specific expertise in the transactions involved and are often able to impose unfair conditions on consumers. Although the models adopted are numerous and varied, it can be fairly said that all legal systems recognize—although to various degrees—that soft law has a role to play in supplementing traditional hard law, and consequently legal systems have devised mechanisms to adjust the existing legal setting accordingly.

The interplay of different elements—legal, economic, and social—together with the cross-involvement of a number of legal actors, as well as the interplay of a number of national and international levels, gives rise to a great variety of sources of consumer law. Consequently, there is a need to coordinate these elements in order to tackle problems of gaps and inconsistencies.

III. THE IMPACT OF LEGAL GLOBALIZATION ON CONSUMER LAW

The analysis of legal phenomena is traditionally centered on the notion of the state, because legal systems in the past have been linked to the existence of states capable of producing and applying legal rules through a variety of institutions and mechanisms. This starting point is increasingly called into question by the developments of globalization, which are blurring national boundaries in all sectors, including the legal one, by creating new lawmakers and bodies of rules that cannot be ascribed to states.¹² Also, globalization has changed the working of markets. Massive and fundamental technological changes have both allowed much closer connections among markets that were traditionally isolated or separated and enabled consumers and businesses to enter new and wider markets. The effects of the Internet represent one example of technological change playing these roles.¹³

12. See JÜRGEN HABERMAS, *THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS* vii–ix (Max Pensky ed. & trans., The MIT Press 2001) (1998) (discussing the hopes, fears, benefits, and challenges of globalization while recognizing a universal basis on which its institutions are based). See generally ULRICH BECK & SANDRO MEZZADRA, *I RISCHI DELLA LIBERTÀ: L'INDIVIDUO NELL'EPOCA DELLA GLOBALIZZAZIONE* (2000); MARIA ROSARIA FERRARESE, *IL DIRITTO AL PRESENTE: GLOBALIZZAZIONE E TEMPO DELLE ISTITUZIONI* (2002); MARIA ROSARIA FERRARESE, *LE ISTITUZIONI DELLA GLOBALIZZAZIONE: DIRITTO E DIRITTI NELLA SOCIETÀ TRANSNAZIONALE* (2000).

13. See generally Roger Brownsword & Geraint Howells, *Consumer Protection on the Internet: The Impact of the Information Society on Law*, 4 *CONTEMP. ISSUES L.* 301 (2000) (explaining the effects of the Internet on consumer protection).

The legal areas that are directly affected by markets are the first to be exposed to the pressures of globalization, and consequently consumer law must be analyzed in this wider context.¹⁴ The effects of globalization on consumer issues are both positive and negative. On the positive side, the opening of new markets enhances competition and thereby increases consumer choice. On the negative side, due to globalization, states are no longer fully capable of regulating transnational transactions. This means that there may be cases where the protection afforded to consumers by national rules is weakened.

Traditional mechanisms for dealing with transnational legal relationships—like those of private international law and the connected use of public order as a means to guarantee the application of national, mandatory, protective rules—do not always lead to satisfactory results. At the same time, while it has been possible to establish at least common, minimum standards at a regional level, as, for example, in the European Union, it is much more difficult to create common rules with worldwide application and more difficult still to find suitable enforcement mechanisms. Many contemporary observers recognize that a global *lex mercatoria* is emerging with respect to commercial transactions. This body of law addresses accepted business practices and usages, standard contracts, principles, and rules deriving from arbitral awards. However, there is still no parallel development concerning consumer transactions.¹⁵ It is not hard to find a reason for that: consumer law is mainly composed of mandatory, protective rules based on specific policy aims that require enforcement mechanisms that are available only at the national level or within international organizations having suitable enforcement powers (as in the case of the European Union). Soft law mechanisms, such as codes of conduct, best practices, and informal dispute resolution mechanisms, work only if there are no significant power asymmetries present (as is usually the case in the business community), or if the soft law mechanisms are backed

14. CONSUMER LAW IN THE GLOBAL ECONOMY: NATIONAL AND INTERNATIONAL DIMENSIONS (Iain Ramsay ed., 1997) [hereinafter CONSUMER LAW]; see also John Goldring, *Consumer Protection, Globalization and Democracy*, 6 CARDOZO J. INT'L & COMP. L. 1, 1 (1998) (discussing the advantages and disadvantages of a global economy to people "in their capacity as consumers, employees and citizens"); Donald B. King, *Globalization Thinking: Commercial and Consumer Law Illustrations*, 39 ST. LOUIS U. L.J. 865, 866 (1995) (arguing that globalization requires certain changes in thinking about commercial and consumer law).

15. The international dimension of consumer issues is acknowledged by the United Nations Guidelines for Consumer Protection, enacted in 1985 in order develop a shared set of minimum objectives for consumer protection. G.A. Res. 39/248, ¶ 1, U.N. Doc. A/RES/39/248 (Apr. 16, 1985); see David Harland, *The United Nations Guidelines for Consumer Protection: Their Impact in the First Decade*, in CONSUMER LAW, *supra* note 14, at 1, 1–14 (elaborating upon the Guidelines' impact over its first ten years). The Guidelines are a soft law instrument; therefore, they are not legally binding.

by a framework of strictly binding law. Therefore, in national law aggrieved parties can turn to the courts to protect their rights where soft law instruments fail.

This means that while globalization is producing new, important opportunities for consumers worldwide, it is also creating a regulatory gap since the situations that are no longer under state control usually lack a transnational or international legal framework guaranteeing suitable regulation. It is likely that this gap will be gradually filled by new rules, yet it is clear that the new, global legal environment poses a significant challenge to consumer protection, because it requires policy choices and enforcement mechanisms that are not only currently lacking but will also be difficult to devise in the future.

IV. CONSUMER LAW IN THE EUROPEAN COMMUNITY

In Europe, one element that has significantly influenced the development of consumer law and has led to a significant increase in its transnational and harmonized character has been the establishment of the European Community.¹⁶ This organization's primary focus is the operation of an internal market as a means of integrating member states, thereby ensuring stability and prosperity.¹⁷ Initially, emphasis was mainly on the workings of the market from the point of view of "supply," i.e., on the

16. See PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* (3d ed. 2003) (providing a comprehensive discussion and analysis of the European Union and its development, institutions, and policies); STEPHEN WEATHERILL, *CASES AND MATERIALS ON EC LAW* (2d ed. 1994) (discussing the development of EC law and focusing on its internal competence).

17. Treaty Establishing the European Community, art. 2, Nov. 10, 1997, 2002 O.J. (C 325) 40 [hereinafter EC Treaty].

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

Id. "For the purposes set out in Article 2, the activities of the Community shall include . . . (c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital . . ." *Id.* art. 3. On the scope and content of the common market (now called the internal market after the Single European Act), see *THE LAW OF THE SINGLE EUROPEAN MARKET: UNPACKING THE PREMISES* (Catherine Barnard & Joanne Scott eds., 2002); see also *GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET* (Christian Joerges & Renaud Dehousse eds., 2002) (offering several perspectives on efforts to modernize Europe's economies over the past fifteen years of European market building).

creation of common rules that would guarantee the free circulation of goods, services, capital, and workers (self-employed and employees). Yet, gradually the European Community has recognized that a working common market can be established only by guaranteeing, in addition to the supply side, the “demand” side, i.e., the possibility for consumers (as recipients of the free circulation of goods and services) to purchase goods and services across national borders.¹⁸ The original Treaty of the European Community of 1957 did not foresee any specific competence in the field of consumer policy; consequently, protections were limited to the indirect impact of measures adopted for the establishment and operation of the internal market.¹⁹ The link between the internal market and consumer protection is still strong, and in fact all documents and acts by EC institutions start from the premise that consumer-protection legislation must be harmonized at the European level in order to eliminate distortions of competition that may hinder the operation of the internal market.²⁰

Due to the limitations of the original Treaty, the first actions that took place in the 1970s were through political instruments and soft law. The most significant example is the Resolution on a Preliminary Programme for a Consumer Protection and Information Policy of 1975, which formed the basis for later programs and strategies.²¹ The rights established by the Resolution concern consumer health and safety, protection of consumer economic interests, advice and right to damages, information and education, and consultation and representation of consumers.²²

An initial, significant shift took place in the 1980s with the adoption of the Single European Act of 1986.²³ This Act amended the most important provision relating to the internal market (article 100) by adding a new provision (article 100A, now article 95) which, among other things, provided that a high level of consumer protection should be guaranteed in

18. For an overview of EC consumer law, see GIANNANTONIO BENACCHIO, *DIRITTO PRIVATO DELLA COMUNITÀ EUROPEA* [Private Law of the European Community] (1998); GERAINT HOWELLS & THOMAS WILHELMSSON, *EC CONSUMER LAW* (1997); NORBERT REICH & HANS-W. MICKLITZ, *EUROPÄISCHES VERBRAUCHERRECHT* (4th ed. 2003); STEPHEN WEATHERILL, *EC CONSUMER LAW AND POLICY* (1997).

