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Consumer Citizenship in Postnational
Constellations?

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Abstract

It is perhaps a truism to note that ‘the consumer’ is but a role that is played by human subjects. This insight leaves us, as lawyers, with one vital question: how can or does the legal system meaningfully rationalise its encounters with the consumer? Can it, and if so to what way, shape the act of consumption? Can it even ensure that the ‘fact’ of consumption translates into ‘good’ normative institutions.

In a summarizing account of legal encounters with the consumer since the era of *laissez-faire* liberalism we seek to show that this potential does exist within the constitutional state. However, as markets, political systems and consumers have broken free from national communities we need to ask: will the achievements of constitutional democracies survive Europeanisation and Globalisation? In our assessment of current trends in the EU we diagnose a seemingly paradoxical alliance between a new orthodoxy of neo-liberalism within market relations and a de-legalisation of regulatory policies. At international level, our analysis is restricted to a single case (namely, the recent report of a WTO Panel on the controversy over Genetically Modified Organisms (GMOs)). >It has become increasingly clear that the notion of a international consumer interest has been reduced to one of health and safety that is identified and secured with simple recourse to ‘scientific expertise’. ‘Sound science’ has become transnationally binding yardstick that both orients and limits consumer policy. The vision of a ‘consumer citizen’, who would actively participate in the transformation of consumption into a normative ‘good’, has become a matter of utopian history.

Keywords

Europeanization – globalisation – governance – international regimes – risk regulation – international trade – WTO

Disciplinary background of paper: law; political science

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*Consumer Citizenship in Postnational Constellations?**

Michelle Everson, London &
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1. Introduction

It is perhaps a truism to note that the ‘consumer’ is not a human subject, but is instead a role that is played by human subjects. By the same token, however, the act of consumption can never be fully understood in isolation – as an autonomous act of personal volition – but must likewise be viewed through interactive lenses: consumption occurs within and is both shaped by and shaping of a series of social institutions and systems, which possess their own varied rationales. Thus, the act of consumption makes up only one determining component within a market exchange system that is also inexorably shaped by a profit motive, and is further facilitated or constrained by the technical or social realities of manufacturing and production. Similarly, consumption may impact upon or be informed by cultural, political and economic institutions. A simple ‘buy British campaign’, for example, entails a complex combination of social, political and economic impulses: an appeal (successful or otherwise) to sentiments of ‘national community’, a political desire to maintain the national manufacturing base, as well as a co-ordinated economic effort to satisfy ‘national’ consumption demands within ‘national’ production and marketing systems.

The deceptively complex or interactive nature of consumption – the partially-autonomous and partially-dependent role that is played by the consumer – in its turn raises interesting questions about the law that ‘governs’ consumer matters. At the simplest level, the law’s relationship with consumption is most commonly distilled down to a notion of ‘consumer protection’; ‘consumer law’ is surely dedicated to ensuring that the act of consumption is not only safe, but is also one which is ‘fair’ to consumer expectations. Ubiquitous though this simple consumer protection formulation may be, however, it barely begins to describe the true complexity that characterises the interrelationships that are established between the act of consumption and the whole of any one legal order, be that order national, supranational or transnational in nature. Law,

* An earlier version of this essay was presented at the workshop on ‘Citizenship and Consumption: Agency, Norms, Mediations, and Spaces’ on 30 March – 1 April 2006, Trinity Hall, University of Cambridge. The workshop was one in a series of events organised in the context of the research on ‘Cultures of Consumption’ directed by Frank Trentmann, Birkbeck College, University of London.

after all, is also a social institution, an independent system with its own governing rationale made up of its own norms, prescriptions and simple procedural rules within which consumers must act and with which consumers interact: law may accordingly be viewed as a constraint upon autonomous acts of consumption, dictating the normative frameworks within which the role of consumer is played out; alternatively, it may also be considered to be a weapon, which consumers might also deploy, in order to determine for themselves the particular normative parameters within which consumption can occur.¹

The particular degree of complexity that characterises the relationship that is established between the law and the consumer explains the choice of title for this essay. As we will demonstrate, all the while distancing ourselves from a simple ‘consumer law’ approach to the protection of the consumer, legal orders do not simply directly further or restrain acts of consumption. Rather, individual legal orders ‘encounter’ the consumer in a variety of legal contexts (from contract law to competition law to labour regulation and to risk regulation) and are likewise guided by a variety of potentially conflicting rationales on the nature, purpose or role of consumption within any one social, political or economic arena. For example, acting to guard against labour exploitation, or to defend traditional forms of manufacturing and production, a legal order may act to the detriment of a perceived ‘consumer interest’ in, say, unrestricted outlet opening hours and the provision of cheap, if merely utilitarian, goods. At the same time, however, the *same* legal order may also appear to pander to an inveterate consumer interest in the provision of affordable and diverse goods, promoting and sustaining a competition law order that fiercely regulates any private restrictions on freedom of trade.

