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# Assembling the fractured

## European consumer

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# Assembling the fractured

## European consumer

Marco Dani\*

### Abstract

Recognised and shaped by regulatory strategies pulling in different directions, the European consumer may be portrayed as a fractured subject. By drawing from the Pasta and Hormones litigation, the article investigates its multiple and heterogeneous identities as resulting from the interaction between domestic, EU and WTO law. It argues that the fractured consumer could be viewed as a realistic legal projection of the human condition of actual individuals engaging in consumer activities, and sets out an adjudicative strategy for assembling its identities at an argumentative level so as to do the best by their promises and counter their biases. The article concludes by suggesting that the conceptual framework construed around the fractured consumer could improve the transparency and contestability of adjudication and policy-making.

**Keywords:** Consumer law, legal pluralism, subjectification, interpretive community, Pasta, Hormones.

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## Introduction

It was in deciding over the substitutability of light wine and beer in a case concerning tax discrimination in the United Kingdom<sup>1</sup> that the Court of Justice famously stated:

[...] for the purpose of measuring the possible degree of substitution, it is impossible to restrict oneself to consumer habits in a member state or in a given region. In fact, those habits, which are essentially variable in time and space, cannot be considered to be a fixed rule; the tax policy of a member state must not therefore crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned to comply with them.<sup>2</sup>

This passage served to counter the position of the defendant state that, in advocating that beer and wine were not similar products nor products in competition for the purposes of what is now article 110 TFEU, had observed how in that country beer and wine were traditionally perceived as beverages to be consumed for distinct purposes.<sup>3</sup> By refuting this argument, the Court ushered in a rigorous discrimination test relying on the notion that, in gauging the degree of substitutability between products, actual consumers' preferences in the market place may be misleading.<sup>4</sup> Furthermore, its emphasis on the contingent nature of consumers' habits and, notably, a hint to the effects of long-established protectionist practices on their configuration, heralded what would be the decisive finding for that hard dispute.<sup>5</sup> In

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<sup>1</sup> Case C-170/78, *Commission v United Kingdom* [1980] ECR 417.

<sup>2</sup> *Ibidem*, paragraph 14.

<sup>3</sup> *Ibidem*, paragraph 13.

<sup>4</sup> H. Horn and J. H. H. Weiler, 'European Communities – Measures Affecting Asbestos and Asbestos-Containing Products' (2004) *World Trade Review*, 129, at 134-135, discussing latent demand and potential competition of products in the WTO.

<sup>5</sup> Case C-170/78, *Commission v United Kingdom* [1983] ECR 2265.

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concluding on the discriminatory nature of the British tax system, the Court indeed noted that:

[...] the effect of the United Kingdom tax system is to stamp wine with the hallmarks of a luxury product which, in view of the tax burden which it bears, can scarcely constitute in the eyes of the consumer a genuine alternative to the typical domestically produced beverage.<sup>6</sup>

It was not just sophisticated adjudication. Unwittingly, the Court of Justice also offered a fine sample of social theory. In his account of how it is that government aligns with the nature of those governed, Nikolas Rose claims that policies and institutional arrangements do not simply reflect individuals' preferences as if the latter were a given variable.<sup>7</sup> The interaction between government and those subject to its rule is a much more complex matter in that it also involves a different and opposite dynamic: individuals are acted upon by government and thus it is their preferences which are also shaped by government's aspirations and projects.<sup>8</sup> Put differently, besides being recognised in our autonomy and desires, we are also targets of regulatory strategies that exert defining pressures on us.<sup>9</sup> Therefore, according to this process – with Rose, we may call it 'subjectification'<sup>10</sup> – the alignment between government and governed ensues from a more circular course of action relying on both the *recognition* of individuals' nature and its *shaping* by government operation.

The ruling on the British taxation of alcoholic beverages substantiates legal subjectification quite nicely. In the Court's view, the seemingly consolidated

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<sup>6</sup> Ibidem, paragraph 27.

<sup>7</sup> N. Rose, *Inventing Our Selves – Psychology, Power and Personhood* (CUP, 1996), at 119.

<sup>8</sup> Ibidem, at 121. It must be stressed that in Rose's view this process works through rather than against subjectivity. In his words (at 122): 'Liberal democracies increasingly depend on these indirect mechanisms through which the conducts, desires, and decisions of independent organizations and citizens may be aligned with the aspirations and objectives of government not through the imposition of politically determined standards, but through free choice and rational persuasion. Psychological theories, experts, languages, and calculations have had a key role here, providing the technologies to form these alliances between citizens and their rulers, persuading, convincing, shaping the private decisions of family members, managers, owners, and entrepreneurs so that they come into alignment with public goals such as increasing profitability, efficiency, health and adjustment'.

<sup>9</sup> Ibidem, at 152.

<sup>10</sup> Ibidem, at 171, clarifying that 'subjectification is thus the name one can give to the effects of the composition and recombination of forces, practices, and relations that strive or operate to render human being into diverse subject forms, capable of taking themselves as the subjects of their own and others practices upon them'.

preference of British consumers for beer over light wine<sup>11</sup> had been shaped by longstanding protectionist policies. Even more interestingly, the same ruling betrayed also the Court's own policy aspirations and their defining potential over individuals' preferences. This was more explicitly acknowledged a few years later in a similar case concerning the regulatory regime of beer in Germany.<sup>12</sup> The Court, prior to referring to its earlier judgment on light wine and beer, completed its doctrinal exposition by holding that

[...] consumers' conceptions which vary from one Member State to the other are also likely to evolve in the course of time within a Member State. The establishment of the Common Market is, it should be added, one of the factors that may play a major contributory role in that development [...].<sup>13</sup>

Cumulatively taken, therefore, those rulings demonstrate how consumers' subjectification in Europe is a complex and controversial phenomenon. It is complex because individuals, situated within a pluralist system of government, are simultaneously exposed to multiple strategies of regulation. It is controversial because those strategies respond to distinct and not necessarily coordinated policy goals and rationales. As a consequence, consumers' subjectification may be regarded as the resultant of a number of vectors responding to as many legal regimes, with their distinct foundations, concerns and regulatory ideals of the self.

This article explores the legal subjectification of European consumers<sup>14</sup> by rehearsing the *Pasta* and *Hormones* disputes. Drawing from those sources, it illustrates how individuals *qua* consumers are affected by distinct regulatory projects associated with domestic, EU and WTO legal systems. Situated at this intersection, individuals are recognised, stimulated and acted upon from varying vantage points, with each frame capturing (and shaping) specific aspects of the experience of consuming. On

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<sup>11</sup> After the adjustment of the tax rates for beer and wine, the increasing consumption of wine suggested that previously British consumers had probably been deterred by discriminatory taxation, S. Weatherill and P. Beaumont, *EU Law* (Penguin, 1999), at 482.

<sup>12</sup> Case C-178/84, *Commission v Germany* [1987] ECR 1227.

<sup>13</sup> *Ibidem*, paragraph 32.

<sup>14</sup> A similar effort to investigate the complexity of the legal encounters between law and consumption is undertaken in M. Everson and C. Joerges, 'Consumer citizenship in post-national constellations?', in K. Soper and F. Trentmann (eds), *Citizenship and Consumption* (Palgrave Macmillan, 2008), at 154.

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the whole, the consumer emerges as a fractured subject, a bundle of partial identities, each deserving critical consideration and all requiring some degree of mutual adjustment. In a way, this yields an unexpected result: by fragmenting subjectivity, European legal pluralism offers a rather realistic representation of the contemporary human condition<sup>15</sup> and, hence, is quite successful in aligning government with the nature of those governed.

If this is true, there may be important legal implications for consumer protection across Europe. Conceived within a similar framework, market regulation and adjudication appear to be largely about the management and assemblage of competing identities, a task requiring both courts and policy-makers to accommodate them by devising synergies between their underlying regulatory projects. For this to happen, the way in which consumer protection is currently carried out must probably undergo some reconsideration as neither adjudication nor policy-making seem sufficiently intent on grasping the good inherent in European legal pluralism. As *Pasta* and *Hormones* show, courts do not conceive adjudication as a transnational coordinated effort. Disputes travel from court to court giving rise to judgments that most of the time are framed in a dimension essentially internal to their relevant legal systems. Engagement with the arguments proffered in previous rulings by courts belonging to other legal orders is seldom sought, with the overall result that each court enforces its particular conception of the consumer, neglects alternative identities and overlooks the possibility of synergies.

To cope with this shortcoming, this article advocates the notion that European courts, alongside nurturing their specific perspectives on a dispute, act as components of a broader transnational interpretive community. In such a capacity, they would be requested to establish a degree of external coherence between the arguments put forward in their rulings and develop a shared understanding of the mechanics underlying European legal pluralism based on the notion of functional complementarity of its component parts. After showing the practical implications that such an adjudicative strategy would have had in the *Pasta* and *Hormones*

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<sup>15</sup> Rose, cit. at nt 7, at 169.



litigation, the article concludes by claiming that a similar conceptual framework for the relationships between consumers' identities and the European legal regimes of subjectification may improve the transparency and contestability of adjudication and policy-making. Ultimately, it is suggested that the fractured European consumer may be constantly assembled in particular legal contexts as a contingently coherent, though highly problematic, legal entity.

## Consumers' subjectification across Europe's legal frameworks: an excursus on *Pasta* and *Hormones*

Consumer protection inspires significant branches of EU<sup>16</sup> and states' law.<sup>17</sup> Though indirectly, it is also of some concern for the law of the WTO.<sup>18</sup> In market regulation across these legal systems consumers do not always play leading roles, the standing of governments and producers being quite often more prominent. Nonetheless, even if not directly or explicitly addressed, they are however touched upon by the trajectories of policy-making and adjudication. As such, they are the object of distinct assumptions and defining pressures as to their role and identity. The competition between regulatory strategies, therefore, is not simply about different allocations of regulatory resources between producers and consumers or conflicting categories of consumers. Perhaps more radically, regulatory strategies may be viewed as enhancing or contrasting rival identities coexisting in the same consumer and struggling for the hegemony. The *Pasta* and *Hormones* litigation provides ample illustration of this reality.

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<sup>16</sup> Articles 169 and 12 TFEU, and Article 38 of Charter of Fundamental Rights of the EU. For a general and comparative account on the evolution of consumer protection in the EU, see L. Antonioli, 'Consumer law as an instance of the law of diversity' (2006) 30 *Vermont Law Review*, 855.

<sup>17</sup> A variety of domestic approaches to consumer law is described in J. Stuyck, 'European consumer law after the Treaty of Amsterdam: consumer policy in or beyond the internal market?' (2000) 37 *Common Market Law Review*, 367, at 368-377.

<sup>18</sup> Notably, although not exclusively, the TBT and SPS Agreements.

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### The consumer as citizen and infantilisation

In Italy, national pride and gastronomic integrity appeared threatened when the Court of Justice set out to review under article 34 TFEU (then, 30 EEC) the domestic legislation<sup>19</sup> on the composition requirements of pasta.<sup>20</sup> Before being reviewed by the Court of Justice, the Italian legislation on pasta had already appeared on a few occasions before the Italian Constitutional Court. In a first case, the constitutionality of the prohibition on making pasta from ingredients other than durum wheat had been tested in *Bottiglieri and Caruso*.<sup>21</sup> In that case, Bottiglieri and Caruso had been prosecuted for having illegally produced and sold pasta containing rye. The ordinary judge argued that that ban might violate article 41 of the Italian Constitution, the constitutional provision protecting the freedom of enterprise.<sup>22</sup> In its view, not only did the prohibition hardly match the explicit limits to that freedom as defined in the Constitution, but it also appeared unreasonable with regard to the dietetic properties of rye. Legislation, it was observed, should have encouraged rather than banned the production of that cereal. Hence, the court decided to refer a question to the Constitutional Court. The latter replied with a rather terse ruling that, however, contains several interesting elements.