19. Treaty Establishing the European Economic Community, *opened for signature* Mar. 25, 1957, 298 U.N.T.S. 11.

20. This approach is nevertheless ambiguous: obstacles to regulatory intervention that exist in the internal market due to differences in national laws (in this case consumer laws) form the basis for regulatory intervention at the EC level, but, at the same time, the existence of these obstacles must be proven by suitable evidence.

21. Council Resolution (EC) No. 92/1, *supra* note 8.

22. *Id.* at 1.

23. Single European Act Amending the Treaty Establishing the European Economic Community, Feb. 17, 1986, 1987 O.J. (L 169) 1 [hereinafter Single European Act].

acts concerning the establishment and working of the internal market.²⁴ The new provision was also crucially important because it facilitated and boosted the lawmaking process, since it determined that measures concerning the establishment and working of the internal market could be adopted by a qualified majority vote in the Council.²⁵ This change from the previous requirement of unanimity made it easier to reach the agreement needed in order to pass legislation. This had an impact on consumer law as well, albeit indirectly.²⁶

The general developments that took place in the 1990s gradually shifted the emphasis from market and economic considerations to a wider synthesis between economic and social issues.²⁷ An important step was taken with the Treaty of Maastricht of 1992, which established the European Union and transformed the European Economic Community into the European Community, signaling a symbolic shift from the merely economic sphere.²⁸ The Treaty also introduced a specific EC competence

24. See *id.* art. 18 (amending the Treaty of the European Economic Community of 1957); EC Treaty art. 100 (as in effect 1985) (now article 95).

The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking into account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.

Id.

25. Single European Act, *supra* note 23, art. 18.

26. EC Treaty art. 95. Initially the Council votes were taken in most cases by unanimity, but the number of areas where a qualified majority vote is sufficient has greatly increased and is now the most frequent type of voting requirement.

27. For a critical evaluation of the interplay between economic and social aspects of the European Community, see Christian Joerges & Florian Rödl, “*Social Market Economy*” as Europe’s *Social Model*? (Eur. Univ. Inst., Working Paper No. 2004/8, 2004), available at <http://digbig.com/4rcgg>.

28. Treaty on European Union Amending the Single European Act, July 29, 1992, 1992 O.J. (C 191) 1 [hereinafter TEU]. The European Union also established new areas of competence outside the Community framework, which are handled on the basis of a complex structure defined as a “pillar structure”: the first pillar is the Community, which comprises all European Communities (European Community, European Atomic Energy Community (EAEC or Euratom), and the former European Coal and Steel Community (ECSC), which was brought within the European Community when the ECSC elapsed in 2001); the second pillar concerns the common foreign and security policy (CFSP); the third pillar initially referred to justice and home affairs (JHA), but its scope has subsequently been reduced by the Treaty of Amsterdam, and it now deals with judicial and police cooperation in criminal matters. See generally TEU, *supra* (introducing the three-pillar structure, which collectively became known as the European Union); Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) tit. VI [hereinafter Treaty of Amsterdam] (amending the Treaty on European Union and developing “[p]rovisions on police and judicial co-operation in criminal matters”). All three pillars share a common institutional framework, but they work according to different rules: the second and third pillar have a stronger intergovernmental character. In contrast, the Community pillar is characterized by deeper integration. The Treaty establishing a Constitution for Europe foresees the dismantling of the pillar structure, bringing all competencies within the European Union, although the different roles of the

in the field of consumer protection (article 129a),²⁹ recognizing the need to guarantee a high level of consumer protection in measures related to the internal market. The Treaty also raised the possibility of the European Community foreseeing specific actions, supporting and integrating state action in this area, while simultaneously recognizing the possibility of member states establishing and maintaining a higher level of consumer protection than that provided by EC law.³⁰

The Treaty of Maastricht also introduced a fundamental principle that regulates the allocation of concurrent competencies between the European Community and member states: the principle of subsidiarity. According to this principle, the European Community should generally defer to state action, since it is preferable that regulation be enacted as close as possible to the relevant community.³¹ However, if it can be shown that due to the dimension or effects of the phenomena to be regulated Community action better achieves the objectives, then the competence should be exercised by the European Community.³² The definition of subsidiarity clearly shows

institutions in the various fields remain. Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) 1 [hereinafter Europe Constitution Treaty].

29. EC Treaty art. 129a (as in effect 1992) (now article 153).

1. The Community shall contribute to the attainment of a high level of consumer protection through:

(a) measures adopted pursuant to Article 100a in the context of the completion of the internal market;

(b) specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers.

2. The Council, acting in accordance with the procedure referred to in Article 189b and after consulting the Economic and Social Committee, shall adopt the specific action referred to in paragraph 1(b).

3. Action adopted pursuant to paragraph 2 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them.

Id.

30. This is the mechanism of "minimum harmonization." See *infra* note 52 and accompanying text.

31. EC Treaty art. 3b (as in effect 1992) (now article 5). Article 3b of the Maastricht Treaty, now article 5 of the Treaty of Amsterdam states that:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Id.

32. *Id.* The standard example is that of environmental protection, where a set of single, individual, national measures is generally incapable of tackling problems having an international dimension (e.g., pollution of rivers flowing across several countries). In fact, the principle of

that it is meant as a flexible device for allocating competencies. Rather than being based on a comprehensive list of powers that are either entrusted to the European Community or to the states, subsidiarity is designed to utilize the most effective level to tackle a specific, legal problem. The price to be paid for this flexibility is vagueness and unpredictability. The principle was mainly devised in order to block the erosion of member states' competencies from a continuous and creeping expansion of EC competencies. Its application, however, can theoretically lead either to further integration or to a reversionary trend, depending on the evaluation of the relevant elements of competencies, which are not merely of a technical legal nature. The principle of subsidiarity has of course a much wider scope than consumer protection, but it is relevant in this field because it strengthens the idea that Community intervention must complement, rather than substitute for, state action.³³

The Amsterdam Treaty of 1997, which amended the Treaty on the European Union, further specified Community competence in consumer policy: article 153 (the new version of article 129A of the Treaty on the European Community) further requires the Community to maintain a high level of consumer protection and to promote consumer interests, by fostering the right to health and safety, economic interests, the right to information and education, and the right of consumers to organize themselves.³⁴ Moreover, article 153 mandates that consumer protection

subsidiarity was first introduced by the Single European Act for environmental policy. EC Treaty art. 130r (as in effect 1987) (now article 174).

33. Subsidiarity's role and its consequences are subject to debate. Some observers see the principle as a bulwark that protects member states against the growing intrusion of the European Community. Other observers see subsidiarity merely as an instrument guaranteeing greater efficiency in allocating competencies between member states and the Community; the principle therefore can have either restrictive or expansive effects on EC competencies, depending on the circumstances. To date there have been no cases where the Court of Justice has annulled an EC act for infringement of the principle of subsidiarity, but it is clear that the principle has had a significant impact on the EC lawmaking process. A number of proposals by the Commission were dropped because they were considered contrary to subsidiarity. Moreover, all EC legislative measures must respect the principle of subsidiarity, which makes the allocation of competencies more transparent.