The complex and contradictory nature of the relationship established between law and consumption has been attributed to the fact that the role of ‘consumer’ is only one of many roles played by any one human agent.² In other words, a consumer is never *just* a consumer, but is also a worker, producer of goods or economic agent, always with varied goals in mind. Equally, however, the law is never simply law, but is, likewise, labour law, consumer law, contract law or general economic regulation, with its own distinct regulatory goals. Seen in this light, it seems appropriate to doubt whether it is possible to identify any coherent categorisation of legal encounters with the consumer. Nonetheless, at the level of national legal orders, characterised by dense historical interaction between the many identities or roles adopted by national citizens, and further marked by dialogue between the varied parts of national legal orders, we can tentatively identify three legal encounters with the consumer, which translate into three concrete legal conceptions of the nature and purpose of consumption, albeit that each

¹ See, for example, Frank Trentmann’s historical investigation of the ‘consumer revolution’ and the mode in which consumers might organize themselves as a distinct political class in order to influence legal regulation, ‘The Modern Genealogy of the Consumer: Meanings, Identities and Political Synapses’, in J. Brewer & F. Trentmann, *Consuming Cultures, Global Perspectives: Historical Trajectories, Transnational Exchanges* (Oxford: Berg Publishing: 2006), pp. 19-70.

² J. Q. Whitman, ‘Cosumerism, Producerism and Comparative Law, Manuscript, Yale University 2006; see also, M. Bevir & F. Trentmann, ‘Markets in historical contexts: ideas, practices and governance’, in *id.*, (eds.), *Markets in Historical Contexts: Ideas and Politics in the Modern World* (Cambridge: CUP 2004), 1-24; G. Trumbull, *Consumer Capitalism Politics, Product Markets, and Firm strategy in France and Germany* (Ithaca-London: Cornell UP 2006), pp. 161-178.

are subjected to their own internal inconsistencies: the ‘sovereign-consumer’; the ‘citizen-consumer’; and the ‘enabled consumer’.

It is the initial purpose of this essay to describe each of these legal encounters with and conceptions of consumption within a national historical context. Consumer law emerged in tandem with the secular emergence of the Western European state and is best understood within the national constellation. Now, however, it requires urgent re-elaboration within postnational and transnational analytical frameworks.³ It is no longer adequate to conceive of modern law or the modern act of consumption in purely national terms. Most visibly, both consumers and lawyers have been able to spring the normative confines of national states by virtue of the activities of supranational and transnational organisations such as the European Union (EU) and World Trade Organisation (WTO). Where the act of consumption, as well as the law that shaped it, might once have been postulated in terms of the ‘common’ goals of the nation state, as well as its comprehensive (or nationally integrated) legal order, consumers now act within or interact with ‘partial legal/economic orders’ dedicated to very specific supranational or transnational goals, such as the establishment of an effective European market or the enabling of global trade. At one level, this has given rise to considerable political tension as post-national legal orders, more particularly, the WTO, are perceived of as promoting one particular and seemingly truncated (US brokered) notion of consumption, ‘consumerism’, to the detriment of conflicting producer, labour or financial interests in various parts of the globe.⁴ At a far deeper or legal theory, level, however, the notion of the global consumer has also posed great challenges to the discipline of law, and has further raised manifold doubts, both about the effectiveness of global legal regulation of consumer affairs, and about the legitimacy of legal encounters with the consumer at global level.

Within the national setting, although legal encounters with the consumer were also inevitably marked by contradiction as the varied roles played by national citizens (consumer versus worker versus producer) conflicted with one another, the notion of national identity (shared national economic and social goals), established and secured by national democratic process, lent legal encounters with and conceptions of consumption an air of integrative legitimacy. In the modern post-national setting, however, contradictions and conflicts within legal encounters with the consumer raise particular doubts about the ability of law to continue to provide an integrative force within modern society. Habermas’ famous query of whether democracy will survive globalisation⁵ comprises the legacy of the consumer citizen. Within national societies,

³ See for a concise summary of pertinent debates in political science S. Leibfried & M. Zürn, ‘Reconfiguring the national constellation’, in *id.*, (eds.), *Transformations of the State* (Cambridge: CUP 2005), pp.1-36.

⁴ See, J. Q. Whitman (note 2), citing an article in *Le Figaro* on the global threat of US ‘consumerism’ (S. Devillers & P.-O. Julien, ‘Leur anti-américanisme ne nuit pas au succès des marques de l’Oncle Sam, Ces jeunes qui aiment Nike mais pas L’Amérique’, *Le Figaro*, August 1st, 2002). Clearly, such denunciations are fuelled by the perception that unregulated individual consumption undermines a joint social belief in the value of certain goods that is established by virtue of the mode in which they are produced.

⁵ J. Habermas, ‘Die postnationale Konstellation und die Zukunft der Demokratie’, in *id.*, *Die postnationale Konstellation. Politische Essays* (Frankfurt a.M.: Suhrkamp 1998), pp. 91-169 [=‘The Postnational Constellation and the Future of Democracy’, in *The Postnational Constellation. Political Essays* (Cambridge-Oxford: Polity-Blackwell 2001), pp. 58-112].

we have witnessed a transformation, however gradual, tentative and contentious, of the 'fact' of consumption into a normative 'good', which is now challenged by international institutions – but which may in turn be challenging the legitimacy claims of these institutions.

In the following we aim to illustrate these points in a work of three acts. Firstly, we shall delve back into legal history to investigate the three ideal-type paradigms of the consumer that have been established under national law and within national legal theory. Secondly, we shall demonstrate how post-national consumption, within the EU context, has begun to unravel what were once fairly integrated notions of nature of consumption. We will also underline, however, that the EU has learned a lesson of presumably principled importance about the dependence of its liberalising market-building project on a concomitant development first of consumer protection policies and then of the consumer as political citizen. Thirdly and finally, we shall turn to globalisation. That is in terms of our theoretical endeavours a widely uncharted sea. We will therefore do what lawyers are best equipped to do, namely highlight the contemporary challenge with a contemporary case: the recent panel report on the dispute between the US and the EU on Genetically Modified Organisms (GMOs).⁶ That case, we will argue, is of exemplary importance – and if we are right with that assumption the prospects of the global citizen consumer are gloomy.