Firstly, EU regulatory principles are completely neglected. At that time, for an Italian ordinary court faced with a conflict between domestic and Community law it was definitely appropriate to refer the case to the Constitutional Court.<sup>23</sup> Yet, neither the ordinary nor the Constitutional court envisaged the potential common market implications of the dispute which was exclusively decided under article 41.

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<sup>19</sup> Law 4 July 1967, n. 580, *Disciplina per la lavorazione e commercio dei cereali, degli sfarinati, del pane e delle paste alimentari*, in *Gazzetta Ufficiale*, n. 189, 29 July 1967.

<sup>20</sup> For a passionate defence of the Italian legislation, see the Opinion of AG Mancini in Case C-407/85, *Drei Glocken and Kritzingler* and Case C-90/86, *Zoni* [1988] ECR I-4233.

<sup>21</sup> Corte cost., sent. 137/1971, in *Giurisprudenza Costituzionale*, 1971, 1577.

<sup>22</sup> Article 41 reads as follows: 'Private economic enterprise is free. It may not be carried out against the common good or in such a manner that could damage safety, liberty and human dignity. The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and co-ordinated for social purposes'.

<sup>23</sup> The case was decided before *Simmenthal* and *Granital*, its domestic equivalent. In that period, conflicts between Community law and subsequent domestic legislation could only be adjudicated by the Constitutional Court (sent. 232/1975, *ICIC*, in *Giurisprudenza Costituzionale*, 1975, 2211).

Secondly, the Italian Constitutional Court construed article 41 as mandating a rather relaxed standard of review. In keeping with its precedents,<sup>24</sup> the Court restated that judicial review under this constitutional provision requires a two-step scrutiny on the reasonableness of legislation. Accordingly, the legitimacy of its policy objectives must first be assessed. Next, 'the generic suitability of the means'<sup>25</sup> predisposed in the legislation for the pursuit of those goals must be tested. In the case at hand, the Constitutional Court found that the legislative measure aimed at legitimate objectives such as 'the increase of grain production, through the protection of the specialised cereal cultivations, particularly notable in Southern Italy', and the 'protection of the consumers and their health'. Then, the Court paid lip service to suitability review. Indeed, its scrutiny did not go as far as to test whether the prohibition of pasta containing rye could actually contribute to an increase of grain production or the protection of consumers. The Court was just content with the fact, documented in the text of the norms and the *travaux préparatoires*, that the legislative norms had apparently been designed for those ends. The question, therefore, was dismissed. Yet, in concluding, the Court offered an exquisite passage on consumer protection which is revealing of the spirit of the time. Confronted with the argument on the dietetic properties of rye and its possible use in the cure of diseases such as obesity, the Constitutional Court maintained that its ban could also be justified on health-protection grounds. As a rule, legislation ought to 'afford consumers the highest and not the lowest nutritional value for the same price', and only in exceptional cases could legislation authorise the production of dietetic pastas. Put differently, not only did the Court spare a protectionist industrial policy from strict judicial review, but it also endorsed a paternalistic model of consumer protection whereby individuals must normally be afforded more nutritional value than freedom of choice.

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<sup>24</sup> See, e.g., sent. 50/1957, *Nonna and others*, in *Giurisprudenza Costituzionale*, 1957, 621, and sent. 97/1969, *Segalini*, in *Giurisprudenza Costituzionale*, 1969, 1239.

<sup>25</sup> In the absence of an official translation of these judgments, the translation of this and other passages is my own.

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Constitutional litigation on pasta arose a few years later in *Moja*,<sup>26</sup> a case in which the Constitutional Court proved its tremendous generosity. The dispute this time revolved around the production of pasta made from wholemeal flour. Again, possibly due to the purely internal nature of the dispute, the ordinary court framed its questions exclusively with regard to article 41, neglecting any EU law argument as well as the possibility of engaging with the Court of Justice through preliminary ruling. In its questions to the Constitutional Court, the ordinary judge suggested the overruling of *Bottiglieri and Caruso* with rather compelling arguments.<sup>27</sup> Firstly, it questioned the coherence of the legislation at issue. It noted that whereas both wholemeal and durum pasta are made from durum wheat, only the former was banned – a choice that was difficult to justify if the goal of legislation was the protection and promotion of durum wheat production. Moreover, the measure could be challenged from a different angle, namely on the grounds of consistency. If the legislation allowed trade of wholemeal bread, on what grounds could it ban trade in wholemeal pasta?

Those arguments received further support from enquiries ordered by the Constitutional Court itself that corroborated the suspects on the protectionist nature of legislation as well as the doubts on its actual contribution to the protection of human health.<sup>28</sup> As a consequence, even if the Constitutional Court did not want to explicitly sanction protectionism, the legislative prohibition of wholemeal pasta could be found to be unreasonable or unnecessary on several grounds. Nevertheless, also in this case the Constitutional Court opted for a cautious approach. In its judgement, it conceded that the elements emerging from the proceedings had

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<sup>26</sup> Corte cost., sent. 20/1980, in *Giurisprudenza Costituzionale*, 1980, 171.

<sup>27</sup> *Ibidem*, paragraph 1.

<sup>28</sup> *Ibidem*, paragraphs 2-3. The ruling reports that the Ministry of Health recognised that the prohibition was hardly justifiable on health-protection grounds. On the contrary, it declared that, according to the most modern scientific evidence, trade of wholemeal pasta was desirable. It is also documented that the Ministry of Agriculture upheld the legislation by candidly advocating its underlying protectionist objectives. Notably, favour of durum pasta could be explained in light of the higher consumption of durum wheat associated with its production. Finally, figures from the Ministry of Foreign Trade and the Italian National Institute of Statistics offered data to evaluate the market of durum wheat and its alleged need for protection. The enquiry revealed that not only did the internal production of pasta absorb all the domestic supply of durum wheat, but also that conspicuous amounts of that staple were actually imported. As a consequence, a decreased consumption of durum pasta in favour of wholemeal pasta would probably have resulted in reduced imports rather than in a decline of national productions.

undermined the arguments underpinning *Bottiglieri and Caruso*. However, it transparently admitted that political discretion in economic legislation was beyond its purview and that it was for the Parliament to reconsider the measure at issue. As a result, it ended up accepting as legitimate the legislative objectives and certifying with a shallow reasoning the generic suitability of the means.<sup>29</sup>

On the whole, therefore, article 41 and the standard of review applied by the Constitutional Court seem to perform rather poorly in constraining economic legislation. That provision establishes a constitutive principle<sup>30</sup> defining in open-ended terms the relationship between economic freedom and its limits. Against this background, legislation is subject to proportionality review which the Italian Constitutional Court carries out through a 'rationality test', the most deferential of the standards of review.<sup>31</sup> This leaves unaffected ostensibly protectionist objectives such as the defence of cereal cultivations of Southern Italy, and uncontested the means for their pursuit for their generic suitability. Far from being peculiar to the Italian Constitutional Court, a similar style of adjudication is common also to many of its equivalents operating in other European constitutional democracies.<sup>32</sup> Within national constitutional contexts, indeed, existing distributions of economic resources are not entitled to any special protection from majoritarian decision-making.<sup>33</sup> Constitutional courts are marginal players, their role being confined to the safeguard of economic freedom only from the most egregious violations perpetrated by legislation. And sometimes, not from them either.

In a similar context, the role of consumers seems residual and mostly decorative. *Bottiglieri and Caruso* and *Moja* are cases addressing the limits posed by national protectionist measures on the economic interests of certain pasta manufacturers. The side-effects of those policies on consumers are mostly disregarded as repeatedly

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<sup>29</sup> *Ibidem*, paragraph 4.

<sup>30</sup> On the notions of constitutive and regulatory principles (see below in the text), see D. J. Gerber, *Law and Competition in Twentieth Century Europe – Protecting Prometheus* (Clarendon Press, 1998), at 248-249.

<sup>31</sup> C. R. Sunstein, *The Partial Constitution* (Harvard University Press, 1993) at 29.

<sup>32</sup> T. Koopmans, *Courts and Political Institutions* (CUP, 2003), at 249-250.

<sup>33</sup> This appears also the view espoused by the German Constitutional Court since its seminal judgment BVerfGE 4, 7 (1954) Investment Aid case.

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demonstrated by the scarce enthusiasm of the Constitutional Court for the arguments concerning the dietetic properties of rye and wholemeal pasta. Such attitude is probably not accidental but, on the contrary, it exhibits a distinctive trait of national regulatory strategies. In national quarters, the individual is mainly assumed as a citizen, whereas its consumer profile remains subsidiary. The political identity of the individual overshadows its economic role – an aspect reflected at an institutional level by the privileged status recognised in constitutional adjudication to parliamentary deliberations over economic freedoms. In this framework, both production and consumption are regarded as activities in the service of the society. As such, they are exposed to the possible biases and detrimental effects of democratic decision-making,<sup>34</sup> without any meaningful assistance from constitutional norms and judicial review of legislation. This seems the price to be paid for citizens' voice and constitutional settings that praise parliaments and representative democracy as the main venues for working out economic and social conflicts. The risk of protectionism and the infantilisation of consumers are the inconvenient flip sides of those legal regimes, of which the passage on the nutritional value of durum pasta in *Bottiglieri and Caruso* is probably the most eloquent illustration.<sup>35</sup>

## The rational consumer and vulnerability

It is at this juncture that the EU principles of free movement and the European Court of Justice appear on the scene. In *Zoni*,<sup>36</sup> an Italian wholesaler imported from Germany dry pasta made from a mixture of common wheat and durum wheat. Such trade also contravened domestic legislation but, unlike in earlier disputes, the case had a clear and actual cross-border dimension which allowed the invocation of the free movement principles. The ordinary court referred the case to the Court of Justice

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<sup>34</sup> M. Everson, 'The Legacy of the Market Citizen', in J. Shaw and G. More (eds), *The New Legal Dynamics of European Union* (Clarendon Press, 1995), 73, at 87-88.

<sup>35</sup> For the totally opposite approach of the Court of Justice on the issue of nutritional value, see Case C-216/84, *Commission v France* (Milk substitutes) [1988] ECR 793 and Case C-274/87, *Commission v Germany* (Nutritional value of meat) [1989] ECR 229.

<sup>36</sup> Case C-90/86, *Criminal Proceeding against Giorgio Zoni* [1988] ECR I-4285. See also Case C-407/85, *Drei Glocken GmbH and Gertraud Kritzinger v USL Centro-Sud and Provincia autonoma di Bolzano* [1988] ECR I-4233.

requesting a tailor-made interpretation of article 34 TFEU. The latter judgment reframes the whole issue of pasta regulation through the common market vocabulary and, by doing so, it gives the following relationship with the Italian Constitutional Court a radical twist. In the EU lexicon, indeed, the Italian legislation on pasta clearly amounts to a measure regulating product requirements. The Court of Justice deals routinely with this kind of measures, so much so that it has gradually gained institutional expertise in the field.<sup>37</sup> To a large extent, *Zoni* conforms to that consolidated line of case law.

In the first part of the judgment,<sup>38</sup> the Court found that the measure at issue hindered access to the Italian market to foreign products not complying with the host state legislation. As such, it qualified it as a measure equivalent to a quantitative restriction prohibited by article 34. Already at this stage, therefore, a stark contrast with the national style of constitutional adjudication can be noted. In the application of common market principles, there are no traces of the deference towards political decision-making so influential in the arguments and solutions adopted by the Constitutional Court. Unlike its national counterpart, the Court of Justice does not shy away, since in the common market framework obstacles to trade flows are normally regarded with suspicion regardless of their political goals.