On the role of subsidiarity in general, see George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 335–37 (1994) (comparing the experience of the United States with issues of federalism to the European Community's concerns about power imbalance and arguing that implementing subsidiarity will be a difficult but worthy task).

34. EC Treaty art. 153.

1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

must be taken into account in the measures pertaining to all EC policies, thereby ensuring horizontal integration.³⁵

Finally, consumer protection is also listed in the European Charter of Fundamental Rights approved in Nice in 2000.³⁶ The document currently lacks binding legal value because it has not been formally inserted among the amendments of the Nice Treaty. Nevertheless it is generally acknowledged as a sort of "European bill of rights" and has a significant persuasive role, indirectly influencing the work of the EC lawmaking institutions, particularly the Court of Justice. It should also be underlined that the Charter would acquire binding legal character if the European Constitution enters into force because the Charter is inserted in the text of the new Treaty.³⁷ Unfortunately, the prospect of the European Constitution

2. Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities.

3. The Community shall contribute to the attainment of the objectives referred to in paragraph 1 through:

(a) measures adopted pursuant to Article 95 in the context of the completion of the internal market;

(b) measures which support, supplement and monitor the policy pursued by the Member States.

4. The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 3(b).

5. Measures adopted pursuant to paragraph 4 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them.

Id. The Treaty of Amsterdam deleted superseded provisions that were renumbered in the articles of both the EC and the EU Treaties. Some consumer rights, such as the right to health and safety, are considered fundamental rights and are consequently directly actionable. Others, such as economic interests, are individual rights but do not count as fundamental rights and therefore can be subject to limitations. Others yet, such as the right to information, are both individual rights and rights having a collective dimension. ALPA, *supra* note 4.

35. *Id.*; Jules Stuyck, *European Consumer Law After the Treaty of Amsterdam: Consumer Policy in or Beyond the Internal Market?*, 37 COMMON MKT L. REV. 367, 386-87 (2000). See generally Dirk Staudenmayer, *Europäisches Verbraucherschutzrecht nach Amsterdam: Stand und Perspektiven*, 45 RECHT DER INTERNATIONALEN WIRTSCHAFT 733 (1999).

36. Charter of Fundamental Rights of the European Union, art. 38, 2000 O.J. (C 364) 1. "Union policies shall ensure a high level of consumer protection." *Id.*

37. EUR. CONST. art. II-98 (corresponding to article 38 of the Charter of Fundamental Rights.) Other relevant provisions for consumer protection are as follows: "Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities." *Id.* art. III-120.

European laws or framework laws shall establish measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. . . .

....

entering into force is currently dim because rejections by national referenda have caused a stalemate in the process of adopting the constitution.³⁸ It is unclear whether ratification will continue or whether the Treaty will be renegotiated and revised.

The various amendments in the treaties paint an incomplete picture without the important developments that have emerged from the caselaw of the European Court of Justice (ECJ). Starting in the late 1960s and 1970s, the ECJ has developed a veritable catalogue of fundamental rights, derived from the constitutional traditions of the member states and several international conventions, particularly the European Convention on Human Rights of 1950.³⁹ These rights were developed and applied in several fields. Of particular importance is the caselaw concerning the free circulation of persons, goods, services and capital, called the “four fundamental freedoms,” and the working of the internal market. These freedoms lie at the heart of the European Community and have significant effects for consumer protection.⁴⁰ The protection of individual rights in general has been a cornerstone of the caselaw of the ECJ and has led to the creation of a

... The Commission, in its proposals submitted under paragraph 1 concerning health, safety, environmental protection and consumer protection, shall take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council shall also seek to achieve this objective.

Id. art. III-172.

1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.
2. The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through: (a) measures adopted pursuant to Article III-172 in the context of the establishment and functioning of the internal market; (b) measures which support, supplement and monitor the policy pursued by the Member States.
3. European laws or framework laws shall establish the measures referred to in paragraph 2(b). . . .
4. Acts adopted pursuant to paragraph 3 shall not prevent any Member State from maintaining or introducing more stringent protective provisions. Such provisions must be compatible with the Constitution. They shall be notified to the Commission.

Id. art. III-235.

38. Ratification of the Treaty was rejected in referenda held in France and The Netherlands in 2005. *EU Constitution: Where Member States Stand*, BBC NEWS, Nov. 24, 2005, <http://digbig.com/4rcgh>.

39. Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221.

40. See Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, 1979 E.C.R. 649, 664 (holding that legislative measures by a member state regarding alcoholic beverages were similar to prohibited quantitative restrictions on imports).

system of “constitutional” principles and rules.⁴¹ Caselaw has brought about innovative doctrines such as the direct effect of unimplemented directives⁴² (although the ECJ up to now has refused to accept the possibility of direct effect in cases of legal relationships between private parties)⁴³ and the principle of state tort liability for infringement upon fundamental EC obligations that causes damage to individual rights.⁴⁴

The changes to the EC Treaty related to consumer protection and the developments in the caselaw of the ECJ are the basis of a large number of legal acts, mainly directives, that have been adopted from the mid-1980s, forming the core of EC consumer law.⁴⁵ Among the numerous areas covered are several specific contracts (doorstep sales, distance sales, package-travel contracts, timeshare contracts, etc.), unfair terms in consumer contracts, warranties in consumer sales, e-commerce, insurance

41. The bold lawmaking activity of the ECJ is all the more striking when taking into account the prevailing position of European legal systems, particularly those belonging to the civil law tradition, according to which caselaw merely applies, but does not create, legal rules.

42. Directives generally require national measures implementing them in order to establish individual rights since, according to the EC Treaty, they are directed to states rather than directly to individuals. In spite of this, the ECJ has found that if member states fail to comply with such directives, they can be directly invoked by individuals appearing before national courts provided that such directives are sufficiently specific. Case 152/84, *Marshall v. Southampton and Sw. Hampshire Area Health Auth.*, 1986 E.C.R. 723, 725 (“Article 5 (1) of Council Directive No[.] 76/207 . . . may be relied upon as against a State authority acting in its capacity as employer, in order to avoid the application of any national provision which does not conform to Article 5 (1).”); Case 14/83, *Von Colson & Kamann v. Land Nordrhein-Westfalen*, 1984 E.C.R. 1891, 1895 (requiring member states to implement measures for the equal treatment of men and women).

43. This is the so-called horizontal direct effect. According to the ECJ, since directives are addressed to member states, which have a legal obligation to implement them, their provisions can be made directly effective (if they are sufficiently well-defined and unconditional) against any body related to a public power—the vertical direct effect. *See supra* note 42. On the contrary, they cannot be applied against private parties until they have been transposed. *See* Case C-192/94, *El Corte Inglés SA v. Rivero*, 1996 E.C.R. I-1281, I-1289 (holding that a directive did not apply in a case between a consumer and a creditor); Case C-91/92, *Dori v. Recreb Srl*, 1994 E.C.R. I-3325, I-3327 (“If a Member State fails to comply with the obligation to transpose a directive . . . and if the result prescribed by the directive cannot be achieved by way of interpretation of national law by the courts, Community law requires that Member State to make good the damage caused to individuals through failure to transpose the directive . . .”).

44. C-46/93 & C-48/93, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland & The Queen*, 1996 E.C.R. I-1029, I-1154–55 (holding member states liable to individuals when those states breached EC law); C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. I-5357, I-5405, I-5416 (holding Italy liable when it failed to implement laws protecting employees from insolvent employers, as required by an EC Directive).