2. A Brief Historical Reconstruction of Legal Encounters with the Consumer

As noted above, the legal relationship with the act of consumption is complex and often contradictory, characterised both by conflict between the varied roles played by any one individual (consumer, artisan, worker, producer) and by the great difficulties which any one legal order faces when seeking to reconcile the varied policy goals pursued by each individual area of law (contract law, labour law, competition law and economic regulation). Nonetheless, within the historical national setting, we can identify three 'ideal-type' legal encounters with consumption, giving rise to a threefold legal categorisation of the consumer: 'the sovereign-consumer'; the 'citizen-consumer'; and the enabled consumer'.

In other words, though by no means comprehensively so, the nation state has traditionally proven to be a forum within which national polities evolve their own distinctive visions of the legitimate purpose of the normative good of consumption. In its turn, each such version is translated (though necessarily imperfectly so) into national law. As such, law may be portrayed as having a transformative effect upon the act of consumption and the role of the consumer. By this token, the law of the nation state is afforded an integrative role. It is assumed to be able to ameliorate stark distinctions

⁶ See *EC — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/Interim, WT/DS292/Interim, WT/DS293 (complaints by United States, Canada and Argentina respectively) 13 October 2006; available at http://www.wto.org/english/news_e/news06_e/291r_e.htm; for the preliminary confidential report leaked by Friends of the earth cf. http://www.foe.co.uk/resources/press_releases/leaked_wto_report_us_misle_28022006.html.

between views of the nature and purpose of consumption, in order to transform simple acts of consumption into a shared (national) normative good.⁷ Nonetheless, as we shall demonstrate, even this (national) integrative role has its own limits; and not the least since legal theory teaches us that legal orders are themselves autonomous social institutions, with their own underlying visions of which legal interventions into the act of consumption are legitimate and when.

The Freedom to Consume: Formal law and the ‘Sovereign-Consumer’

The notion of US ‘consumerism’ has a modern air to it. Nonetheless, consumerism – or the concept that the act of consumption possesses its own egalitarian force – has deep historical roots within very many national legal orders, and more particularly, within 19th Century (European) legal notions of contractual justice and equality, which, although unable to recognise consumers as a distinct legal class, nonetheless assumed that contractual partners (or consumers) were fit and able to determine their own destinies.⁸ Switzerland is a not so often cited case in point:

‘Die Ablehnung eines Sondergesetzes für Kaufleute stehe ‘mit den demokratischen Staatseinrichtungen in der Schweiz und mit der demokratischen Gesinnung des Schweizervolkes im Zusammenhang, vermöge deren es jeder Sonderstellung eines Berufsstandes entschieden abgeneigt’ sei.⁹

The cited 1879 declaration of the Swiss *Bundesrat*, rejecting the introduction of a special law for the sale of goods within Switzerland, furnishes us with our first glimpse of an abiding form of encounter between law and the consumer (better-stated ‘non-consumer’), which is governed, not by any legal desire specifically to identify and support consumers within the economy, but rather by a happy coincidence between law’s ancient mission to preserve its own (pre-political) legitimacy through the maintenance of ‘formal legal rationality’ and the economic and social rationales and theories that underpinned emerging European nation states.

As Max Weber teaches us, the modern law of the western nation state was to be distinguished from its natural or charismatic forebears by virtue of its refusal to embody or promote any one anthropological or substantive vision of the legitimate nature of human organisation. Instead, the legitimacy of law derived from its neutral mission to provide a formal framework of norms within which all human agents were assumed to

⁷ See for an early description of the need to integrate the varying and various interests of national citizens within national politics and national law C. Offe, ‘Ausdifferenzierung oder Integration’, in G. Fleischmann (ed.), *Der Kritische Verbraucher* (Frankfurt a.M.: Campus 1981), pp. 259-276..

⁸ See, D. Bollier & J. Claybrook, *Freedom from Harm* (Washington, D.C.: Public Citizen Project: Washington 1986), a classic work making a stark distinction between the freedom to consume and a notion of consumption, which places a far greater emphasis upon the need to ensure that individual be free from harm during the act of consumption.

⁹ See, E.A.Kramer, ‘Zur Konzeption des Konsumentenschutzes’, 2 (1986) *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, pp. 270-290 at 286. see, also M. Amstutz, A. Abbegg & V. Karavas, *Soziales Vertragsrecht. Eine rechtsevolutorische Studie* (Basel: Helbing & Lichtenhahn 2006), pp. 13 ff.

be willing and able to act of their own volition.¹⁰ The cornerstone of such a theory of legal legitimation was in turn formed by a private law doctrine of contractual privacy, which precluded any legal intervention within economic exchange relationships that might be motivated by interventionist efforts to secure the particular status of any one contractual party (as consumer, worker etc...). In other works, the inspirational power underlying a formally rational legal refusal to recognise the consumer as a distinct legal class, lay in the belief that once a formal legal framework had been established that would apply equally to *all*, regardless of status, the individual autonomy and creative power of all citizens would be assured, leaving them free to pursue productive economic activity in service of the economy.