After finding the Italian measure *prima facie* illegal, the Court of Justice examined its possible policy justifications. In this respect, a human health exception had been claimed by the Italian Government. The latter had stated that pasta made from common wheat contained chemical additives or colorants which could be harmful to human health. Yet, such an assertion had not been adequately documented and, therefore, was rapidly dismissed.<sup>39</sup>

Nor was the goal of ensuring a higher quality of pasta accepted. A number of objections could be submitted in this regard: is the quality of pasta made from durum wheat really higher than that made from common wheat? In Italy that might

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<sup>37</sup> The leading case is Case C-120/78, *Rewe Zentral AG v Bundesmonopolverwaltung Fuer Branntwein* [1979] ECR I-649.

<sup>38</sup> *Zoni*, paragraphs 9-11.

<sup>39</sup> *Ibidem*, paragraphs 12-14.

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go uncontested, since pasta made solely from durum wheat cooks much better. Nonetheless, during the case it was revealed that, for instance, in Nordic countries pasta made from common wheat is preferred. Moreover, one could also ask whether it was appropriate for the state to channel consumers' choices towards products supposedly of a higher quality.<sup>40</sup> In its judgment the Court of Justice did not answer all these questions directly. Yet, its ruling conveys a notion of consumer protection diametrically opposed to that encountered on a national level. In accordance with its precedents, the Court conceded that it could be legitimate for a state to grant consumers high-quality products and, in the case at stake, pasta made exclusively from durum wheat. Nevertheless, that objective, noted the Court, did not necessarily require an outright ban on imports. There were instruments with a lesser impact on intra-Community trade such as labels which could instruct consumers as to the quality of products and, on that basis, help them make their own choices. As a result, the national measure, although aiming at a legitimate goal, infringed the principle of proportionality and could not be justified.<sup>41</sup>

Even with regard to proportionality, therefore, the Court of Justice adopts a stricter standard of review than its national colleague. On human health, the Court requires scientific evidence for measures purporting to prevent health risks. On consumer protection, it ends up second-guessing and redefining the policy choices inherent in the pasta legislation. Under the rule of article 34, the Court of Justice questions the paternalist approach to consumer protection inspiring Italian legislation and activates the consumers' ability to choose between a wider range of products with different ingredients and prices. The cost of this solution is a direct interference with national regulatory autonomy and greater exposure to charges of judicial activism. Yet, even in this regard, the ruling of the Court of Justice contains important nuances. In the final part of its judgment, the Court devotes a few passages to the industrial policy objectives so benevolently validated by the Italian Constitutional Court.<sup>42</sup> The Italian Government had argued that the repeal of the domestic legislation would also

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<sup>40</sup> In support of a more active role of EU institutions in this regard, see C. MacMaoláin, *EU food law – Protecting consumers and health in a common market* (Hart Publishing, 2007), Ch. 6.

<sup>41</sup> *Zoni*, paragraphs 15-18.

<sup>42</sup> *Ibidem*, paragraphs 23-25.



cause domestic producers to use the cheapest common wheat for pasta intended for the Italian market. A similar outcome would also have a negative impact on consumers of durum wheat pasta, suddenly deprived of their favourite product. Quite surprisingly, on this specific point the Court of Justice avoided a confrontational approach and, namely, it did not repeat its steadfast opposition to the invocation of economic objectives as grounds for derogation of market regulatory principles.<sup>43</sup> In replying to those arguments, it observed that the contrast between article 34 and national legislation did not necessarily entail the repeal or annulment of the latter. The effect of its ruling was to impede the application of that measure to imports, leaving unaffected the right of national authorities to regulate restrictively the domestic production of pasta and pursue industrial policy objectives in that sphere.

Whereas voice and political participation were the defining features of the 'consumer as citizen' encountered at a domestic level, freedom of choice and information are the main traits of the 'rational consumer', its counterpart promoted at a supranational level.<sup>44</sup> In *Zoni*, the rational consumer emerges as the indirect beneficiary of the common market project.<sup>45</sup> Its ideological significance could not be overestimated: as in the 18<sup>th</sup> Century the notion of *homo economicus* enabled the emancipation from the feudal economic and legal order, in the common market project the notion of a rational consumer embodies the individual freed from state protectionism, paternalism and other dysfunctions associated with the deterioration of representative democracy or uncoordinated national policy-making. In view of its purposes of economic integration, the common market postulates an informed, self-reliant and circumspect agent who can confidently exercise his freedom of choice

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<sup>43</sup> See, e.g., Case C-7/61, *Commission v Italy (Italian pigmeat)* [1961] ECR 317 and Case C-254/98, *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH* [2000] ECR I-151.

<sup>44</sup> See, e.g., Case C-470/93, *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH* [1995] ECR I-1923, paragraph 24, referring to a 'reasonably circumspect consumer', and Case C-465/98, *Verein gegen Unwesen in Handel und Gewerbe Köln eV v Adolf Darbo Ag* [2000] ECR I-2297, paragraph 20, referring to an 'average consumer who is reasonably well informed and reasonably observant and circumspect'.

<sup>45</sup> S. Weatherill, 'The Evolution of European Consumer Law and Policy: From Well Informed Consumer to Confident Consumer?', in H. W. Micklitz (ed), *Rechtseinheit oder Rechtvielfalt in Europa?* (Nomos, 1996), 424, at 429.

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between goods and services that he can apparently afford.<sup>46</sup> The market place is his favourite habitat, whereas his relationships with political institutions and policy-making are largely instrumental.<sup>47</sup> Indeed, the world of the rational consumer is a world of mobility and competition where political involvement and solidarity are only secondary dimensions.

Enhancing the rational consumer implies tackling the biases of national policy-making, a strategy that lies at the core of the common market project and is clearly reflected in the framing of supranational disputes.<sup>48</sup> In cases such as *Zoni*, for instance, litigation is structured as a challenge to the political autonomy of the member states. National measures are viewed from the standpoint of regulatory principles such as articles 34-36 TFEU, establishing default prohibitions on measures hindering access to market mitigated by principled derogations for policy objectives. In this framework, member states are expected to rebut a *prima facie* finding of illegality of their measures by showing that they are genuinely committed to the pursuit of legitimate policy objectives. Justification, then, brings in proportionality review, a task that the Court of Justice undertakes in the light of far stricter standards than the rationality test. As witnessed by the passage on health protection in *Zoni*, the Court first tests the legitimacy of states' policy objectives as well as their effective and coherent pursuit. Next, national measures may undergo more demanding scrutiny. In *Zoni*, for instance, pasta legislation is reviewed with a 'pure balance' test under which the level of protection of non-economic objectives is second-guessed and, ultimately, questioned.<sup>49</sup>

Obviously, even a project tailored to the rational consumer reveals a number of critical points. Investing in individuals' rationality and ability to process information may be sound policy, particularly if the purpose is tackling market fragmentations

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<sup>46</sup> Everson, cit. at nt 34, at 87.

<sup>47</sup> Ibidem, at 85-86.

<sup>48</sup> J. H. H. Weiler, 'The Constitution of the Common Market Place: Text and Context in the Evolution of Free Movement of Goods', in P. Craig, G. de Burca (eds), *The Evolution of the EU* (OUP, 1999), 349, at 362-363.

<sup>49</sup> On the distinction between 'pure' and 'equivalence' (see below in the text) balance tests, see M. Poiares Maduro, *We, the Court - The European Court of Justice and the European Economic Constitution* (Hart Publishing, 1998), at 56-57.

and building a common market. Yet, that may turn out also to be a strategy that underestimates vulnerability and places high demands on actual consumers.<sup>50</sup> Indeed, besides constraining states' regulatory autonomy, an aggressive enforcement of free movement principles is often conducive to a redistribution of regulatory resources from vulnerable to circumspect individuals.<sup>51</sup> Pro-choice regulatory strategies not only put a premium on rationality, caution and cunning but, critically, reward information, culture and purchase power. As such, they may be a recipe for regressive policy outcomes.

The redistributive side-effects of free movement are but one of the critical implications of the rational consumer. In fact, the weakest segments of society are not the only potential losers of regulatory strategies relying on choice. This appears overtly when considering that consumers' preferences are only in part a product of rational deliberation. Other variables such as time constraints, emotional and accidental elements may impinge upon them and exert an often crucial influence on their definition. From this perspective, vulnerability emerges as an endemic feature of modern societies. Virtually all individuals in a certain moment of the day, a certain period of their lives or in particular contexts or relationships may be vulnerable and, as such, seek protection from the inconveniences attached to choice. However, cases such as *Zoni* and, more in general, a considerable part of EU law appear to underestimate these aspects.<sup>52</sup> On an ideological level, the appeal of the rational consumer or, more appropriately, its underlying promise of autonomy, success and prosperity seem irresistible, so much so that it has gone into making up the default approach to consumption in EU law.<sup>53</sup>

It is at this point that a further, less evident but probably more problematic element of this regime of subjectification emerges. As noted, in promoting the rational consumer, the common market project presents itself as investing a great deal on

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<sup>50</sup> G. Howells and T. Wilhelmsson, 'EC consumer law: has it come of age?' (2003) *European Law Review*, 370, at 380-381.

<sup>51</sup> Weatherill, cit. at nt 45, at 429.

<sup>52</sup> MacMaoláin, cit. at nt 40, at 223.

<sup>53</sup> D. Chalmers, 'Gauging the Cumbersomeness of EU Law' (2009) 62 *Current Legal Problems*, 405, at 410.

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individual choice.<sup>54</sup> Paradoxically, though, to be a rational consumer does not seem entirely a matter of choice. More accurately, the option of evading that role is not without economic and social costs, especially if that identity has implicitly gained the status of mainstream social paradigm. In this view, the promise of emancipation and more opportunities associated with the common market project sounds more ambiguous.<sup>55</sup> Whereas on the one hand the rational consumer succeeds in reforming the infantilised consumer-citizen, on the other it constantly confronts individuals with the stress of choice: comparing offers, avoiding cheating and, more in general, responding to the apparently self-imposed expectation of behaving if not like a good consumer, at least as an average one.<sup>56</sup> This may result in anxiety, chronic uncertainty and, predictably, increasing demands for legal protection.

## The transformative capacity of the rational consumer

It was noted in the previous subsection that the Court of Justice, by confining its rulings to cross-border trade, scales down their impact on states' regulatory autonomy and preserves a degree of regulatory diversity on a national level.<sup>57</sup> Yet, this adjudicative strategy also brings in reverse discriminations which, besides benefiting consumers and relieving the pressure on national governments, may provoke less enthusiastic reactions by the social groups discriminated against. Domestic producers of pasta, for instance, may decide to relocate their business to other member states. Once there, not only can they profit from a more favourable regulatory framework, but they are also in the position of penetrating their originally foreclosed national markets. Other economic players may opt for alternative strategies. Rather than migrating, they can try to voice their interests in their domestic constituency by either lobbying the political circuit or challenging reverse

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<sup>54</sup> In this enabling aspect, the common market project embodies the notion of 'advanced liberalism' discussed in N. Rose, *Powers of freedom* (CUP, 1999), at 141-142.

<sup>55</sup> Chalmers, cit. at nt 53, at 437.

<sup>56</sup> Rose, cit. at nt 7, at 160, speaking of an '... autonomous, responsible subject, *obliged* to make its life meaningful through acts of choice' (Italics added).

<sup>57</sup> C. Barnard and S. Deakin, 'Market Access and regulatory Competition', in C. Barnard and J. Scott (eds), *The Law of the Single European Market* (Hart Publishing, 2002), 197, at 203.

discriminations before national courts.<sup>58</sup> The latter circumstance occurred in Italy a decade after *Zoni* had been decided.

The last chapter of the *Pasta* saga, in fact, takes place where it started, a purely internal situation. In *Pepi and Catto*,<sup>59</sup> an ordinary court was requested to enforce the prohibition on making pasta from ingredients other than durum wheat against domestic manufacturers who had produced pastas containing garlic, parsley and squid ink. The judge, considering the more liberal regulatory regime applying to foreign pastas, decided to refer a question to the Constitutional Court asking whether the different treatment of domestic and imported products was reasonable. Influenced by the ruling in *Zoni*, the Constitutional Court reversed its earlier views on pasta legislation.