45. In the 1990s the European Community started to develop comprehensive plans (“action plans”) in the area of consumer policy, each of which covers a three-year period. *See* Geraint Howells & Thomas Wilhelmsson, *EC Consumer Law: Has it Come of Age?*, 28 EUR. L. REV. 370, 375 (2003) (noting the trend of EC consumer law toward “maximal harmonisation,” which makes EC consumer policy the only source of consumer protection and has a danger of reducing the freedom of member states to have their own policies).

and financial services, consumer credit, product liability, misleading advertising, unfair commercial practices, and injunctive relief through consumer-association actions.⁴⁶

This development of EC consumer law has several important consequences, mainly linked to the need to find new instruments to integrate and coordinate the law with the existing law of the EC member states.⁴⁷ The elaboration of EC law is usually considered an element of

46. Council Directive 84/450, Laws, Regulations and Administrative Provisions of the Member States Concerning Misleading Advertising, 1984 O.J. (L 250) 17 (EC), *amended by* Council Directive 97/55, 1997 O.J. (L 290) 18 (EU) (stating that it is in the public interest “to harmonize . . . national provisions against misleading advertising and . . . unfair advertising and, as far as necessary [that] comparative advertising should be dealt with, on the basis of appropriate Commission proposals”); Council Directive 85/374, Liability for Defective Products, 1985 O.J. (L 210) 29 (EC); Council Directive 85/577, To Protect Consumers in Respect of Contracts Negotiated Away from Business Premises, 1985 O.J. (L 372) 31 (EC); Council Directive 87/102, Approximation of the Law, Regulations and Administrative Provisions of the Member States Concerning Consumer Credit, 1987 O.J. (L 42) 48 (EC), *amended by* Council Directive 90/88, 1990 O.J. (L 61) 14 (EC), *amended by* Parliament and Council Directive 98/7, Amending Directive 87/102/EEC Concerning Consumer Credit, 1998 O.J. (L 101) 17 (EU); Council Directive 90/314, Package Travel, Package Holidays and Package Tours, 1990 O.J. (L 158) 59 (EC); Council Directive 93/13, Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29 (EC); Parliament and Council Directive 94/47, Protection of Purchasers in Respect of Certain Aspects of Contracts Relating to the Purchase of the Right to Use Immovable Properties on a Timeshare Basis, 1994 O.J. (L 280) 83 (EU); Parliament and Council Directive 97/7, Protection of Consumers in Respect of Distance Contracts, 1997 O.J. (L 144) 19 (EU); Parliament and Council Directive 98/27, Injunctions for the Protection of Consumers’ Interests, 1998 O.J. (L 166) 51 (EU); Parliament and Council Directive 1999/44, Sale of Consumer Goods and Associated Guarantees, 1999 O.J. (L 171) 12 (EU); Parliament and Council Directive 2000/26, Approximation of the Laws of the Member States Relating to Insurance Against Civil Liability in Respect of the Use of Motor Vehicles, 2000 O.J. (L 181) 65 (EU); Parliament and Council Directive 2002/65, Distance Marketing of Consumer Financial Services, 2002 O.J. (L 271) 16 (EU); Parliament and Council Directive 2005/29, Unfair Business-to-Consumer Commercial Practices in the Internal Market, 2005 O.J. (L 149) 22 (EU).

47. This is one of the reasons for the proposal of a European Civil Code; the idea started mainly as a scholarly project, but in the late 1990s was taken on by the EC institutions, particularly the European Parliament and the Commission. *See* European Parliament Resolution, Action to Bring into Line the Private Law of the Member States, A2-157/89, 1989 O.J. (C 158) 400, 400 (unifying “branches of private law which are highly important for the development of the single market, such as contract law”); European Parliament Resolution, Harmonization of Certain Sectors of the Private Law of the Member States, 1994 O.J. (C 205) 518, 518 (harmonizing “certain sectors of [the] private law” of member states); *Communication from the Commission to the Council and the European Parliament on European Contract Law*, at 2, COM (2001) 398 final (July 11, 2001) (gathering information on potential problems from the divergence of contract law between member states and views on possible solutions to any concrete problems identified); *Communication from the Commission to the European Parliament and the Council: A More Coherent European Contract Law*, at 2, COM (2003) 68 final (Feb. 12, 2003) (outlining an action plan to address problems that result from attempting to uniformly apply EC contract law despite differences in contract law in the member states). *See generally* AN ACADEMIC GREEN PAPER ON EUROPEAN CONTRACT LAW (Stefan Grundmann & Jules Stuyck eds., 2002); ELENA IORIATTI FERRARI, CODICE CIVILE EUROPEO: IL DIBATTITO, I MODELLI, LE TENDENZE (2006); TOWARD A EUROPEAN CIVIL CODE (Arthur Hartkamp et al. eds., 2d ed. 1998). For a critical evaluation, see UGO MATTEI, THE EUROPEAN CODIFICATION PROCESS: CUT AND PASTE (2003) and Martijn W. Hesselink, *The Politics of a European Civil Code*, 10 EUR. L.J. 675 (2004).

integration and harmonization, but it must be underlined that this process also generates disintegrating effects,⁴⁸ which are linked to the multilevel nature of EC law.⁴⁹

In the field of consumer law, this tension is evident in the different concepts of the consumer. While in most member states the consumer is conceived as a weak party in need of specific rules granting the consumer special protection, in EC law the consumer is considered a crucial actor for a competitive market to work (the “active consumer”), who does not generally need protective rules. Rather, the consumer needs rules enabling the consumer to act across the internal market.⁵⁰ This is also evident looking at the general definition of the “consumer” given in EC acts as: a natural person acting for purposes outside that person’s trade, business or profession.⁵¹ This can be juxtaposed to that of the “professional,” defined as: any natural or legal person acting for purposes relating to the person’s trade, business, or profession, in either a private or public capacity. The definition of consumer is restrictive, both because it is limited to natural persons, and because it only refers to legal transactions that are not related, even indirectly, to professional activities.

Up to now, the risk of under protection and the tension with national law has been kept under control by “minimum harmonization,” the technique generally used for harmonizing consumer law. This technique establishes minimum requirements for protection at the European level and leaves member states free to set higher protection standards, as well as to have more comprehensive definitions of consumers.⁵² Yet, after the entry into force of the Amsterdam Treaty, the European Community is revising this technique in order to remedy one of its main drawbacks: with minimum harmonization, rules can remain widely different in various states, thereby impairing both the goal of harmonization and the functioning of the

48. See Thomas Wilhelmsson, *Private law in the EU: Harmonised or Fragmented Europeanisation?*, 10 EUR. REV. PRIV. L. 77, 77–79 (2001) (arguing that predicting situations where EC law could intrude into what are normally national, legal issues is difficult and that this uncertainty will “disintegrate” national, legal systems).

49. See LIESBET HOOGHE & GARY MARKS, *MULTI-LEVEL GOVERNANCE AND EUROPEAN INTEGRATION* (2001) 1–4 (discussing the developments in the integration process of the European Union and their effects on the politics and type of governance within Europe, which can lead to disintegration or at least disagreement on some levels).

50. See generally Hans Micklitz, *La nozione di consumatore nel § 13 BGB*, 5 RIVISTA DI DIRITTO CIVILE 623 (2001).

51. E.g., Council Directive 93/13, art. 2, 1993 O.J. (L 95) 29, 31 (EC).

52. Kamiel Mortelmans, *Minimum Harmonization and Consumer Law*, 1988 EUR. CONSUMER L.J. 2, 5–6; Jules Stuyck, *Patterns of Justice in the European Constitutional Charter: Minimum Harmonisation in the Field of Consumer Law*, in *LAW AND DIFFUSE INTERESTS IN THE EUROPEAN LEGAL ORDER* 279, 282 (Schriftenreihe des Vereinigten Instituts für Europäisches Wirtschafts- und Verbraucherrecht e.V., No. 3, Ludwig Krämer et al. eds., 1997).

common market. The shift to “maximum harmonization” in areas connected both to the functioning of the internal market and to consumer protection, i.e., to standards that are mandatory for all national legal systems (preventing states from guaranteeing higher standards of protection), eliminates this problem, but it also forces all national legal systems to adopt the standards of consumer protection that are set by the European Community—a choice that is clearly not merely technical and that will surely create problems of compatibility with the various member states’ national policies and rules. The difficulties in finding the proper balance between EC and national law concerning consumer protection represent a symptom of a more general problem in defining the allocation of powers within the European Union. This problem is partly due to the still incomplete EU “constitutional” system (a system having no existing parallel, which makes it different from both federal systems and international organizations) and partly due to the fact that all arrangements for the allocation of power within complex, legal systems are necessarily dynamic. Therefore, these arrangements tend to change over time, reaching solutions that can be more or less satisfactory or stable but never immutable.