By the same token, however, formal rationality was to find much favour within emerging nation states, dedicated both to the destruction of the feudal or status-based relationships, which had seemingly retarded the economic and social development of their aristocratic or hierarchical forebears, as well as to the promulgation of the new and integrative powers of the national economy:

‘Die Einheitskonzeption (unity of contract law) rechtfertige sich auch ‘durch die wohl in keinem anderen Lande Europas in so hohem Grade durch alle Schichten der Gesellschaft gleichmässig verbreitete Schulbildung und geschäftliche Begabung des Volkes’.¹¹

In other words, classical economic theory, the growing political preference for bourgeois patterns of social organisation, as well as the national imperative for creative economic development, acted in concert to support and sustain formal legal notions of contractual autonomy, which assumed that individual volition, or individual ‘economic sovereignty’, formed both the legitimate basis for law and for the foundation of an egalitarian society. Within such an egalitarian society, the legally secured economic freedom ‘to act within the market’ would both sustain and be sustained by national solidarity and would further unleash creative forces of political and economic consolidation. The imputed social distinctions of the feudal economy had been superseded. As a consequence, formal law would refuse directly to recognise a distinct class of consumers. Nonetheless, a freedom to consume would be enshrined within the legal order and further be supported by the ideology of the emerging nation state, which deemed the character of the ‘national citizen’ - and above all, the ‘talented’ national economic citizen’ - to be both a force for the creation of egalitarian social organisation and a potent weapon within the effort to evolve the national economy.

The inspirational power that lies behind formal egalitarian conceptions of ‘the freedom to consume’, or the notion of contractual sovereignty, provides us with an explanation for the fact that whilst most European states have long since dispensed with their firm belief in the notion of ‘given’ economic equality, and have long since intervened to regulate once private contractual relations, traces of the 19th Century conception of

¹⁰ The cornerstone of Weberian formal legal rationality was provided by the ability of a modern and formal law to furnish and secure the intimacy and certainty of market-place across the whole of an advanced industrial economy, see his *Rechtssoziologie* (edited by J.Winckelmann, Neuwied-Berlin::Luchterhand, 2nd ed. 1967, e.g. pp. 123-126.

¹¹ E.A. Kramer (note 9), p. 286.

formal equality can still be found in most European private legal orders.¹² Most strikingly, however, ‘the freedom to consume’ and, with it, a notion of the ‘sovereign consumer’, now finds its most powerful contemporary expression within the ‘consumerism’ that is attributed to a peculiarly US conception of the nature and purpose of world trade orders.¹³

Alternatively, whilst the simple assumption that individual autonomy can be secured by the blanket application of one set of legal norms to all parties may appear outmoded, both within the law itself and within wider society,¹⁴ the inspirational roots of consumer sovereignty still live on within a rhetoric of consumer choice, that is, in its modern form, underpinned by a legal framework of individual legal rights. Seen in this light, US consumerism is not simply an expression of ‘cultural rootlessness’,¹⁵ a ‘meaningless’ consumerism within which the urge and ability to purchase unravels any deep-seated cultural or social perceptions about the nature of ‘valued’ goods, but is instead, an echo of the egalitarianism and belief in the self-determining powers of egalitarian identity politics, which marked the birth of the modern western state. To the ‘consumerist’ legal order, the notion of rights is determinative: evident weaknesses in formal legal rationality – the simple abuse of economic, political and social power within contractual relations¹⁶ – can be compensated for by the recognition in higher (constitutional) law that all *must* be treated equally, regardless of race, religion or national origin. By the same token, modern neo-classical economic theory, together with the self-determining and socially-creative purchasing power of once disregarded minorities, such as women, blacks and gays,¹⁷ imbue the consumerist economy with an egalitarianism all of its own. In this scenario, ‘valued goods’ are, thus, not the simple creation of unthinking and possibly prejudicial traditional values and social relations, but are, rather, an immediate market response to the needs and self-expressed identities of ‘sovereign consumers’.

Freedom from Harm: Material Law and the ‘Citizen-Consumer’

Although the notion of the ‘sovereign-consumer’ may be thought to be most closely identified with the US legal arena, evidence for the contention that legal encounters with the consumer are highly complex indeed, can also be derived from history and

¹² See, for a historical examination of the disruptive tendencies of modern private law to translate interventionist regulation into older former legal frameworks to which they are not suited, Ch. Joerges, *Verbraucherschutz als Rechtsproblem* (Heidelberg: Verlagsgesellschaft Recht und Wirtschaft, 1981).

¹³ J. Q. Whitmann (note 2).

¹⁴ Formal law was largely superseded by interventionist regulation in a post-war period. For the full evolution of interventionist and substantive legal encounters with the consumer within this period, see, M. Everson, ‘Legal Constructions of the Consumer’, in F. Trentman (ed.), *The Making of the Consumer Knowledge, Power and Identity in the Modern World* (Oxford-New York: Berg, 2006), 99-124.

¹⁵ See, James Q. Whitmann (notes 2 and 4).

¹⁶ For the historical realization that consumers were placed at a bargaining disadvantage within contractual relationships, see, M. Everson, ‘Legal Constructions of the Consumer’ (note 14).