Already from the outset, the reasoning shows that after *Zoni* the atmosphere in national quarters had changed. The Constitutional Court conceded that the goals pursued by national legislation and validated in its earlier judgments were difficult to accommodate with EU law.<sup>60</sup> Next, it addressed the core of the case and stressed how the outcome of *Zoni* undermined the competitive position of domestic pasta manufacturers. At this point, the Constitutional Court observed that, according to EU free movement principles, national legislation could still govern purely internal situations. As recognised also by the Court of Justice, in purely internal situations member states were entitled to pursue their industrial policy objectives and, therefore, maintain reverse discriminations.<sup>61</sup> Yet, in this dimension, the legislative remained constrained by the domestic constitutional principles such as equal treatment and the freedom of enterprise.<sup>62</sup> In this respect, the Constitutional Court noted that, however immaterial for EU purposes, the disparity in the treatment of domestic and foreign economic producers mattered for domestic ones. It found that,

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<sup>58</sup> On EU regulatory competition and its practical difficulties, see J-M. Sun and J. Pelkmans, 'Regulatory Competition in the Single Market' (1995) 33 *Journal of Common Market Studies*, 67, at 72-82.

<sup>59</sup> Corte cost., sent. 443/1997, in *Giurisprudenza Costituzionale*, 1997, 3904.

<sup>60</sup> *Ibidem*, paragraph 4.

<sup>61</sup> See, e.g., Case C-237/82, *Jongeneel Kaas BV and others v State of the Netherlands and Stichting Centraal Orgaan Zuivelcontrole* [1984] ECR 483.

<sup>62</sup> *Pepi and Catto*, paragraph 5.

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in the absence of other constitutionally based justifications, the legislative had no choice but to extend to domestic producers the more favourable treatment applying to their foreign competitors.<sup>63</sup> As a result, pasta legislation was outlawed for the breach of domestic constitutional norms.

The turnabout of the Constitutional Court is remarkable. Also in purely internal situations, protectionism and paternalism are replaced by market orthodoxy and freedom of choice. At a closer look, nevertheless, common market principles do not trump national law. Rather, those norms are used to recast the interpretation of constitutional principles in purely internal situations and adapt it to the transnational process of economic integration.<sup>64</sup> The change in domestic constitutional adjudication, in fact, amounts to neither an explicit overruling of its earlier case law on article 41 nor to a substitution of national constitutional principles with EU ones. The trajectory followed by the Constitutional Court is more sophisticated. Its new assessment of pasta legislation consists of a quite conventional application of the principle of equal treatment. What has considerably changed from its prior judgments is the legal context. By removing the obstacles to the import of pasta made from ingredients other than durum wheat, the Court of Justice has opened the national jurisdiction to a broader scenario including the economic interests of outsiders previously overlooked by national legislation. The Constitutional Court did not find valid reasons to defend a legislation which from protective had become detrimental for domestic producers. As a result, it embraced the more liberal solution suggested by its Luxembourg counterpart and extended it also to domestic producers.<sup>65</sup>

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<sup>63</sup> *Ibidem*, paragraph 6.

<sup>64</sup> S. Weatherill, 'Pre-emption, Harmonisation and the Distribution of Competence to Regulate the Internal Market', in Barnard and Scott, *cit.* at nt 57, 41, at 67.

<sup>65</sup> However, it is noteworthy that subsequent legislation, besides incorporating a mutual recognition clause for imported pasta lawfully produced in other member states (art. 48(1), Law 24 April 1998, n. 128), has reintroduced a degree of reverse discrimination by adopting distinct product requirements for pasta made in Italy and intended for the Italian market (Regulation 9 February 2001, n. 187).

## The confident consumer and anxiety

Until now analysis has highlighted how common market principles as construed by the Court of Justice may contribute to the reconfiguration of the domestic approach to consumer protection. However, the transformative capacity of the rational consumer must not be confused with its uncontested primacy. In particular, European policymakers and courts have not turned a blind eye on vulnerability. There are cases in which the Court of Justice has acknowledged the weakness of specific categories of consumers and reinforced through 'equivalence' balance review national measures that genuinely assured their protection.<sup>66</sup> Similarly, EU legislation provides remedies and guarantees vis-à-vis particularly aggressive forms of marketing and trading.<sup>67</sup>

The EU, indeed, does not rely on the information paradigm only. Building a common market is a much broader effort than ensuring access to market or empowering rational individuals. It requires also that the latter actually engage in cross-border shopping, an objective that the EU encourages with policies directed at the 'confident consumer'.<sup>68</sup> Through these initiatives, the focus of the market project shifts gradually from producers to consumers, opening up a new regulatory scenario. Consumer protection is not just about increasing individuals' freedom of choice, although it continues to build upon that notion. For consumers to become confident and actually exercise their freedom of choice, they also need to be reassured as to the reliability of the common market as a space for convenient and effective transactions.<sup>69</sup> Moreover, their need for assurances extends well beyond economic risks and involves other potential threats to human health such as the spread of diseases or the use of dangerous substances. In addressing similar concerns, the EU embarks on political administration and the government of risk.<sup>70</sup> In this respect, the

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<sup>66</sup> See, e.g. Case C-382/87, *Buet v Ministère Public* [1989] ECR 1235.

<sup>67</sup> Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ L 372, 31.12.1985, 31-33.

<sup>68</sup> *Weatherill*, cit. at nt 45, at 461-464.

<sup>69</sup> N. Reich, 'Economic law, consumer interests and EU integration', in H-W. Micklitz, N. Reich and P. Rott (eds), *Understanding EU Consumer Law* (Intersentia, 2009), 1, at 16.

<sup>70</sup> D. Chalmers, 'Risk, anxiety and the European mediation of politics of life' (2005) *European Law Review*, 649, at 651.

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confident consumer also raises challenging questions. To what extent is the promotion of consumers' confidence on the functioning of the common market worth pursuing over other rival values? To what extent should consumers be reassured as to real or virtual threats?

The *Hormones* saga offers an emblematic representation of such quandaries. Since the 1980s the European Community had taken up a rather sceptical approach to the use of hormones in livestock farming.<sup>71</sup> Previously, member states' views on the issue diverged and different regulatory regimes applied throughout Europe. In certain countries, the adoption of restrictive rules reflected consumers' widespread distrust of the health effects of hormones. Other states enforced more liberal rules. Strongly pressured by consumer and environmental groups as well as by the first directly elected European Parliament, the Commission and the Council decided to regulate the matter by laying down a uniform legislation based on a high standard of health protection. Thus, despite the prevalent opinion of scientific experts that hormones, if properly administered, are safe, a limited<sup>72</sup> and, later, wide-ranging<sup>73</sup> ban on their use in livestock farming was eventually enacted.

The newly introduced legal regime met with both external and internal opposition. Outside Europe the main opponent was the US, where hormones are widely used in the cattle sector. At the FAO/WHO Codex Alimentarius Commission the US engaged with the EU in negotiations, but no agreement was reached. The dispute also appeared intractable at a GATT level, ending up in US retaliation against EU exports. Ultimately, an agreement on a partial lift of the ban on US 'hormone-free' beef was reached but, apart from that, the affair remained largely unresolved.

Inside Europe, beef producers, importers and pharmaceutical companies mobilised against the ban and, at the end of that decade, made their way to the Court of

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<sup>71</sup> On the background of the beef-hormone dispute, see T. Josling, D. Roberts and A. Hassan, 'The Beef-Hormone Dispute and its Implications for Trade Policy', Stanford University, European forum WP, 1999, <<http://iis-db.stanford.edu/pubs/11379/HORMrev.pdf>> (last consulted December 2010), at 3-9.

<sup>72</sup> Council Directive 81/602/EEC concerning the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action, OJ L 222, 7.8.1981, 32-33.

<sup>73</sup> Council Directive 88/146/EEC, prohibiting the use in livestock farming of certain substances having a hormonal action, OJ L 70, 16.3.1988, 16-18.



Justice.<sup>74</sup> In *Fedesa*,<sup>75</sup> the directive prohibiting hormones administration was challenged on several grounds but, for our purposes, two aspects are worth considering in particular.

Firstly, the plaintiff argued that the directive lacked an adequate scientific basis. In this regard, the Court of Justice found that the measure at issue involved a complex economic and political situation.<sup>76</sup> Accordingly, its judicial review ought only to examine 'whether the measure in question [was] vitiated by a manifest error or misuse of powers, or whether the authority in question [had] manifestly exceeded the limits of its discretion'. On this point, the Court observed that science was inconclusive on the safety of hormones and that divergences in national legislations reflected that contentious debate. As a consequence, in regulating the use of hormones the Council enjoyed broad discretionary powers, which it had not manifestly exceeded. On the contrary, by adopting a general prohibition, the Council had responded to the concerns expressed in turn by the European Parliament, the Economic and Social Committee and consumer organisations<sup>77</sup> – a conclusion reaffirmed soon after when the Court noted that divergences in national legislations were such that one could not reasonably expect the EU directives to rely on scientific data alone.<sup>78</sup>

A rather similar outcome was reached also by reviewing the proportionality of the EU measure. Here, the Court of Justice appeared to endorse a rather strict standard of adjudication including all the canonical steps of proportionality test. Yet, as a matter of fact, the Court applied a light-touch review.<sup>79</sup> Confronted with the arguments of the plaintiff, the Court replied first of all that a complete ban on hormones was not manifestly inappropriate in regulating the beef market and,

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<sup>74</sup> Previous challenges had been dismissed due to applicants' manifest lack of *locus standi*. See, e.g., Case 34/88, *Coopérative agricole de l'Anjou et du Poitou (Cevap) and others v Council* [1988] ECR 6265.

<sup>75</sup> Case C-331/88, *The Queen v The Minister of Agriculture, Fisheries and Food and the Secretary of State for Health ex parte: Fedesa and others* [1990] ECR I-4023.

<sup>76</sup> For a survey on the complex web of interests involved in the regulation of hormones, see the Opinion of AG Mischo, paras 15-16.

<sup>77</sup> *Fedesa*, paragraphs 8-9.

<sup>78</sup> *Ibidem*, paragraph 10.

<sup>79</sup> *Ibidem*, paragraphs 13-14.

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actually, was easier and cheaper to supervise than a system of partial authorisation.<sup>80</sup> Then, it went on to observe that no less restrictive measures were available to achieve the same level of protection afforded by the directive at issue. Notably, it pointed out that dissemination of information to consumers and labelling of meat were not sufficient measures in allaying consumers' anxieties.<sup>81</sup> Finally, the Court of Justice affirmed that the protection of human health could justify the negative financial repercussions suffered by certain traders.<sup>82</sup>

Overall, such an outcome may seem somewhat puzzling. Reshaped in the member states, at an EU level consumer protection unexpectedly reveals traits echoing some of the most out-of-date domestic sensibilities documented by cases like *Moja*. Faced with the political decisions of national governments and the European Parliament, the Court of Justice adheres to deferential standards of review.<sup>83</sup> Accordingly, it reinforces legislative measures that, however supported by broad political consensus, probably overlooked scientists' contributions. That leads to a quite startling conception of consumer protection. Relentlessly preached to national legislators, freedom of choice and its corollaries of labelling and information appear suddenly ill-suited measures to cope with the risks associated with the food market.

The thing is that with the legislative ban the EU responds to concerns expressed by its consumers over the safety of hormones with a view to restoring their confidence in the meat market after a few episodes in which the administration of hormones had seemed the cause of severe diseases. Protectionism is not a meaningful issue in that dispute. Unlike pasta legislation, the EU measures did not amount to disguised barriers to trade protecting European beef producers.<sup>84</sup> Rather, if anyone captures the regulator in *Hormones*, those are the 'anxious consumers',<sup>85</sup> another of the identities

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<sup>80</sup> *Ibidem*, paragraph 15.