V. CONSUMER LAW IN THE AMERICAN LEGAL SYSTEM

From a comparative point of view, it is useful to study the experience of the European Community in the light of other complex systems in which rules developed at the higher regulatory level must be transposed and coordinated with lower tiers.⁵³ From this perspective the experience of a federal system such as that found in the United States can provide important information, not only because of the early development of a body of consumer law, but also because the interplay of federal and state law necessitates the development of coordinating mechanisms that can be compared to those developed at the European level.⁵⁴

53. For a groundbreaking comparison of the U.S. legal system and that of the European Community, see Thierry Bourgoignie & David M. Trubek, *Consumer Law, Common Markets and Federalism in Europe and the United States*, in 3 *INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE* 98 (Mauro Cappelletti et al. eds., 1987). For a comparison of the federal characteristics of the United States and the European Union, see Koen Lenaerts, *Federalism: Essential Concepts in Evolution: The Case of the European Union*, 21 *FORDHAM INT’L L.J.* 746 (1998).

54. See, e.g., WILLIAM BURNHAM, *INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES* ch. X (3d ed. 2002) (outlining contract and commercial law in the United States).

U.S. consumer law, similar to European consumer law, covers a variety of fields and issues.⁵⁵ A conspicuous area is covered by the Uniform Commercial Code (UCC), which in several provisions distinguishes between merchants and consumers⁵⁶ and applies the unconscionability doctrine to commercial transactions.⁵⁷ This guarantees consumers greater protection in comparison to common law rules.⁵⁸ A very significant aspect of the UCC is that it is a product of a “private lawmaker”: it is the creation of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI). The task of these organizations is to produce uniform model laws that can then be adopted by public, state legislatures, thereby producing legal uniformity through a bottom-up approach, rather than through the traditional top-down approach of federal legislation.

There are also several federal acts that regulate aspects of consumer protection such as consumer credit and deceptive and unfair trade practices.⁵⁹ Among them is the Truth in Lending Act (TILA) of 1968,⁶⁰

55. For an overview of U.S. consumer law, see JOAN M. BURDA, AN OVERVIEW OF FEDERAL CONSUMER LAW (1998); MICHAEL M. GREENFIELD, CONSUMER TRANSACTIONS (4th ed. 2003); GENE A. MARSH, CONSUMER PROTECTION LAW IN A NUTSHELL, (3d ed. 1999); FREDERICK H. MILLER ET AL., CONSUMER LAW: CASES, PROBLEMS, AND MATERIALS (1998); DOUGLAS J. WHALEY, PROBLEMS AND MATERIALS ON CONSUMER LAW (3d ed. 2002).

56. Merchants are those who deal in the goods involved in a commercial transaction or who have knowledge or skill peculiar to the practice or goods involved. U.C.C. § 2-104(1) (2003). The UCC therefore distinguishes between a professional engaged in business and a casual or inexperienced seller or buyer. This distinction, although theoretically clear-cut, has actually been the subject of much litigation. There are numerous instances in the UCC where merchant transactions are treated differently than consumer transactions. For instance, contracts of sales over a specific amount need to be in writing, but, between merchants, oral agreements are valid if they are in conformity with certain requirements. *Id.* § 2-201(1)–(2). Another relevant area concerns warranties. For instance, the limitation of consequential damages for injury to the person in the case of consumer goods is considered unconscionable. *Id.* § 2-719(3).

An important revision of the UCC is currently underway, covering consumer protection issues. See Press Release, Uniform Law Commissioners, ABA Approves Six NCCUSL Acts: Amendments to UCC Articles 2 and 2A Among Acts Approved (Feb. 9, 2004), available at <http://digbig.com/4rcgk> (approving changes to numerous articles of the UCC in an ongoing effort to modernize it). But see Jean Braucher, *Foreword: Consumer Protection and the Uniform Commercial Code*, 75 WASH. U. L.Q. 1, 2–3 (1997) (introducing a symposium on the scheduled UCC revisions and noting that although the drafts do include some new consumer provisions, the sponsors generally leave the job of consumer protection to other state and federal law); A. Brooke Overby, *Modeling UCC Drafting*, 29 LOY. L.A. L. REV. 645, 649 (1996) (defending the UCC’s 1990 revisions against criticism that it did not address consumer protection).

57. U.C.C. § 2-302

58. The declared aim of the UCC, proposed in 1952 and adopted widely in the 1960s, is “to simplify, clarify, and modernize the law governing commercial transactions” and “to make uniform the law among the various jurisdictions.” U.C.C. § 1-103(a)(1), (3) (2003).

59. A Uniform Consumer Credit Code was passed in 1968 and subsequently amended in 1974, but it has not been very successful (only nine states have enacted it), mainly because similar rules were

which establishes uniform requirements for the disclosure of terms of credit (such as annual percentage rate, finance charges, and late-payment fees), in order to give adequate and comparable information to the consumer. The regulation of the credit itself is left to state law. The TILA also provides a right of cancellation for the consumer if the credit creates a security interest on the consumer's home.⁶¹ The TILA rules can be enforced in federal courts and through the intervention of various federal agencies that supervise different types of creditors.⁶²

The Equal Credit Opportunity Act⁶³ regulates various issues such as the issuance, liability and billing for credit cards and electronic funds transfers (EFT), as well as consumer credit reporting.⁶⁴ It also provides for equal-credit opportunity by prohibiting any discrimination on the grounds of race, color, religion, national origin, origin, sex, marital status, and age.⁶⁵ Rules are also provided by the Fair Debt Collection Practices Act, regulating the practices of collection agencies.⁶⁶

Another aspect of consumer protection concerns the rules governing the negotiability of financing contracts. Contracts providing for consumer credit can be transferred, and in some cases there may be problems for the

already provided by state laws and FTC regulations. Marvin F. Milich, *Incorporation to Circumvent Usury Laws: Associated Tax Problems and Law*, 14 J. CORP. L. 527, 529 n.10 (1989). The Uniform Consumer Credit Code provides for unconscionability as a basis for rescission of consumer credit transactions and establishes statutory penalties, which can also be enforced by administrative bodies. UNIF. CONSUMER CREDIT CODE § 1.107(4) (1974), 7 U.L.A. 112–13 (2002).

60. 15 U.S.C. §§ 1601–1667f (2000). While TILA is considered a successful instrument to guarantee a transparent and fair consumer credit market, financial institutions often complain that it generates an excessive amount of confusing paperwork. It has been underlined, however, that the corresponding EC rules, while similar in structure (being based on mandatory disclosure of the main terms of the credit agreement), have been far less successful. This may be related to a different level of integration of legal and economic markets among the member states in Europe, as well as to the significant differences in policies and business practices and to language barriers. Overby, *supra* note 11, at 1271–77.

61. 15 U.S.C. § 1635.

62. *Id.* §§ 1607, 1640.

63. Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f (2000). The United States economy has a very low savings rate and is heavily relying on credit for consumer transactions. The use of credit to spend beyond consumer's actual income is extremely widespread.

64. The Act limits the kind of information that can be provided and restricts the uses that are permitted. *Id.* § 1691. This information must be available to the consumer, who has the right to view the file and ask for deletion of unlawful information. *Id.* § 1691(d)–(e). Denial of credit must be provided in writing, and civil suits by consumers related to the act may be filed in federal courts. *Id.* §§ 1691(e), 1691e.

65. *Id.* § 1691(a).