¹⁷ See, Whitman (note 2), on the emancipatory powers of a notion of consumption, which allows the nature of ‘valued goods’ to be established by consumers rather than producers. Alternatively, social prejudices are overcome as traditional production complexes must cede to a real world social demand, which better reflects the needs and desires of once disadvantaged social groups.

from the simple fact that the US is also the cradle of a notion of ‘consumer protection’, which often places the status of the sovereign consumer in doubt;¹⁸ sovereign consumption sitting uneasily aside the paternalistic mores of interventionist consumer protection. It was thus President John F. Kennedy, who, in the wake of the thalidomide crisis, began to encourage law and lawyers to review their age-old refusal to regard consumers as a distinct class, requiring special legal protection.¹⁹

Thalidomide cruelly exposed the myth that the modern industrial economy might simply be viewed as a forum for egalitarian economic exchange. By the 1960s, economic exchange was instead characterised by large-scale imbalance in the relative bargaining powers of producers and consumers of goods. Above all, thalidomide revealed wide-ranging disjunction between the profit motive that drove modern production and the legitimate interests and concerns of consumers in the safety of consumer goods. The time had come for the re-evaluation of the place of the consumer within national society, and, with this, for the reconsideration of the underlying notion that unfettered exchange could *per se* sustain an egalitarian and ‘just’ society:

[T]he consumer is no longer seen merely as a purchaser and user of goods and services for personal, family or group purposes but also as a person concerned with the various facets of society which might affect him directly or indirectly as a consumer.²⁰

Reproduced almost verbatim in a 1975 European Community policy statement on the legitimate nature of consumption, Kennedy’s sentiments directly addressed the dilemma of the conflicting identities and interests of modern consumers. Certainly, consumers possessed an interest in plentiful and cheap goods; however, as producers, workers, family members and simple national citizens, they also maintained a simultaneous interest in the sustainable production of safe goods, which were also produced with due respect for the legitimate concerns of the workforce and society as a whole. Immediate public outrage had coalesced into a demand from prompt regulatory intervention into the modes of production, in order to counterbalance a ‘freedom to consume’ with a notion of ‘freedom from harm’. Accordingly, ‘explicit’ legal recognition was to be given to the notion of the ‘consumer’, as purchasers of goods and services were to be regarded less as free and creative economic agents, and more as economic subjects in need of a degree of interventionist protection. At the same time, however, this new and distinct class of ‘consumer’ was also to be promptly reintegrated with within more modern perceptions of the nature and the role of the national citizen.

Most strikingly, and within the context of European welfare states, the shift in emphasis from an isolated ‘freedom to consume’ to an integrated conception whereby the state would act to ensure ‘freedom from harm’ (be the danger of harm one that was posed to consumer, worker, producer or simple citizen), accordingly formed the backdrop for a new legal encounter with the ‘citizen-consumer’. Consumption could not and would not be viewed as an autonomous act. Instead, consumption would be regulated in the light

¹⁸ See, for example, D. Bollier & J. Claybrook (note 8): the US notion of ‘consumer protection’; has always proven to be a strong counterweight to unfettered consumerism.

¹⁹ D. Bollier & J. Claybrook (note 8), p. 31 on the full details of Kennedy’s consumer protection programme.

²⁰ EEC Council Resolution on a ‘Preliminary Programme for a Consumer Protection and Information Policy, OJ 1975 C 92/1.

of the shared concerns of the citizens of the nation state. The state, the representative of the joint interests of its own citizens, might consequently intervene widely in order to regulate the economy, using its own national legal order to determine the exact parameters within which consumption might now occur.

The egalitarianism of the post-war welfare state within Europe, which secured the equality of its own citizens through large-scale redistribution (either directly through taxation, or indirectly, by means, say, of requiring industry to bear the costs of interventionist economic regulation) was, in part, facilitated by a heightened belief in the sustainability of theories of economic organisation, informed to a greater or lesser degree by corporatist impulses.²¹ At the same time, however, it also necessitated a re-evaluation of the legitimate bases of national law. Where once the formal legal order had derived its own internal legitimacy from its ability to impose one universal and pre-political framework of legal norms upon society, the law of the welfare state now demanded (in the interest of substantive equality) that law cede to purposive political direction, in order to treat different groups within society in different ways. The consumer would henceforth be recognised as a distinct class of citizen in need of particular protection. At the same time, however, the needs and interests of consumers would also be balanced against the needs and interests of the entire population, as workers, producers and family members.

Legal encounters with the ‘citizen-consumer’ are accordingly marked by a high degree of what Max Weber was to term, ‘legal materialisation’. In stark contrast to the formal legal notion of the ‘sovereign-consumer’, the citizen consumer entails a series of positive values, which cannot be legitimated by a simple internal legal dedication to the maintaining of contractual autonomy, but must instead find their approbation in democratic discourse and the subjection of law to subsequent political direction. With this, individual national legal notions of the ‘citizen-consumer’ are necessarily distinguishable from one another, as each political community chooses which social concerns will be addressed in which particular manner; at the same time, however, such distinctions are necessarily intensified as the law has always struggled to translate political values coherently into the whole of a national legal order – as Max Weber also warned, material law is far from perfect, prone to its own ‘irrationality’ as purposive political direction tears apart the coherence and autonomy of formal legal structures of reasoning.

Inconsistency thus inevitably arises given the varied identities of its citizenry (as workers, consumers, producers etc.); no one national political community is constant in the impulses and directions that it sends its legal order. Just as the seemingly ‘consumerist’ US legal order is also prone to contradiction between consumerist and consumer protection goals, individual European polities often send contradictory messages on the legitimate nature of consumption within society to the varied sections of its own legal order (consumer law, competition law, labour law and economic

²¹ See, for the full impact of corporatist theories of economic regulation upon European legal orders (as well as their status as barrier to the evolution of the integrated European market), G. Majone, *Dilemmas of European Integration: The Ambiguities & Pitfalls of Integration by Stealth* (Oxford: Oxford UP, 2005).