<sup>81</sup> *Ibidem*, paragraph 16.

<sup>82</sup> *Ibidem*, paragraph 17.

<sup>83</sup> J. Corkin, 'Science, legitimacy and the law: regulating risk regulation judiciously in the European Community' (2008) *European Law Review*, 359, at 363.

<sup>84</sup> This will be acknowledged by the WTO Appellate Body, see *EC Measures Concerning Meat and Meat Products (Hormones)*, Appellate Body Report, WT/DS26 and WT/DS48/AB/R/CAN, 16 January 1998, at paragraph 245.

<sup>85</sup> Josling and others, *cit.*, at 34.

populating EU policymaking and adjudication.<sup>86</sup> The judgment in *Fedesa* is probably the best example to account for this more obliging approach of EU law. In that ruling the Court of Justice upholds the EC ban on hormones regardless of its shaky scientific grounds. EU policy-making had been seized by consumers groups and their politics of fear does not find any serious constraint on the part of the Court of Justice. In its judgment, the information paradigm and labelling no longer appear as the panacea, and no objections are raised to the fact that anxious consumers end up being the only constituency represented in hormones legislation.

Beyond the merit of that dispute, this attitude places risk regulation before a thorny dilemma. On the one hand, policy responses to marginal or hypothetical risks may back up and even amplify popular prejudice, providing further incentive to special interests to promote both the fear and the corresponding response.<sup>87</sup> On the other, while the utility of EU directives in reducing the risks associated with the use of hormones may be disputed, the same cannot be said for their contribution to ensuring consumers' psychological security, a public good that both markets and the government of risk cannot easily disvalue.<sup>88</sup>

### **Between the technocratic paradigm and the judicious consumer**

Such dilemma will be of central relevance in the WTO segment of the *Hormones* litigation. With the entry into force of the Marrakech Agreement, the *Hormones* dispute resumed on an international level in the newly established WTO legal

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<sup>86</sup> There are clear similarities between the infantilised and anxious consumer in that both are patronised by public powers with a view to prevent real or virtual hazards associated with choice, and both could be reformed by regulatory strategies inspired to the rational consumer. Notwithstanding this analogy, a critical difference concerning their prevailing regulatory demands remains: whereas the infantilised consumer is likely to be interested in more choice and emancipation from regulatory constraints, the anxious one is more likely to request protection from the risks that choice could entail.

<sup>87</sup> H. F. Chang, 'Risk Regulation, Endogenous Public Concerns, and the Hormones Dispute: Nothing to fear But fear Itself?' (2003) 77 *South California Law Review*, 743, at 774.

<sup>88</sup> R. Howse, 'Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization' (2000) 98 *Michigan Law Review*, 2329, at 2350. Restoring consumers' confidence has been recognised as legitimate policy objective also by the Court of First Instance in Case T-13/99, *Pfizer Animal Health SA v Council* [2002] ECR II-3305, paragraph 462.

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framework. In that context, two important reforms had been introduced since the earlier controversies under the GATT. Firstly, an *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS) had been approved. Such a treaty spells out a set of regulatory principles on food safety accommodating states' political autonomy with other objectives such as the protection of human health and free trade. Accordingly, WTO members retain their right to adopt sanitary measures but, in order to avert protectionism, they are expected to rely on science.<sup>89</sup> Secondly, a reformed system of dispute settlement had been established with a view to improving the enforcement of WTO regulatory principles. Enticed by such innovations, the US and Canada reopened their hostilities against the EU ban on hormones.<sup>90</sup>

In a first review undertaken by the Panel, the EU directives received a rather harsh treatment and were found to be in breach of several SPS provisions.<sup>91</sup> At the outset, the Panel noted that the EU measures did not conform to the relevant technical standards contained in the recommendations of the Codex Alimentarius Commission. Notably, significant discrepancies were found between the no residue level of hormones administered for growth purposes allowed in meat by the EU and the limited and unlimited levels of, respectively, synthetic and natural hormones permitted by international standards.<sup>92</sup> Confronted with this discrepancy, the Panel stressed the need for the EU to justify the higher level of protection in its measures. In this respect, the directives were found to be lacking a sufficient scientific basis.<sup>93</sup> In its review of risk assessment, the Panel held that the EU had not observed both the procedural and substantive requirements mandated by the SPS agreement. Scientific evidence had not been cited in the preambles of the directives where, conversely, the

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<sup>89</sup> Article 2 SPS.

<sup>90</sup> In the meantime, the EC ban had been confirmed and extended by Directive 96/22/EC, concerning the prohibition on the use in stock farming of certain substances having a hormonal or thyrostatic action and of  $\beta$ -agonists, and repealing Directives 81/602/EEC, 88/146/EEC and 88/299/EEC, OJ L 125, 23.5.1996, 3-9.

<sup>91</sup> *EC Measures Concerning Meat and Meat Products (Hormones)*, Report of the Panel, WS/DS26R/USA, 18 August 1997.

<sup>92</sup> *Ibidem*, paragraphs 8.75-8.76.

<sup>93</sup> *Ibidem*, paragraphs 8.113-8.114 and 8.137.

opinions of the EU political bodies appeared undisputed.<sup>94</sup> Then, contradictions were noted also between the outright prohibition of hormones and the more benign scientific studies submitted by the EU to the attention of the Panel.<sup>95</sup>

On the top of that, the EU measures were also found to be illegal on consistency grounds. Article 5.5 SPS requires that WTO members adopting higher standards of health protection avoid arbitrary or unjustifiable distinctions between equivalent sources of risk which might result in disguised restrictions on international trade. In this regard, after a comparative assessment between the treatment of natural and synthetic hormones administered for growth promotion, natural hormones occurring endogenously in meat and other foods and growth promoters, the EU measures were declared inconsistent.<sup>96</sup> The EU, as a result, was found to be in breach of its WTO/SPS obligations and was advised by the Panel to consider alternative and rather familiar instruments of consumer protection: '[...] we are aware that in some countries where the use of growth promoting hormones is permitted in beef production, voluntary labelling schemes operate whereby beef from animals which have not received such treatment may be so labelled'.<sup>97</sup>

A negative appraisal of the EU ban on hormones emerged also from the scrutiny of the WTO Appellate Body.<sup>98</sup> Admittedly, in the report of the latter several of the Panel's findings on crucial aspects such as the allocation of the burden of proof, the role of international standards under the SPS agreement, the interpretation and methodology of risk assessment and consistency review were reversed. Nonetheless, the absence of an adequate scientific basis in the directives was confirmed.<sup>99</sup> Indeed, the Appellate Body found that the EU had not carried out a complete risk assessment of the risks arising from the failure to observe good veterinary practices in the administration of hormones. As a result, the obliging attitude of the EU towards the anxieties of its consumers was again penalised. In that ruling, the role of scientists'

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<sup>94</sup> Ibidem, paragraph 8.114.

<sup>95</sup> Ibidem, paragraphs 8.134 and 8.137.

<sup>96</sup> Ibidem, paragraphs 8.245 and 8.270.

<sup>97</sup> Ibidem, paragraph 8.274.

<sup>98</sup> *EC Measures Concerning Meat and Meat Products (Hormones)*, Appellate Body Report, cit. at nt 84.

<sup>99</sup> Ibidem, paragraphs 207-208.

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contributions in particular gained important support. The Appellate Body, in fact, recognised that science can be inconclusive. But differently from the Court of Justice in *Fedesa*, it found that experts' disagreement cannot be an excuse for political institutions to bypass scientific opinions. To be sure, WTO members retain important margins of discretion but, in defining the desired level of protection and devising their regulatory measures, they are expected to take into account scientific opinions coming from qualified and respected sources.<sup>100</sup>

Faced with measures enacted under the influence of consumers' anxiety, the WTO reaction is a call for technocracy. Yet, if it may be conceded that populist responses to anxiety are flawed, neither do their technocratic alternatives seem entirely satisfactory. Anxious consumers are not prone to being easily converted into rational ones through information or regulatory solutions in which science ultimately trumps self-government. However, this is the strategy inspiring both the Panel and the Appellate Body reports.<sup>101</sup> According to the former, political and social arguments may be taken into account at the stage of risk management, in setting the desired level of health protection.<sup>102</sup> But once that is defined, regulatory autonomy calls for scientific validation, stemming from both the procedural and substantive requirements associated with risk assessment.

Although rejecting such solution, the Appellate Body does not introduce a conceptual break with the Panel's approach. True, in discussing risk assessment the Appellate Body concedes that science is inherently controversial and that, therefore, it is for political institutions to pick out among the available scientific studies the one that seems most convincing. But despite this significant specification of governments' obligations, regulatory autonomy is not exempted from scientific support. Regulators may have regained important margins of political discretion but, in the end, they still

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<sup>100</sup> Ibidem, paragraph 194.

<sup>101</sup> Admittedly, one could note that had article 5.7 SPS on the precautionary principle be argued in the *Hormones* dispute, the WTO adjudicative outcome might have been remarkably different and upheld the EU measure. Yet, in a quite controversial passage the Appellate Body points out that in the SPS Agreement the precautionary principle has not been inserted to justify otherwise inconsistent measures and, notably, cannot override the provisions on risk assessment (Ibidem, paragraphs 124-125).

<sup>102</sup> *EC Hormones*, Panel Report, cit. at nt 91, paragraph 8.97.

require science to justify their decisions. As a consequence, even the more nuanced solution of the Appellate Body is ultimately about science patronising politics and infantilising, though in a technocratic perspective, those consumers who, notwithstanding science, may legitimately maintain a sceptical attitude and prefer the regulatory status quo.<sup>103</sup>

This calls for an intermediate position between populism and technocracy and, possibly, an alternative identity from those unproductively confronting each other in the *Hormones* litigation. Arguably, risk regulation could try out regulatory strategies recognising and shaping a 'judicious consumer'. The latter, like the anxious consumer and the citizen consumer, cherishes self-government and political freedom. Nonetheless, similarly to the rational consumer, she relies also on science or, at least, expects that in regulating risks her representatives are thoroughly informed about the relevant scientific researches and debates. Science, however, is regarded as serving political decisions and, as such, it cannot pre-empt democracy. Accordingly, regulations protecting judicious consumers can legitimately address only well-informed anxieties, that is, concerns that have been the object of deliberation in the light of available scientific contributions. Notwithstanding this procedural step, self-government and politics keep the last word, which implies that protective measures may be ultimately enacted even without the validation of any expert.<sup>104</sup>

### Reforming the anxious consumer?

At this juncture, the *Hormones* saga proceeds on a bifurcated path. At the WTO level, the EU was given 15 months to comply with the recommendations of the Dispute Settlement Body (DSB). Exchanges between EU and US officials and experts concerning the standards of enforcement of US veterinary programs were conducted

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<sup>103</sup> J. Scott, 'On Kith and Kine (and Crustaceans): Trade and Environment in the EU and WTO', in J. H. H. Weiler (ed), *The EU, the WTO and the NAFTA - Towards a Common Law of International Trade?* (OUP, 2000), 125, at 157.

<sup>104</sup> Howse, cit. nt 88, at 2330.