66. 15 U.S.C. §§ 1692–1692o. The Act prohibits collection agencies from contacting the debtors in unusual or inconvenient places or times, harassing debtors, and abusing them. *Id.* §§ 1692c(a)(1), 1692d. These federal laws do not preempt state-debt-collection laws, and states also regulate the issuance of licences for collection agencies. *Id.* § 1692n. Therefore, consumers' rights are also protected by state law.

consumer who wants to stop payments due to problems related to the purchased goods. According to the UCC, the purchaser of the financing contract is the holder in due course (HDC),⁶⁷ and therefore the purchaser can ask for the payments even if the goods are defective. The Federal Trade Commission (FTC) has issued regulations according to which it is an unfair trade practice to deny the consumer a defense concerning the goods sold.⁶⁸ Moreover, every consumer credit contract must contain a notice providing that any holder of the contract is subject to the claims and defenses that can be asserted against the seller of the goods or services.⁶⁹ Because this notice is part of the contract, it is enforceable under state contract law.⁷⁰ These regulations do not eliminate state laws that enable the consumer to assert defenses against the seller or a later purchaser of the financing contract, but rather they reinforce them significantly.

The FTC is generally responsible for policing all unfair and deceptive trade practices, which are often relevant to consumer protection.⁷¹ After promoting an interventionist approach to consumer protection for several decades, the FTC, in a 1983 Policy Statement, gave a definition of deceptive and unfair trade practices that is generally considered more favorable to business than past definitions.⁷² The new definition focuses on actual economic or physical harm, thereby rejecting the standard of immoral, unethical, oppressive, or unscrupulous conduct.⁷³ This change led to a gradual shift of enforcement from the federal level to the state level, with an increase in state control over consumer-protection issues related to trade.⁷⁴

67. U.C.C. § 3-302 (2003).

68. 16 C.F.R. § 433.1–3 (2005).

69. *Id.* § 433.2.

70. *Id.*

71. 15 U.S.C. § 45 (2000).

72. FEDERAL TRADE COMMISSION, FTC POLICY STATEMENT ON DECEPTION (1983), available at <http://dignbig.com/4qmpa>. For a discussion of the efforts to redefine “deception,” see Mark E. Budnitz, *The FTC’s Consumer Protection Program During the Miller Years: Lessons for Administrative Agency Structure and Operation*, 46 CATH. U. L. REV. 371, 396–409 (1997).

73. See Budnitz, *supra* note 72, at 396–409 (examining the FTC’s consumer-protection activities in the time-context in which they occurred). Other instructive examples are *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 164–65 (1984), where a deceptive act or practice was defined as a representation, omission, or practice that is material and is likely to mislead consumers acting reasonably under the circumstances; and *In re Int’l Harvester Co.*, 104 F.T.C. 949, 1051 (1984), where an unfair trade practice was found to require a substantial, unavoidable injury, involving actual and completed harm (either monetary or to health and safety) whose negative effects were larger than any beneficial effects; moreover, the injury must have been one that consumers could not reasonably have avoided through consumer choice.

74. See J.R. Franke & D.A. Ballam, *New Applications of Consumer Protection Law: Judicial Activism or Legislative Directive?*, 32 SANTA CLARA L. REV. 347, 425 (1992) (examining state-consumer-protection statutes and courts’ application of those statutes, concluding that both have been

The regulatory intervention of the FTC has several interesting parallels in EC law. For instance, FTC regulations require a mandatory cooling-off period for in-home-solicitation sales during which the consumer can freely cancel the contract.⁷⁵ State laws, which can provide more protective rules in these cases, are similar to the minimum harmonization requirements of EC law.⁷⁶ Specific requirements also are set for mail and telephone sales, which include Internet sales.⁷⁷ Moreover, the FTC is responsible for the control of deceptive advertising because the definition of unfair or deceptive acts or practices also covers false advertising.⁷⁸

One of the drawbacks of FTC regulations is that they may only be enforced in judicial proceedings brought by the FTC itself, while consumers are generally considered not to have a private right of action.⁷⁹ Obviously, the FTC can prosecute only a limited number of cases—those it considers to be of greater significance. This triage implies that other infringements are left without a remedy. In order to overcome this limitation, it is crucial for state laws to provide effective remedies for consumers.⁸⁰ These should at least cover the right to damages and attorneys' fees but should also cover class action suits⁸¹ in order to pool small claims that have a relevant

consistent with the larger trend in U.S. government regulation). The parallel control by states is usually exercised by applying the state statutes on unfair and deceptive acts and practices, which usually (contrary to the FTC act) allow for a private right of action. See Pridgen, *Predatory Lending: The Hidden Scourge of the Housing Boom*, WYO. L.A.W., Oct. 2005, available at <http://digbig.com/4rcgt>. Other state law mechanisms are common law causes of action such as actions for fraud or misrepresentation.

75. 16 C.F.R. § 429.1 (2005).

76. Cf. Council Directive 85/577, art. 8, 1985 O.J. (L 372) 31 (EC) (stating that “[t]his Directive shall not prevent Member States from adopting or maintaining more favourable provisions to protect consumers”); Council Directive 97/7, 1997 O.J. (L 144) 19, 19 (EU) (noting that “Member States have already taken different or diverging measures to protect consumers . . . [and] it is therefore necessary to introduce at Community level a minimum set of common rules”).

77. 16 C.F.R. § 435.1; cf. Council Directive 97/7, 1997 O.J. (L 144) at 19–21 (protecting consumers when negotiating contracts at a distance including through “teleshopping” and “electronic technologies”).

78. 15 U.S.C. § 52(b) (2000); cf. Council Directive 84/450, 1984 O.J. (L 250) 17, 17 (EC) (addressing Member States’ regulation of “misleading advertising”).

79. See *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 987 (D.C. Cir. 1973) (finding no private right of action for false advertising claimed under the FTC Act); cf. *Guernsey v. Rich Plan of the Midwest*, 408 F. Supp. 582, 582, 586 (N.D. Ind. 1976) (distinguishing *Holloway* and finding a right of action for a consumer under the FTC Act for claims both of deceptive practices and acts and of unfair methods of competition).

80. See Ralph J. Rohner, *Multiple Sources of Consumer Law and Enforcement (Or: “Still in Search of a Uniform Policy”)*, 9 GA. ST. U. L. REV. 881, 885 (1993) (explaining the problems that a lack of uniformity at the national level creates for consumer-protection law and the tendency of states to act to fill “the interstices of federal regulation”).

81. See generally STUART T. ROSMARIN ET AL., CONSUMER CLASS ACTIONS: A PRACTICAL LITIGATION GUIDE (5th ed. 2002); Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 TEX. INT’L L.J. 135 (1999). European law is unfamiliar with the device of

collective dimension.⁸²

Problems of unfair trade practices are also tackled by some other important federal statutes. One of them is the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, which complements state law (as well as the UCC) on the issue of express, written warranties.⁸³ The Act does not establish new warranties but provides rules concerning the use of warranties and disclosure requirements.⁸⁴ Other federal statutes concern the protection of consumers against shipment of unsolicited goods⁸⁵ and against aggressive, telephone solicitation (telemarketing).⁸⁶ Labeling, ranging from food to cigarettes to medicines, is another important area of federal consumer law.⁸⁷

As for state law, several states have general consumer-protection acts, which cover a variety of aspects. A few states have modeled their laws on the Uniform Consumer Sales Practices Act (UCSPA) or have drawn inspiration from it, but on the whole it can be said that uniform laws have

class action, but in recent times it has tried to tackle the problem of adequate judicial protection of consumers in cases concerning large numbers through the establishment of standing for consumer associations or public bodies representing consumers. *See* Council Directive 98/27, art. 2, 1998 O.J. (L 166) 51 (EU) (providing injunctive relief where appropriate to protect consumers' collective interests).

82. Some states have laws that mirror the structure of FTC regulations, while others provide that practices prohibited by FTC regulations are also in violation of state law.

83. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301–2312 (2000).