regulation).²² Equally, however, individual national notions of the ‘sovereign-consumer’ are often also strangely incomplete and inconsistent as material law betrays its own lack of comprehensive steering capacity’, both proving itself unable to overcome perennial conflict between the goals of competition, consumer and labour law, and further tending (or in part at least) to a recidivistic belief in the legitimating powers of a legal formalism, to whom the ‘paternalistic’ notion of a citizen-consumer cannot but be an anathema: contract law, in particular, often remains in thrall to earlier formal notions of legal legitimacy and is often still predicated upon the assumption that parties to the contract retain an autonomous bargaining power.²³

Taken together, the contradictions and conflicts that can be identified within any one effort to define the legitimate (redistributive) parameters of consumption might accordingly be argued to create one very particular dilemma within modern legal encounters with the citizen-consumer: the citizen-consumer is not only an elusive character, a victim of the lack of coherent steering capacity within material law, but is also inexorably embedded within and shaped by individual national legal orders, creating a very particular barrier to transnational trade and consumption. In other words, each particular bundle of compromises and contradictions that underpin each national body of contract law, labour law, competition law and consumer protection law, represents its own highly idiosyncratic barrier to trade (or a foreign producer transaction cost) across national borders.

As a consequence, and, particularly within the setting of the European Union, legal encounters with the citizen-consumer are, as we shall see below, now marked by a heightened degree of friction, as a partial EU legal order dedicated to the creation of an integrated European market begins to sweep national regulatory laws away. Nonetheless, as the WTO GMO case readily demonstrates, the ideal-type concept of the ‘citizen-consumer’ is still present within Europe, and, indeed, seems to have been strengthened in one very important modern respect: where the post-war European concept of the citizen-consumer was, by and large, shaped and formed by utilitarian efforts to overcome class distinctions (between workers, producers and consumers), a modern European emphasis on the maintaining of democratically-informed regulation over the building blocks of agricultural and foodstuffs production, is not simply concerned with heightened consumer protection (precautionary risk regulation), but is also reflective of a desire to incorporate the ethical concerns of European citizens within the modern economy.

Alternatively, the notion of the ‘citizen-consumer’ still retains its inspirational quality. The democratic will and effort to predetermine the nature of consumption, to define the parameters of the economy in which it occurs, is not simply a matter of European trade intransigence – or the blind protection of traditional or artisan means of production – but is (also) an inspirational effort to ensure that all affected views, opinions and interests on the legitimate nature of consumption should be translated into a shared European conception of the normative good of consumption.

²² See, for the full details of the contradictory political impulses sent to each section of the national legal order (and subsequent difficulties in co-ordinating the national legal order), M. Everson ‘Legal Constructions of the Consumer’ (note 14).

²³ See, for full details Ch. Joerges (note 12).

Legal Proceduralism and the ‘Enabled Consumer’

Our final legal encounter with an ‘ideal-type’ consumer cannot be exemplified through broad brush stroke reference to any one national legal order. Instead, the ‘enabled consumer’ can only be found fleetingly within the writings of various legal theorists,²⁴ and must likewise be understood to form a part of a legal response to a very particular dilemma of legal legitimacy.

As we have seen within our analysis of both the sovereign-consumer and the citizen consumer, legal encounters with the consumer are often marked by contradiction, complexity, the economic or political manipulation of law, as well as, an underlying crisis within the notion of the legitimacy of law. Thus, on the one hand, formal legal orders might find their legitimacy within their apolitical nature; their ability to apply universal legal norms of legal autonomy to all individuals, regardless of status. Nonetheless, where the precepts of classical or neo-classical theory are placed in doubt, and real-world imbalances in political, social or economic power are recognised, the overall sustainability and legitimacy of the law of the sovereign consumer cannot but be placed in doubt: what price the power to define my own ethnic, religious or gender identity by means of consumption if I cannot guard myself against the irreparable harms posed by a profit-driven market’s systemic disregard for scientific uncertainty? By the same token, however, as Max Weber rightly warned, material legal orders are subject to their own inconsistencies and irrationalities – in particular, as the purposive values underlying them inevitably vary over time and space – the currently most pressing of which, is surely the inability of material law to reach beyond the boundaries of imputed (national) political community, in order to take account of values, interests and concerns that might not necessarily find their place within the (forever contradictory) national concept of the ‘citizen-consumer’.

To lawyers engaged in the eternal waltz between formal and material conceptions of law – the chimera of apolitical and autonomous formal legal legitimacy and the irrational dedication of law to a forever elusive political claim to have identified immutable social values – the struggle to identify the legitimate bases of law is an existential one, and, within the specific context of legal encounters with the act of consumption, leads to a conclusion that the law should never claim to have identified one final and ‘legitimate’ ideal-type consumer. The process of legal transformation of the act of consumption into a normative good of consumption is not one that can be satisfactorily performed through simple recourse to panacea of sovereign purchasing power; nor is it one that can be said to have been performed by means of the subordination of law to one political, economic or social set of consumption values. Instead, the only sustainable source of legitimacy that might be identified for law during its encounters with the consumer is procedural in nature. Law should not and, fortunately enough, cannot pre-determine the normative good of consumption. Instead, it can only ever act to attempt to ensure that the social, economic and political parameters within which each individual act of consumption occurs have been drawn

²⁴ See, for example, Ch. Joerges (note 12) and *id.*, ‘Quality Regulation in Consumer Goods Markets: Theoretical Concepts and Practical Examples’, in T. Daintith & G. Teubner (eds.), *Contract and Organization* (Berlin: deGruyter, 1986), pp.142-163.

up, and are continually re-drawn up, with due regard for each and every interest, individual and concern upon whom the act of consumption impacts.