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in that period but, after repeated reports of abuses in the use of hormones,<sup>105</sup> the ban was not lifted and the deadline expired unsuccessfully. In 1999, the DSB authorised the US and Canada to impose retaliatory measures on EU imports. In the meantime, the EU commissioned further scientific research on the health risks related to the administration of hormones and, on that basis, a new directive allegedly complying with the DSB recommendations was adopted.<sup>106</sup> In the new text, the ban on hormones was retained, although backed by a more comprehensive risk assessment.<sup>107</sup> Predictably, the US and Canada regarded the new directive as merely perpetuating a twenty-year violation of international trade law and refused to lift their trade sanctions. As a response, the EU brought the dispute before the WTO adjudicative bodies. In this further stage, litigation involved procedural issues concerning the interpretation of the DSU and the scientific basis of the new legislation. In reviewing the new directive, the Panel embraced a strict scrutiny test and concluded that the EU had not complied with its SPS obligations on risk assessment and the precautionary principle.<sup>108</sup> This finding was later reversed by the Appellate Body, which established that the Panel was not entitled to conduct *de novo* review and substitute its scientific judgment to that of the risk assessor.<sup>109</sup> In this vein, it maintained that the EU was not required to observe conventional science, leaving room for the adoption of more contextualised risk assessments related to the chosen level of protection.<sup>110</sup> However, even after the ruling of the Appellate Body it remained unclear whether the EU directive relied on an appropriate risk assessment.<sup>111</sup> Thus, the *Hormones* saga continued at a diplomatic level, being temporarily settled with a memorandum of understanding whereby the US agreed to

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<sup>105</sup> For a detailed analysis, see C. Joerges, 'Law, Science and the management of Risks to Health at the National, European and International Level – Stories on Baby Dummies, Mad Cows and Hormones in Beef' (2001) 7 *Columbia Journal of European Law*, 1, at 11-14.

<sup>106</sup> Directive 2003/74/EC amending Council Directive 96/22/EC concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and of beta-agonists, OJ L 262, 14.10.2003, 17-20.

<sup>107</sup> *Ibidem*, preamble 3-10.

<sup>108</sup> *Canada – Continued Suspension of Obligations in the EC-Hormones Dispute*, Report of the Panel, WT/DS321/R, 30 March 2008.

<sup>109</sup> *Canada – Continued Suspension of Obligations in the EC-Hormones Dispute*, Report of the Appellate Body, WT/DS321/AB/R, 14 November 2008, paragraph 590.

<sup>110</sup> *Ibidem*, paragraph 591.

<sup>111</sup> The Appellate Body considered that there were not sufficient factual findings to complete the review on the consistency of the EU directive (*Ibidem*, paragraphs 620 and 735).



reduce the sanctions imposed on EU products and the EU offered better market access for high-quality beef.<sup>112</sup>

After the original rulings of the WTO adjudicative bodies, the *Hormones* dispute was resurrected at an EU level in the form of a liability action before the Court of First Instance. In *Biret*,<sup>113</sup> a French company challenged the Council claiming damages ensuing from the prohibition on importing veal and beef from the US.<sup>114</sup> Notably, the company urged the Court to conform to the ruling of the Appellate Body and, namely, to acknowledge that also for EU purposes the directives on the ban of hormones breached the SPS agreement. The Court dismissed the claim.<sup>115</sup> In accordance with the case law on the domestic status of WTO norms,<sup>116</sup> the Court held that SPS regulatory principles could not be successfully invoked in the EU legal order. Given that it was impossible to declare the directive illegal on these grounds, the first and essential requirement for a finding of liability for unlawful conduct was missed and compensation could not be awarded.

This verdict was confirmed in appeal, although on different grounds.<sup>117</sup> Here, the Court of Justice appeared in principle open to the idea of recognising direct effect to the WTO rulings after the expiry of the reasonable period of time for their implementation.<sup>118</sup> Yet, in the case at issue the damages claimed by the appellant had occurred prior to that date and, therefore, the action was equally dismissed.<sup>119</sup>

Compared with the *Pasta* litigation, the capacity of the WTO bodies for reforming the anxious consumer is much more limited. Even in the most recent version of its legislation, the EU maintains an obliging attitude towards its consumers, no matter if their anxieties have uncertain scientific foundations or could be met through less

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<sup>112</sup> *EC Measures Concerning Meat and Meat Products (Hormones)*, Joint Communication from the European Communities and the United States, WT/DS26/28, 30 September 2009, <[http://trade.ec.europa.eu/doclib/docs/2009/november/tradoc\\_145357.pdf](http://trade.ec.europa.eu/doclib/docs/2009/november/tradoc_145357.pdf)> (last consulted December 2010).

<sup>113</sup> Case T-144/00, *Biret International SA v Council* [2002] ECR II-17.

<sup>114</sup> The plaintiff claimed the damages resulting from Directives 81/602, 88/146 and 96/22.

<sup>115</sup> *Biret*, paragraphs 60-68.

<sup>116</sup> Joined Cases C-21-24/72, *International Fruit Company* [1972] ECR 1219 and Case C-149/96, *Portugal v Council* [1999] ECR I-8395.

<sup>117</sup> Case C-93/02 P, *Biret International SA v Council* [2003] ECR I-10497.

<sup>118</sup> *Ibidem*, paragraph 62.

<sup>119</sup> *Ibidem*, paragraphs 63-64.

## Assembling the fractured European consumer

restrictive measures. Many factors contribute to such an outcome. Firstly, the WTO system of remedies creates insufficient incentives to comply with SPS obligations, particularly in cases like *Hormones* where risk regulation is highly politicised. Secondly, the doctrines of the Court of Justice on the status of WTO obligations almost completely obstruct the penetration of international trade principles into the EU legal system, even when adjudicated by the Appellate Body.<sup>120</sup> Thus, if EU political institutions perceive the enforcement of SPS obligations as pre-empting their margins of regulatory discretion, they can recoup them through selective exit strategies. Consequently, the transformative potential of WTO obligations is bound to remain unexpressed alongside the chance of curbing possible abuses by EU institutions.

## The challenges of the European fractured consumer

Target of competing legal regimes pulling in different directions, the European consumer could not but give rise to a fractured subjectivity. Depending upon variable circumstances in policymaking and adjudication – such as the existence of cross-border elements in disputes, the adoption of EU legislation, the standards of judicial review employed and the rules of engagement between legal systems – consumers may in turn be patronised by protectionist or technocratic governments, enabled to make rational choices, protected from real or virtual hazards and even allowed to express political preferences. As long as the interactions between Europe's regulatory strategies remain fluid and, ultimately, unsettled,<sup>121</sup> identities

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<sup>120</sup> The opening of the Court of Justice in *Biret* has been reversed in later cases such as Joined cases C-120/06 P and 121/06 P, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Others v Council and Commission and Giorgio Fedon & Figli SpA and Others v Council and Commission* [2008] ECR I-6513.

<sup>121</sup> D. Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in J. Dunoff and J. Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (CUP, 2009), 326.

are bound to coexist, compete and alternate, thus emphasising the functional diversity inherent in European legal pluralism.<sup>122</sup>

Admittedly, the absence of a single or, at least, dominant regulatory strategy of consumer protection may seem regrettable insofar as it leaves regulators and adjudicators exposed to rival claims of legal authority and, apparently, short of a shared and stable conceptual framework. Still, viewed as a whole, a system relying on competing legal regimes of subjectification may turn out to be more attractive than a single coherent institutional setting purporting a unified and stylised conception of the consumer. With its array of identities, indeed, the European fractured consumer gives sophisticated legal expression to that highly problematic entity that is the contemporary consumer.<sup>123</sup> By representing the latter contingent human condition and varying regulatory demands, not only does it offer a more articulate set of conceptual coordinates for structuring policymaking and adjudication, but it also contributes to a more accurate alignment of the European system of government with the actual nature of the individuals subject to its rule.

Nevertheless, the discovery of the hidden virtues of European legal pluralism must not be equated with an unconditional defence of the regulatory status quo. Appealing at an analytical level, the fractured consumer also raises a number of normative issues, chief among them what could be named the problem of the deterioration of identities. The excursus provides broad empirical evidence of this phenomenon. It was noted for instance in *Pasta* that regulatory strategies conceived for maximising citizens' political rights may end up infantilising consumers and narrowing their freedom of choice. Likewise, in *Hormones*, policies bolstering the confidence of individuals in the common market were conducive to obliging attitudes to anxiety and politics of fear. In short, each regulatory strategy is exposed to the constant risk of amplifying its inbuilt biases – an occurrence that if materialised may bring about an excessive tightening of identities, the transformation of their partiality in assertiveness and, ultimately, intractable conflicts

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<sup>122</sup> M. Dani, 'Constitutionalism and Dissonances: Has Europe Paid Off its Debt to Functionalism?' (2009) 15 *European Law Journal*, 324, at 343.

<sup>123</sup> P. Miller and N. Rose, *Governing the present* (Polity Press, 2008), at 119.

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between regimes of subjectification. So, how should regulatory biases be handled? And how should the deterioration of identities be prevented?

Here, the management of subjectivity faces a dual challenge concerning transparency and structural change. If it may be conceded that in many instances bias cannot be eliminated, it may also be maintained that it can be rendered more transparent and, at times, countered with competing biases.<sup>124</sup> This invites some reconsideration on how the fractured consumer is assembled in adjudication and policymaking. It may be asked, for instance, whether in coping with competing regulatory strategies, synergies between them may be devised that may counter the deterioration of identities. Moreover, questions may arise as to whether the judicial reasoning actually employed in adjudicating consumer protection cases adequately illustrates the policy alternatives and the substantive stakes at hand. Finally, it may also be asked whether the arguments employed in judicial review offer persuasive justifications for the decisions inspiring the selection or accommodation of identities.

In this respect, the picture emerging from *Pasta* and *Hormones* is a mixed one. Interestingly, at several stages the excursus has documented the possibility of convergent regulatory outcomes and constructive synergies between legal regimes of subjectification. Policies empowering rational consumers can effectively prevent their infantilisation resulting from unconstrained majoritarian democratic rule.<sup>125</sup> The neglect of vulnerability associated with a rigid application of pro-choice strategies may be contrasted by policies acknowledging the limits of the information paradigm.<sup>126</sup> Similarly, measures genuinely aimed at improving nutritional value and the quality of food can be an antidote to an aggressive enforcement of free movement principles.<sup>127</sup> Finally, the degeneration of the confident consumer into an anxious one may also be tackled by either a renewed commitment to rationality and

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<sup>124</sup> J. H. H. Weiler, 'Epilogue: "Comitology" as revolution – Infranationalism, Constitutionalism and Democracy', in C. Joerges and E. Vos (eds), *EU Committees: social regulation, law and politics* (Hart Publishing, 1999), 339, at 349.

<sup>125</sup> See *Zoni* and *Pepi and Catto*.

<sup>126</sup> See *Fedesa*.

<sup>127</sup> MacMaoláin, cit. at nt 40, at 221-223.

science<sup>128</sup> or, possibly, policies empowering the judicious consumer. In sum, *Pasta* and *Hormones* evoke a broader reality in which the regulatory strategies making up European legal pluralism may exert disciplinary effects on each other, counter their possible biases and induce, through a practice of latent conflict, structural changes at all levels.<sup>129</sup> In this view, the notion of a division of labour between European legal systems<sup>130</sup> and, as a reflection, relationships between them based on the idea of functional complementarity<sup>131</sup> emerge as an attractive agenda to organise at an interpretive level the interactions between competing regulatory strategies and, for our more narrow purposes, avoid the deterioration of consumers' identities.

To fulfil this task, European courts may offer a key contribution. As repeatedly shown in the excursus, when deciding cases at the intersection between legal systems, courts represent the normative claims of their native legal systems with their corresponding regimes of subjectification. In addition, they are also in the position of engaging with the claims of their counterparts operating in related legal systems. Viewed from the angle of the fractured consumer, this function gains remarkably in perspective. Transnational adjudication is not just a process where courts passively witness the struggle for hegemony of consumers' identities. Those disputes challenge the courts to articulate the terms of that competition and, where possible, devise synergies in the light of their functional complementarity.<sup>132</sup> In this view, what may initially appear as the static opposition between the normative claims underlying rival identities can be reframed as an unfolding narrative across jurisdictions in which courts may be expected to regain at an argumentative level the coherence<sup>133</sup> threatened by legal pluralism.<sup>134</sup> Considering these high stakes,

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<sup>128</sup> See the Panel and Appellate Report in *Hormones*.