84. *Id.* § 2304. Terms of a written warranty must be fully and conspicuously disclosed in simple and understandable terms. *Id.* § 2303(a). The Act distinguishes between a “full” and a “limited” warranty and mandates the requirements for a full warranty: remedy without charge for any defect or any other failure of conformity to the warranty; absence of limits to the duration of the warranty, and full disclosure of any limitation of the remedies; refund or replacement if attempts at repair are unsuccessful; extension of the warranty to any consumer who uses the good; and lack of other requirements other than notice in order for the consumer to have the warranty applied. *Id.* §§ 2303(a), 2304. The Act also provides specific remedies for breach of consumer warranties (e.g., if the consumer proves that the good does not conform to the warranty, the burden of proof shifts to the warrantor to show consumer misuse) and encourages agreements between consumer groups and businesses concerning informal, dispute resolution procedures. The consumer can start an action in court only after having completed the informal procedure. *Id.* § 2310; *cf.* Council Directive 1999/44, 1999 O.J. (L 171) 12 (EU) (establishing consumer guarantees and remedies for breach of such guarantees).

85. 39 U.S.C. § 3009 (2000) (stating that consumers may keep the goods without having to pay for them); *cf.* Council Directive 97/7, art. 9, 1997 O.J. (L 144) 19, 23 (EU) (exempting consumers from providing consideration for unsolicited goods).

86. 47 U.S.C. § 227 (2000) (granting private rights of action before state or federal courts and allowing treble damages in cases of wilful violation); *cf.* Council Directive 97/7, art. 2, 1997 O.J. (L 144) at 21 (regulating “distance communication,” which includes telephone solicitation).

87. 15 U.S.C. §§ 1331–1341 (2000) (cigarette-labelling requirements); 15 U.S.C. § 1451 (2000) (packaging); 21 U.S.C. § 331 (2000) (“misbranding” of food, drugs, cosmetics, and “devices”). Often federal-labelling laws refer back to state law for the establishment of negligence and for the granting of damages.

not been very successful in the area of consumer law.⁸⁸

The analysis of U.S. consumer law reveals an interesting and important pattern of interplay among different sources of law (federal laws, federal regulations, uniform laws, and state laws), which shows that a widespread and complex problem such as consumer protection requires a combination of different legal techniques and the coordination of a plurality of lawmaking levels in order to be effective. This is very similar to what happens in the European context: EC law covers a number of issues where harmonization is deemed necessary to provide adequate protection, but at the same time it is clear that this harmonized law must be coordinated with national law.

The current trend in the United States shows an increasing shift from federal regulation toward state and local government regulation. This trend is in contrast both with the original federalizing ideology of the 1960s and 1970s in the United States and with the growing involvement of the European Community in consumer law matters in Europe.⁸⁹ This divergence can be partly explained by the predominance of a market-oriented approach in the United States, which favors deregulation and local regulation in order to adjust to the needs of economic actors. In contrast, the European situation, in spite of a growing emphasis on market mechanisms, is characterized by a long tradition of strong regulatory market control typical of welfare states. Nevertheless, ideological differences are only one of the factors at play; the kinds of organizations that are involved in the lawmaking and law-applying processes (i.e., in the United States, the federal government, states, private lawmaking bodies, and federal and state courts; and in Europe, the EC lawmaking institutions, ECJ, member states' parliaments, governments, and courts, and consumer and business associations) and their mutual interaction are crucial in determining the actual outcomes in the field of consumer law. For example, the ECJ has been crucial in developing the rules concerning the common market and the links and boundaries with connected areas such as consumer protection. This in turn has influenced the strategy that the EC lawmaking bodies have used to develop the common market, of which consumer protection is seen as a component. The way in which European caselaw and statutory law has

88. UNIF. CONSUMER SALES PRACTICES ACT (amended 1971), 7A U.L.A. 69 (1970). The complete Act has been enacted only by Kansas, Ohio, and Utah. Note, *Toward Greater Equality in Business Transactions: A Proposal to Extend the Little FTC Acts to Small Business*, 96 Harv. L. Rev. 1621, 1625 n.28 (1983). The Act is violated by a deceptive act or practice in connection with a consumer transaction. UNIF. CONSUMER SALES PRACTICES ACT § 3(a). Unconscionable consumer-sales practices are prohibited. *Id.* § 4(a).

89. Overby, *supra* note 11, at 1222–23.

impacted the respective legal systems of the member states is dependent on the kind of legal arrangements that are in place and the different mix of statutory, administrative, judicial, and soft law that is characteristic of each system.

VI. THE EVOLUTION OF CONSUMER LAW: THE EXAMPLE OF EC CONSUMER CONTRACT LAW

In order to recognize the specificity of the legal relationships developed in the preceding paragraphs, the evolution of consumer law as an autonomous field can be tested by analyzing a specific sector such as consumer contract law. This area is of particular importance within the European context, because the European Community, due to its emphasis on the operation of the internal market, has been particularly active in regulating contracts, the legal cornerstone of the market.⁹⁰ Consequently, a significant part of EC consumer law deals with contractual issues.

The underlying notion of an active consumer, who needs legal instruments enabling the consumer to act across national markets, is reflected in a variety of rules that are characterized by several important elements. The first of these elements is the duty to inform: to avoid inefficient outcomes, it is usually considered necessary to provide consumers with all relevant information, rather than prescribing the content of contract.⁹¹ Once consumers have this information, they will be able to look after their own interests. Nevertheless, in order to take into account the fact that there is an inherent difference in the position—and consequently the power—of a consumer and a professional, several directives concerning consumer contracts provide for a new remedy: the “cooling-off period,” within which consumers can free themselves of contractual obligations after a contract has been concluded even though there are no specific pathological elements to the contract.⁹² The European

90. See Andreas P. Reindl, *Consumer Contracts and European Community Law*, 75 WASH. U. L.Q. 627 (1997) (exploring EC consumer law and several proposed changes).

91. For an analysis of the role of information duties in contract law, see PARTY AUTONOMY AND THE ROLE OF INFORMATION IN THE INTERNAL MARKET (Stefan Grundmann et al. eds., 2001).

92. The first directive in the field of consumer law providing a right to cancel a contract during a cooling-off period was Council Directive 85/577, To Protect the Consumer in Respect of Contracts Negotiated Away from Business Premises, art. 5, 1985 O.J. (L 372) 31 (EC). Thereafter several directives followed this model: Council Directive 90/314, On Package Travel, Package Holidays and Package Tours, art. 4, 1990 O.J. (L 158) 59 (EC); Council Directive 94/47, On Certain Aspects of Timeshare Property, art. 5, 1994 O.J. (L 280) 83, 85 (EU); Parliament and Council Directive 97/7, On the Protection of Consumers in Respect of Distance Contracts, art. 6, 1997 O.J. (L 144) 19, 22–23 (EU); Council Directive 2002/65, Concerning the Distance Marketing of Consumer Financial Services and Amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, art. 6, 2002 O.J. (L

Community, therefore, has recognized, albeit with some incongruities, that information obligations are not always enough to protect the consumer, and that the power imbalance between the consumer and the professional is not limited to situations characterized by an element of surprise. The concern for the structural imbalance in legal relationships between consumers and professionals also is evident in the important Directive on Unfair Terms in Consumer Contracts of 1993.⁹³ This Directive established that unfair terms in a contract entered into by a consumer are not binding on the consumer unless the terms have been individually negotiated.⁹⁴ Terms are considered unfair if they are contrary to good faith and cause a significant imbalance in the parties' rights and obligations.⁹⁵

Another element that is common to many EC directives on consumer protection is a right of action for consumer associations in addition to the private right of action of individual consumers.⁹⁶ The underlying rationale is that often the claims of each individual consumer are financially trivial; therefore, consumers may be reluctant to start an action, despite the fact that their claims may be very significant from a collective point of view. By granting standing to consumer associations to ask for injunctive relief, the directives have created an important redress mechanism that affords more effective protection of consumers' rights. The mechanism allows the pooling of several individual claims, the sharing of the required legal expertise, and the possibility of starting test cases. In fact, caselaw generated by these directives shows that a significant part of it consists of cases started by consumer associations. It must be underlined that the right of action for injunctive relief granted to consumer associations is not the equivalent of a class action, which is available in the U.S. legal system. While in the latter it is one or several individual plaintiffs that start a case that concerns a class of other persons who are in the same situation, in the former, consumer associations are not acting as representatives of individual consumers but rather as representatives of the collective and diffuse interest in fair consumer transactions. A consequence of this

271) 16 (EU).