Procedural law is the law of political discourse; an open-ended law, which founds its legitimacy in the fact that substantive values are not the product of law, but rather the product of the political discourse which law enables and facilitates. As noted, procedural law is largely the product of legal theory minds and can only be identified in a real world of consumption in very limited circumstances.²⁵ Nonetheless, and at national level, procedural conception of enabled consumption have always been recognised and may yet find their true applicative value at supranational and transnational level.

3. The Consumer in Post-national Constellations

‘Markets are always socially embedded’. It is easily possible and in our context particularly useful to reconstruct the consumer’s encounters with the foregoing three paradigms in Polanyian terms.²⁶ Formal, materialized and proceduralised law are all only different modes of ‘instituting’ the economy. Certainly, legal formalism does this only so indirectly that it is often equated with the assumptions of classical *laissez-faire* economics. And yet, the master thinker of formalism knew more: ‘formal’ and non-formal elements are both simultaneously present in modern legal systems; the former does cannot perform without the latter.²⁷ We need not engage in an exegesis of Weber’s brief and somewhat cryptic observations.²⁸ The turn to materialization and the present concern with proceduralisation are responses to the irreversible technological and economic changes to which all democratic constitutional states were required to develop deliberate political and legal responses. We can therefore feel ourselves on safe ground when interpreting ‘materialization’ and ‘proceduralisation’ as modes of social embeddedness. What we cannot be so sure about, however, is the impact of Europeanisation and globalisation on these accomplishments.²⁹ No commentators argue that the ‘social embeddedness’ of the European market has been set aside by the dynamics of market integration and our survey will argue that the analytical categories we have employed in the national constellation retain much of their analytical strength

²⁵ See, for instance, the efforts of Norbert Reich to identify cases in which consumer interests groups are included within the process of industrial production, *Europäisches Verbraucherrecht*, 3rd ed., Baden-Baden: Nomos, 1996.

²⁶ K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (1944) Boston: Bacon Press 1992, esp. at pp. 45-58, 71-80; cf. the explanatory remarks by Fred Block, *ibid.*, pp. xxiii-xxv.

²⁷ M. Weber, *Rechtssoziologie* (note 10).

²⁸ See Duncan Kennedy, ‘The Disenchantment of Logically Formal, Legal Rationality: Or Max Weber’s Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought’, in Ch. Camic, Ph.S. Gorski, and D.M. Trubek (eds.), *Max Weber's Economy and Society: A Critical Companion*, Stanford, CA : Stanford University Press, 2005, pp. 322-365, esp. at pp. 338-342.

²⁹ ‘Embedded liberalism’ is a notion developed by Gerald Ruggie and other which is related tzo our topic but also distinct becauzie it is concerned with theb behaviour of states; see, for a recent analysis J. Steffek, *Embedded Liberalism and its Critics*, New York: Pgrave Macmillan 2006.

and normative plausibility at EU level. Similarly, it would be naïve to expect that globalised market can function without institutionalised mechanisms that ensure the trust of consumers in the reliability and safety of the goods that free international trade seeks to offer. Post-national constellations, however, do exhibit *differentiae specificaе*, the most important of which are the lack of those tools that nation states had at their disposal to ensure the social embeddedness of their economies and the difficulties of organising transnational political processes which might act as functional equivalents. These differences and difficulties are more obvious at the international than at the European level. We therefore deal with both levels of governance separately.

A) The European Constellation: the Rule of Law on Trial?

It has become common³⁰ within the legal reconstruction of the integration process to distinguish between the formative ‘integration through law’ era under the guidance of European Court of Justice, which was then followed by a very dynamic 15 year period characterised in its turn by the effort to complete the internal market, the strengthening of European competitiveness and the adaptation of EU competences and decision-making rules to the functional necessities of these new ambitions. The first two eras are relatively easily captured within our paradigms. It is only in the third (current) integration phase, encompassing the effort to democratise the integration project, that the challenges of the post-national constellation have become more fully apparent.

Modest beginnings

European Integration was deliberately conceived of as an economic project. However, at the time of its launch, each of the EEC Member States of the EEC had already transformed themselves into social or welfare states and were in possession of institutionalised ‘mixed economies’.³¹ This is why tensions between the European ‘level of governance’ – characterized by the recognition of economic freedoms, a commitment to open markets, and very limited competences – and the national level, at which the nation states retained political powers to organize their economic and social affairs as they saw fit, were inevitable. Fritz W. Scharpf³² was to conceptualise this division between national competences in the realm of social policies and the institutionalisation of market building competences at European (Community) as a decoupling of ‘interdependent’ policy spheres. Nonetheless, this problem remained latent for nearly two decades. In the field of consumer policy, this is easily explained.

³⁰ Following J.H.H. Weiler, ‘The Transformation of Europe’ (1991), in *id.*, *The Constitution of Europe. “Do the new clothes have an emperor”?*, Cambridge: Cambridge UP 1999, pp. 3-101; see also Ch. Joerges & M. Everson, ‘Law, economic and politics in the constitutionalization of Europe’, in E.O. Eriksen, J.E. Fossum & A.J. Menéndez, *Developing a Constitution for Europe*, London-New York: Routledge 2004, pp. 162-179 and Ch. Joerges, ‘What is left of the European Economic Constitution? A melancholic eulogy’, *European Law Review* 30 (2005), 461-489

³¹ See Jacques Pelkmans’ earlier work, e.g., *Market Integration in the European Community* (Den Haag: Martinus Nijhoff, 1984); he does no longer use the term later, but does not lose sight of the problematic, e.g. when analyzing the ‘small social acquis of the Union’ in his *European Integration. Methods and Economic Analysis* (Heerlen: Longman, 1997), pp. 248 ff.