<sup>129</sup> N. Krisch, *Beyond Constitutionalism* (Oxford University Press, 2010), at 85-89.

<sup>130</sup> R. O. Keohane, S. Macedo and A. Moravcsik, 'Democracy-Enhancing Multilateralism' (2009) 63 *International Organization*, 1, at 9-22.

<sup>131</sup>G. Majone, 'The common sense of European integration' (2006) *Journal of European Public Policy*, 607, at 619, arguing the notion of 'distinctive institutional competence'.

<sup>132</sup> The duty of courts to take into account outside interpretive and normative claims may be grounded in both the integration clauses included in national constitutions and the reference to national constitutional identities introduced in article 4(2) TEU. I have argued this position more in detail in M. Dani, 'Intersectional litigation and the structuring of a European interpretive community' (2010) *International Journal of Constitutional Law* (forthcoming).

<sup>133</sup> L. Moral Soriano, 'A Modest Notion of Coherence in Legal reasoning. A Model for the European Court of Justice' (2003) *Ratio Juris*, 296.

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alongside the risk of deadlock and conflict if this fundamental dynamic were not sufficiently grasped, it is all the more important to assess what adjudication delivers in practice.

It is at this point that the excursus reveals its less gratifying side. This is not only because in quite a few instances the substantive outcomes of the cases reviewed may raise some eyebrows. Even more worrying is the process through which those outcomes are reached and, notably, the transparency and intelligibility of legal reasoning. In the vast majority of rulings, the most common adjudicative paradigm seems to be judicial unilateralism, and the indistinct use of the rhetoric of proportionality its technical concretisation. Despite the multiple ramifications of the *Pasta* and *Hormones* disputes, judicial reasoning follows prevalingly introverted patterns. Coherence and integrity are sought only in the internal dimension of the legal system through almost exclusive references to courts' own precedents and doctrines. As a result, only from such an internal perspective the outcomes and arguments of rulings may seem persuasive. Yet, once the focus is widened to include the perspective of other regimes of subjectification, the contents of the same rulings are far from ideal and questions may be asked as to why judges have discarded potentially substitute identities. In legal reasoning traces of outside interpretive and normative claims are indeed scarce, and also previous judgments on the same or similar issues by courts belonging to related legal systems are frequently overlooked. Not only are references to those cases almost invariably omitted, but also discussion of their interpretive and normative claims is absent. To be sure, it can certainly occur that in their reasoning courts engage with arguments echoing those formulated by their counterparts. Yet, if that happens, they seem reluctant to acknowledge this explicitly and conceive their contribution to litigation as part of a broader coordinated judicial effort. A similar style of adjudication boils down to judgments apparently in denial of the high normative stakes inherent in those disputes. As a result, courts may be on the whole successful in expressing the original identities sustained by their legal systems. However, in failing to engage with the claims of

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<sup>134</sup> P. Eleftheriadis, 'Pluralism and Integrity' (2010) 23 *Ratio Juris*, 365.

other courts, they fail to articulate the competition between the legal regimes of subjectification, ultimately bringing about a series of argumentatively segmented rulings.

This calls for a more transparent and, on the whole, more ambitious style of adjudication in which courts enrich the interpretive and normative claims of their native legal systems with the discussion of outside competing claims. Put differently, assembling the fractured consumer in adjudication requires courts to address more openly normative issues such as the intrinsic value, the potential for deterioration and the transformative capacity of the identities posited by both their native and outside legal systems. All this may be achieved at an argumentative level by interfacing judgments and judicial reasoning. To establish a similar *modus operandi*, courts should first of all affirm the identities associated with their native legal system.<sup>135</sup> At the same time, they should also conceive of themselves as parts of a transnational interpretive community sharing a common interpretive strategy to handle the disputes arising at the intersection of their legal orders. Such a strategy would not primarily pursue changes in the final outcomes of adjudication, although interesting implications could be envisaged also in that regard. Its main goal would be improving the quality of legal reasoning by instilling in each court a discipline of recognition and discussion of rival claims proffered by their counterparts. With this in mind, an initial proposal on how to assemble the fractured consumer in adjudication can now be advanced, alongside the implications that its adoption might have had in *Pasta* and *Hormones*.

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<sup>135</sup> M. Poiares Maduro, 'Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism', in Dunoff and Trachtman, cit. at nt 121, 356, at 373.

## **Assembling the fractured European consumer**

### Assembling the fractured consumer in adjudication

#### **From identities to a common interpretive strategy**

Fitting together the multiple identities of the European consumer in a coherent entity may well be considered a daunting task. The competition between regulatory strategies not only defies the very notion of devising a unified and sufficiently stable subjectivity but also challenges the prospect of capturing the contingent status of the consumer in judicial reasoning. Yet, at a closer look, the impediments of legal pluralism are not as insurmountable as they may initially seem. This is not tantamount to saying that the fragmentation of the legal regimes of subjectification can be transcended or that the identities making up the fractured consumer may be ordered or subsumed in an all-encompassing and reconciled super-entity. The task of assembling the fractured consumer cannot evade the reality of legal pluralism but, on the contrary, it is required to do the best by it. Indeed, it is precisely on a correct understanding of the dynamic inherent in European legal pluralism that an attempt to establish a higher degree of coherence and stability in the processes of subjectification can be pursued.

The above analysis of the relationship between identities and their underlying regulatory strategies may illuminate this crucial passage. As noted, as things currently stand in Europe – and, most importantly, as confirmed by realist accounts of the consumers' human condition – the claim of no legal regime of subjectification can be exclusively upheld because none of them has the independent status that would make its normative claims self-sufficient. That is why their competition is not meant to be solved once and for all or to be reconciled in a comprehensive constitutional framework promoting a unified notion of consumer.<sup>136</sup> Conflicts between identities are there to be experienced routinely for the good they can yield, and any attempts to promote a dominant referent for consumer protection may be suspected of bias. In sum, the challenge of assembling the fractured consumer can be

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<sup>136</sup> As observed by Everson and Joerges, cit. at nt 14, at 160, '... the law should never claim to have identified one final and 'legitimate' ideal-type consumer'.



best tackled at an argumentative level by construing contingent harmonies out of dissonances resulting from the interaction of its identities – an objective that could be attained through convergent practices of adjudication conceived in the light of the functional complementarity between the European legal regimes of subjectification.

If this could constitute the general conceptual framework inspiring courts adjudicating in different jurisdictions, now it needs to be translated into a more operational interpretive strategy. At this more practical level, the multiplicity and incommensurability of European legal languages seem to clash with the core idea of common transnational interpretive efforts. A shared legal practice based more on rational persuasion and mutual engagement than on authority implies that courts recognise others' claims, take into account each other's perspectives and incorporate outside arguments into their judgments.<sup>137</sup> This calls into question the plurality of European legal languages since recognition, discussion and incorporation of counterparts' views are all operations that postulate if not a common medium, at least the possibility to communicate and interface claims conceived and framed in particular legal contexts. In promoting competing regulatory strategies, instead, European legal pluralism seems to preclude from the outset the possibility of developing argumentative ties between judicial rulings. It is at this juncture, however, that our insight on *Pasta* and *Hormones* may offer interesting elements of reflection and downplay initial difficulties with European legal pluralism. Upon closer investigation, in fact, the incommensurability of legal languages is only relative insofar as it has essentially to do with the stage of qualification of disputes. As noted, when it comes to defining the facts of a case and the interests at issue, courts draw from varying descriptive apparatuses reflecting, in turn, the fundamental rights, common market and international trade law projects. However, disputes on consumer protection are rarely decided at qualification. In the enforcement of both constitutive and regulatory principles, broad scope is left to proportionality review. Although also in this respect courts tend to adopt

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<sup>137</sup> L. B. Tremblay, 'The legitimacy of judicial review: The limits of dialogue between courts and legislatures' (2005) 3 *International Journal of Constitutional Law*, 617, at 630-634, and J. H. H. Weiler, 'Epilogue: The Judicial Après Nice' in G. de Búrca and J. H. H. Weiler, *The European Court of Justice* (OUP, 2001), 215, at 225.

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remarkably different standards of adjudication, the framework of proportionality emerges as the closest thing to a common language that they can employ to establish a degree of mutuality in their interpretative efforts.<sup>138</sup> In fact, standards of adjudication are not rigidly mandated by legal texts and courts enjoy important margins of discretion in that regard. This is of paramount importance for the definition of a common interpretive strategy. Whereas European grammars remain incommensurable, proportionality is the syntax by means of which rival normative claims and, as a reflection, competing identities voiced at the stage of qualification can be mediated. Actual outcomes of adjudication already bear traces of this reality as it has been often at the stage of justification that discrepancies between the multiple identities of the fractured consumer have been bridged and some degree of convergence between them promoted.

On these premises, courts may certainly continue to qualify cases through the distinct notions and conceptual approaches mandated by the legal regimes of subjectification to which they are bound. However, if the differences between their particular claims are to be bridged, courts may also be expected to develop a sort of cubist sensibility whereby they must grasp the reality of a case from all the relevant directions at once. This means that courts would not only be required to observe the norms and precedents of their own legal system, but they should also try to ensure a degree of external coherence between their respective judgments by recognising and engaging with the claims formulated by courts operating in other legal regimes. As mentioned, proportionality review is the stage for performing this critical task. Thus, in choosing their standard of judicial review, courts could also take into account the interpretive and normative claims proffered in related legal orders and justify on policy grounds their final decisions as to the consumer identity to be enforced. In particular, if other judges have already decided the same dispute, courts could defer to those prior judgments as providing the default solution also for their case.<sup>139</sup> By setting their standard of review at the type of proportionality test previously applied

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<sup>138</sup> J. Black, *Rules and Regulators* (Clarendon Press, 1997), at 33-35.

<sup>139</sup> On deference in a context of legal pluralism, see N. MacCormick, *Questioning Sovereignty – Law, State, and Nation in the European Commonwealth* (OUP, 1999), at 119-120, and Maduro, *cit.* at nt 135, at 374-375.

by their counterparts, courts would ensure a higher degree of external coherence in adjudication and contribute also to the stabilisation of the identities previously enforced.

Yet, coherence is not just the result of obedience to previous judgments. Overriding policy reasons associated with the integrity of its native legal system may arise that could still induce a court to disregard earlier rulings,<sup>140</sup> apply its original standard of adjudication and, ultimately, contest received outside judicial wisdom.<sup>141</sup> In fact, it is precisely through episodes of this kind that the different regulatory strategies may exert their mutual disciplinary effects and promote structural change. However, since the overruling of previous judgments may also trigger intractable conflicts, courts should make sure to operate that move constructively. For one, they should frame the conflict in argumentative rather than authoritative terms. Put differently, an overruling may be more convincing if conducted not as a purported exercise of ultimate authority but insofar as more persuasive reasons are advanced. In this view, if a court decides to depart from previous judgments, a supplement of judicial reasoning seems necessary.<sup>142</sup> After having referred to the previous ruling, therefore, that court should engage in an in-depth discussion of its arguments and explain with robust reasoning why they are not persuasive or why the identity therein promoted should be avoided in favour of a competing one. Next, the substantive impact of the overruling on rival interpretive and normative claims should be minimised. This means that among the possible alternative solutions to a case, courts should opt for the one with the lesser impact on the regulatory strategies of the related legal systems. In this way, also from a substantive perspective the deviation from previous rulings would be limited and the collision between identities kept under control.

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<sup>140</sup> R. Dworkin, *Law's Empire* (Hart Publishing, 1998), at 219.