93. Council Directive 93/13, 1993 O.J. (L 95) 29 (EC).

94. *Id.* art. 3.

95. *Id.* In order to provide some guidance to the interpreter, an Annex to the Directive contains a nonexhaustive list of terms that may be considered unfair, meaning that they are presumptively unfair, but the judge or arbitrator can decide otherwise (so-called grey list, as opposed to a black list, where all terms are considered definitely unfair).

96. The right of actions of consumer associations for injunctive relief was initially foreseen by a number of specific directives enacted in the 1990s. Finally, Directive 98/27 On Injunctions for the Protection of Consumers' Interests has provided for a general framework, with an annexed list of the specific directives to which it applies. Council Directive 98/27, 1998 O.J. (L 166) 51 (EU).

different position is that consumer associations can ask for an injunction but not for damages, which can only be granted in case of a private action by an individual consumer. A long-lasting, heated debate on the need and possibility of introducing class actions in the European Community and national legal systems is going on, and at the moment it seems that the predominant European tradition of the judicial process is still an obstacle to its introduction. Yet, it is clear that both the Community and the member states are increasingly aware that the creation of new consumer rights is useless unless adequate redress mechanisms are simultaneously generated, and that diffuse interests such as those of consumers need some collective-redress mechanisms, either through the intervention of consumer associations or through public agencies in charge of consumer protection.⁹⁷

The new legal mechanisms devised for the protection of consumers are technically limited to consumer contracts, but in fact their use is gradually expanding to other contexts. For instance, several legal systems assume that professional contractual relations can be characterized by the same kind of asymmetries of power and therefore extend the rules to this kind of contract. In fact, the notion of “consumer” often seems to be conceived of as a kind of proxy for weakness. If this is the rationale for regulatory intervention, the strict limitation of the EC legal definition of the consumer as a natural person acting outside the consumer’s business activity seems to be too narrow because there may well be professionals who are in a weak position compared to their legal counterparts, as in the case of franchise agreements. At the same time, the category of consumer may be overbroad because there could be consumers who, because of their expertise or contractual power, do not need to be protected in any special way. The minimum harmonization device permits member states to adjust their own definitions of consumers, but it is clear that the choice of this definition has policy implications.

Generally, the recognition that consumer contracts can derogate from some of the fundamental rules of contract law (such as the principle that contracts, once duly concluded, cannot be terminated unless some pathological event occurs) is gradually leading lawyers to revise the principle of freedom of contracts and to insert social values into an area which, until now, has been mainly characterized by economic

97. Another significant development concerning redress mechanisms for consumer protection is the creation of various forms of ADR, ranging from informal mediation by businesses or business associations to voluntary arbitration. Also, many states have introduced or are planning to introduce a new, simplified procedure in lower courts with jurisdiction over consumer cases to lower the costs (both for the parties and for the judicial system) and shorten the duration of trials.

considerations.⁹⁸ Although it is not yet clear how much this development will spread to the whole of contract law, it is already clear that it is affecting important areas and will surely lead to the elaboration of new rules and concepts.⁹⁹

CONCLUSION

The evolution of consumer law as an example of a body of legal rules based on elements of diversity has a number of relevant features in common with other areas of law. One can mention elements such as the shift from a formal to a substantive conception of equality (and the corresponding right to equal treatment) and the development of a whole new set of remedies that take into account the fact that individual rights have important collective and diffuse dimensions such as in the case of collective or class action. Another element is the increasing awareness that “private” rights can be considered fundamental human rights and consequently have an important constitutional dimension.¹⁰⁰

This evolution suggests that areas of law that have traditionally been considered “neutral” and technical, such as contract law and private law in general, in fact involve political stakes.¹⁰¹ This does not mean that consumer law must be “politicized,” but rather requires that lawyers take

98. The number of scholarly contributions concerning the role of social justice in European contract law is rapidly growing. Among them, one can mention: WELFARISM IN CONTRACT LAW (Roger Brownsword et al. eds., 1994); THOMAS WILHELMSSON, SOCIAL CONTRACT LAW AND EUROPEAN INTEGRATION (1995); Hugh Collins, *European Social Policy and Contract Law*, 1 EUR. REV. CONT. L. 116 (2005); Briggita Lurger, *The “Social” Side of Contract Law and the New Principle of Regard and Fairness*, in TOWARDS A EUROPEAN CIVIL CODE 273 (Arthur Hartkamp et al. eds., 3d ed. 2004); Alessandro Somma, *Giustizia sociale nel diritto europeo dei contratti*, 23 RIVISTA CRITICA DEL DIRITTO PRIVATO 75 (2005); Thomas Wilhelmsson, *Varieties of Welfarism in European Contract Law*, 10 EUR. L.J. 712 (2004). In 2004 a group of European legal scholars published a manifesto concerning this issue: Hugh Collins et al., *Social Justice in European Contract Law: A Manifesto*, 10 EUR. L.J. 653 (2004).

99. See generally Jean Calais-Auloy, *L’influence du droit de la consommation sur le droit des contrats*, 51 REVUE TRIMESTRIELLE DE DROIT COMMERCIAL ET DE DROIT ECONOMIQUE 115 (1998); Rodolfo Sacco, *Interaction Between the PECL and Italian Law*, in THE PRINCIPLES OF EUROPEAN CONTRACT LAW AND ITALIAN LAW: A COMMENTARY 11, 17–19 (Luisa Antonioli & Anna Veneziano eds., 2005).

100. STEFANO RODOTÀ, LIBERTÀ E DIRITTI IN ITALIA: DALL’UNITÀ AI GIORNI NOSTRI (1997); NORBERTO BOBBIO, L’ETÀ DEI DIRITTI (1992); Stefano Rodotà, *Il Codice civile e il processo costituente europeo*, 23 RIVISTA CRITICA DEL DIRITTO PRIVATO 21 (2005); Cesare Salvi, *Norme costituzionali e diritto privato: Attualità di un insegnamento*, 22 RIVISTA CRITICA DEL DIRITTO PRIVATO 235, 244 (2004).

101. See Duncan Kennedy, *The Political Stakes in “Merely Technical” Issues of Contract Law*, 1 EUR. REV. PRIVATE L. 7 (2001) (examining the types and degrees of political stakes involved in the technical rules of contract law).

into account relevant social and political issues in their analysis.¹⁰²

Consumer law must not be considered an isolated field, but rather as a specific instance of a much larger legal phenomenon, through which law is increasingly striving to recognize and accommodate differences while at the same time preserving the coherence and unity of the general legal structure. The growing relevance, both at the national and international level, of areas such as the protection of minorities, equal opportunities for men and women, and many more, and the related efforts to devise new, appropriate legal instruments such as affirmative action, redress mechanisms, and right of participation, demonstrate the awareness that the cherished principle of equality, which lies at the heart of all legal systems, cannot be truly achieved unless it is able to take into account the existence of relevant differences in social and economic status, race, ethnicity, and gender. This is a very demanding task in a context where borders are increasingly blurring and mobility is rapidly increasing, and it is clearly a task that requires the combined use of all available instruments, not only legal, but also political, economic, and social. In this collective effort, law is called upon to develop new legal categories and instruments that are sufficiently flexible to be able to adjust to numerous and rapid changes but at the same time sufficiently specific and analytical to provide legal certainty and coherence.

102. See Luisa Antonioli, *Consumer Protection, Fair Dealing in Marketing Contracts and European Contract Law: A Uniform Law?*, in THE FORTHCOMING EC DIRECTIVE ON UNFAIR COMMERCIAL PRACTICES 241 (Hugh Collins ed., 2004) (providing the context for efforts to achieve greater uniformity in EU contract law).