<sup>141</sup> Krisch, cit. at nt 129, at 81-85.

<sup>142</sup> F. W. Scharpf, 'Legitimacy in the multilevel European polity', in M. Loughlin and P. Dobner (eds), *The Twilight of Constitutionalism?* (OUP, 2010), 89, at 108.

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### *Pasta and Hormones revisited*

But how would this interpretive strategy have functioned in *Pasta* and *Hormones*? Would it really make a difference? How would it improve the transparency of adjudication and management of identities? An immediate way of testing its impact may be to re-examine those disputes and briefly revisit the sequence of their steps in the light of the guidelines illustrated above.

The excursus on *Pasta* started with *Bottiglieri and Caruso* and *Moja*, both cases concerning purely internal situations. In that context, litigation is framed through domestic notions and concepts drawn from the language of fundamental rights, namely economic freedom and its limits. At the stage of proportionality review, both judgments may cause perplexities. Criticism, however, is not primarily related to a lack of deference to outside claims or the failure to grasp the potential external ramifications of the disputes. In fact, already in reviewing those rulings it was pointed out not only that their net result is a patronising attitude to the consumer but, even more critically, that their judicial reasoning falls short even of the loose standards of the rationality test. Nonetheless, particularly in *Moja*, a more deferential attitude to the EU normative claims could have led the Italian Constitutional Court if not to anticipate, at least to envisage the solution achieved by the Court of Justice in *Zoni*. At that time, *Dassonville*<sup>143</sup> was already an established precedent and, for a sensible court, it could be apparent that the measure under scrutiny amounted to a potential obstacle to intra-Community trade. True, *Moja* was a purely internal situation, but the Constitutional Court could have however envisaged in an *obiter dictum* the possibility that, if applied to imports, the legislation on pasta would have run afoul of article 34 TFEU.

Our interpretive strategy may have a more evident impact in *Zoni*, the judgment where the Court of Justice declared that the pasta legislation infringed article 34. Whereas in that case the Court correctly qualifies litigation with common market categories, it does not seem to completely abide by subsequent guidelines on

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<sup>143</sup> Case C-8/74, *Procureur du Roi v Benoit and Gustave Dassonville* [1974] ECR 837.

proportionality and deference. Indeed, not only the outcomes of *Bottiglieri and Caruso* and *Moja* are not incorporated in that ruling, but from its wording it is not entirely clear whether the Court of Justice was aware of them. With essentially introverted arguments, *Zoni* articulates rather mechanically the regulatory framework of the common market project. Scrutiny of the national measure conforms to a pure balance test, and only implicitly do the arguments inspiring national constitutional adjudication feature in its reasoning. This is not meant to criticise the substantive outcome of that pronouncement. Rather, it is its external argumentative dimension that seems underdeveloped. In fact, the Court of Justice, while acknowledging *Bottiglieri and Caruso* and *Moja*, could have however departed from them and reached the substantive solution it actually endorsed. As noted, overruling remains a possible option that, however, requires the respect of a couple of precautions concerning judicial reasoning and substantive impact. Accordingly, the Court of Justice could have referred to *Bottiglieri and Caruso* and *Moja* engaging openly with their arguments. The lenient application of the rationality test could have been subject to critical remarks and also the infantilised consumer could have been discussed and contrasted with the competing notion of the rational consumer. As to its substantive impact, the ruling in *Zoni* seems more considerate. Among the possible alternative outcomes of the case, the Court of Justice adopted the solution with the least impact on national constitutional principles and policymaking. Targeting only cross-border situations, the ruling did not affect the possibility that Italy might implement its industrial policies and constitutional norms in purely internal situations. The coming of the rational consumer, therefore, was limited as well as its capacity to reshape and interfere with the domestic regime of subjectification.

That work was carried out in *Pepi and Catto*, the case that probably provides the clearest example of deference to previous rulings. Although in that judgment definitions are taken from the vocabulary of national constitutionalism, proportionality review is tuned in the substantive outcome of *Zoni*. Despite this, one may note that in the reasoning of the Constitutional Court deference to *Zoni* seems essentially justified by reasons concerning the formal authority of EU law and its supreme interpreter. Little or nothing transpires on what the Constitutional Court

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thinks of the merit of that ruling and its underlying conceptual and ideological assumptions. Does the model of the rational consumer fit with domestic constitutional law? What is its relationship with the notion of citizenship and its political rights? Why and under what circumstances should it prevail over it? None of these questions finds an explicit answer in the reasoning of the case and one is left with the impression that the Constitutional Court, rather than engaging with outside interpretive claims, is simply surrendering to them.

Comments made for the initial stages of the *Pasta* litigation could be repeated almost verbatim for the outset of the *Hormones* dispute. *Fedesa* may be criticised for the lenient standard of review of EU legislation employed by the Court of Justice as well as its complacent attitude to consumers' anxiety. Yet, that line of criticism is purely internal to the EU legal system since at that time there were no previous external rulings to defer to and also international trade law did not provide clear alternative normative claims. In particular the use of the rationality test could be questioned. The adoption of that standard of review at a domestic level matches with the broad endowment of political rights to citizens and with the prominence of representative democracy as the main strategy to deal with economic, social and political conflicts. Transferred to an EU level, the same approach appears more problematic. In this context, political powers do not enjoy the same democratic credentials of national policymaking. In *Fedesa*, for instance, the directive at issue had been adopted only with the consultation of the European Parliament, a procedure which could justify a stricter scrutiny on the resulting legislative measure.

Similarly, the assessment of the WTO segment of *Hormones* could echo the arguments developed in revisiting *Zoni*. In their reports, both the Panel and the Appellate Body frame their arguments exclusively through the lexicon of international trade law. In reviewing the proportionality of the EU measure, *Fedesa* is not even mentioned, although its main arguments are at least implicitly considered and criticised. Even at this stage, therefore, our interpretive strategy could play an important contribution in terms of transparency by articulating the normative stakes inherent in the conflict between the EU and the WTO approaches to risk regulation. If the WTO adjudicative

bodies wanted to depart from *Fedesa*, they could have discussed it and, for instance, contested the prominence gained by lay voices over science in EU legislation and adjudication. Their rulings, instead, develop only in the WTO internal dimension, without any attempt to persuade external interlocutors. If in *Hormones* this argumentative dimension is neglected, the substantive outcome of the Appellate Body report seems at least to conform to the second precaution assisting the overruling of earlier judgments. In fact, in reviewing with stricter standards the measure at hand in *Fedesa*, the Appellate Body opts for the less impactful solution. As noted, risk assessment is established as a necessary requirement of hormones regulation, but science and the renewed commitment to the rational consumer do not seem to completely rule out members' political discretion and their possibility of responding to consumers' anxieties.

Finally, our interpretive strategy could have shed some interesting light also on the EU follow-up to *Hormones*. In *Biret* the Court of First Instance qualified the case with the EU vocabulary on the liability for unlawful conduct and on that basis openly disregarded the WTO rulings in *Hormones*. In principle, such a move would have been possible, although the reasons for this lack of deference should have been spelled out in more detail. No substantive justification is attached to that judgment as arguments focus only on the formalistic aspect concerning the lack of authority of WTO law within the EU legal order. By stressing the lack of direct effect of WTO/SPS obligations, the Court evades the discussion of the WTO normative claims and ends up establishing a shield against all WTO rulings irrespective of their actual content, as if in that dimension substantive and argumentative coherence were not worth pursuing at all.

But considering the established doctrines, could the Court of First Instance rule differently? In this respect, at least two arguments may be advanced to suggest that a more deferential attitude was possible. Firstly, the Court of Justice in appeal showed that a more accurate interpretation of the WTO agreements may lead to the recognition of a limited direct effect of SPS obligations after the end of the reasonable

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period of time for the implementation of WTO rulings.<sup>144</sup> Although opposed in more recent case law, that solution confirms that a more open approach to WTO rulings is a viable option and also that external coherence can be attempted in that direction. Secondly, it can be argued that despite the doctrine on the lack of direct effect the Court of Justice could have however engaged with the substantive issues addressed by the WTO adjudicative bodies. In fact, one does not need to recognise the direct effect of SPS obligations to introduce in the EU legal system a proportionality test including consistency review or a stricter assessment of the scientific foundations of a measure.<sup>145</sup> And also if the EU was not persuaded by a reaffirmation of the rational consumer paradigm, it could however oppose it by overruling WTO judgments on substantive grounds. Solutions relying on the judicious consumer and, notably, on the notion of maintaining protective measures irrespective of their scientific foundations would have appeared if not less contentious, at least more genuinely justified.

## Conclusion

A by-product of European legal pluralism, the fractured consumer may turn out to provide a useful notion to cope with the quagmires of contemporary mass-consumption societies. With its array of identities, it seems sufficiently articulate to project into the legal sphere a number of salient circumstances arising from the experience of consumption. It is sufficiently flexible to avoid unilateral and stylised representations and it is also problematic, as much as the human condition of its factual referent.

Managing in adjudication competing legal regimes of subjectification is a highly demanding task. It requires a supplement of judicial effort, namely a shared interpretive strategy that takes into account both the promises and biases of

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<sup>144</sup> The issue is discussed in M. Dani, 'Remedying European Legal Pluralism – The *Fiamm and Fedon* litigation and the judicial protection of international trade bystanders' (2010) 21 *European Journal of International Law*, 303.

<sup>145</sup> See *Pfizer*, cit. at nt 88, paragraphs 199 and 270.



consumers' identities as well as the potential for synergies between their underlying regulatory frameworks. However, even if a consensus should emerge on a common adjudicative approach, assembling the fractured consumer would remain an ongoing challenge, delivering contingent results and provoking endless debate.

In this view, assembling the fractured European consumer is an effort that by no means can be surrendered to the courts. In this respect, the conceptual framework associated with the fractured consumer may turn out to be appealing also beyond adjudication. Political discussion on consumer regulation can only gain from a more overt definition of its general policy coordinates. In the same vein, the prospect of complementary relationships between legal regimes of subjectification may also seem attractive for the elaboration of nonjudicial strategies in transnational circuits of policy-making.<sup>146</sup> Admittedly, those are rarely places for outspoken debate and transparent deliberation. Nonetheless, by unveiling the legal regimes of subjectification operating in Europe, with their regulatory strategies, dynamics and favourite identities, the fractured consumer may highlight precisely the historical contingency and biases of policy outcomes, encourage their contestation and, ultimately, contribute to mobilising a broader range of actors than the restricted circles routinely involved in judicial politics.

As Rose has observed, 'new modes of subjectification produce new modes of exclusion and new practices for reforming the persons so excluded'.<sup>147</sup> This seems particularly true for the consumer. As documented also in this article, the rise of the consumer has meant if not the demise,<sup>148</sup> at least the transformation or relativisation of citizenship and the social practices traditionally attached to it.<sup>149</sup> In this process, outward values such as civic participation and solidarity are being challenged by the inwardness of freedom of choice and self-realisation.<sup>150</sup> The difficult coexistence of

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<sup>146</sup> Sunstein, cit. nt 31, at 9.

<sup>147</sup> Rose, cit. at nt 7, at 196.

<sup>148</sup> Z. Baumann, 'Exit *Homo Politicus*, Enter *Homo Consumens*', in Soper and Trentmann, cit. at nt 14, at 139.

<sup>149</sup> Rose, cit. at nt 54, at 164-166.

<sup>150</sup> R. Bin, 'I diritti di chi non consuma', relazione al Convegno *Diritti dell'individuo e diritti del consumatore*, 14 dicembre 2007,

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ideals of the self that have such opposing approaches to active liberty is a source of concern that could hardly be overstated. The legal and political instances in which the fractured consumer is assembled provide a formidable laboratory to investigate, reflect and criticise that process.

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<<http://www.forumcostituzionale.it/site/content/view/3/3/#b>> (last consulted December 2010).

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