³² F.W. Scharpf, ‘The European Social Model: Coping with the Challenges of Diversity’ (2002) 40 *Journal of Common Market Studies* 645, 646.

Consumer protection was of very marginal importance in Europe's post war economies and started to gain some momentum only in the 1970s.³³

Once it did, however, Europe entered upon the scene. In the mid 70s, the European Commission adopted its first ambitious consumer policy programme³⁴ This programme was also innovative in that it relied upon a mechanism which was to become extremely important two decades later. Invoking a 'soft law' mechanism ('communication') for its new policy, the Community compensated for the fact that it had no genuine powers or competences in the field it had now entered. 'Hard law' measures were, nevertheless, also on the agenda, and were often presented as a means of overcoming distortion of competition and obstacles to the completion of the common market, in an effort to overcome any national sensibilities which could be used to block European regulation under the unanimity voting requirements of the then Article 100 EEC Treaty. However, following the trend to (qualified) majority voting, ushered in by the 1987 Single European Act, as well as the introduction of Article 100(a), guaranteeing a 'high level of protection' for European consumers, the status of European consumer policy was inevitably strengthened. Further, the Maastricht Treaty of 1992 endowed the European Union with clearer competences. Nationally embedded concepts of the consumer and the national regulatory programmes that sustained them were exposed to the rationalising gaze of the demand that all barriers to trade within the Community be dismantled. Primary European law, though not inherently concerned with visions of the consumer, was thus forced not only to confront embedded national attitudes to consumer law and culture, but also 'explicitly' to investigate the character and nature of the European consumer in order to justify its deregulatory interventions.

Ambitious Endeavours

In all accounts of the integration project, the Delors Commission's 'White Paper on Completion of the Internal Market' of 1985³⁵ figures as a turning point and breakthrough. After years of stagnation, the integration project developed a new dynamic – thanks to the well-chosen focus of all political energies. The programme was presented and widely perceived of as a confirmation of Europe's commitment to economic efficiency through market building. However, what had started out as a collective effort to strengthen Europe's competitiveness and accomplish this objective through new (de-regulatory) strategies soon led to the entanglement of the EU in ever more policy fields and the development of an ever more sophisticated regulatory machinery.³⁶ In particular, the concern of the European legislator and the Commission

³³ See G. Trumbull, *Consumer Capitalism* (note 2), pp. 8 ff.

³⁴ OJ 1975 C 92/1. This initiative was clearly inspired by President John F. Kennedy's famous and much older message (see *Public Papers of the U.S., John F. Kennedy*, Containing the Public Messages, Speeches and Statements of the President, Jan. 1-Dec. 31 1962, 235-243). The Community adopted the rights rhetoric of that message promising to Europe's market citizens a right to the protection of health and safety; a right to the protection of their economic interests; a right of redress; a right to information and education; a right of representation.

³⁵ Commission of the EC, 'Commission White Paper to the European Council on Completion of the Internal Market', COM(85) 310 final of 14 June 1985.

³⁶ For a no longer up-to-date but still impressively comprehensive comprehensive account, see V. Eichener, *Entscheidungsprozesse in der regulativen Politik der Europäischen Union* (Opladen: Leske & Budrich, 1997).

with ‘social regulation’ (health and safety of consumers and workers, and environmental protection) proved to be irresistible.

What consequences did this have for European law’s understanding of and position on the issue of consumption? It had become uncontroversial that ‘high standards of protection’ should form an element within European markets and the European ‘social model’. Seemingly, the materialisation paradigm, together with ‘purposive’ regulatory programming had been transferred from the national to the European level.³⁷ That impression, however, was to be of *breve durée*. Europeanisation under the guidance of Jacques Delors’ White Paper had been a modernising initiative with many innovative impacts. To expect that this initiative would be a European cure to the failures experienced during interventionist programming at national level was at best naïve. At the national level, the response to these failures had been ‘proceduralisation’; Europe was bound to follow suit, but inevitably lacked the plethora of institutions and dense communicative practices within which proceduralisation was embedded in national societies. The alternative it chose was officiously announced in 2001 in the White paper on Governance.³⁸ We now turn to that new trend.

Between De-formalisation of Community Rule and a New Austerity of Economic Liberalism

It is by no means accidental that the European turn to ‘governance’ was triggered by the scandalous malfunctioning of Europe’s regulatory machinery, which caused great anxieties amongst Europe’s market citizens and therefore propelled consumer policy, for so long the poor relation of integration policy, into the arena of high politics.³⁹ The internal market had been visibly politicised, the economy had mutated into a polity. Through its turn to governance Europe sought to meet these challenges.

The White Paper defined governance as ‘rules, procedures and behaviour, that affect the way in which powers are exercised at European level - particularly regarding, openness, participation, accountability, effectiveness and coherence’.⁴⁰ This definition summarises the intense preparatory work of the ‘Governance Team’, a group composed of Commission officials under the leadership of Jérôme Vignon, a close collaborator of the Jacques Delors.⁴¹ The intensive European-wide resonance which the new programmatic provoked⁴² was easily explained. The turn to governance was a clear necessity. The BSE crisis was but one of the many challenges Europe had to respond to. The effectiveness of the ‘integration through law’ paradigm, characterised by the

³⁷ See, Ch. Joerges & M. Everson (note 30), , at pp.167 ff.

³⁸ Commission of the European Communities, ‘European Governance. A White Paper’, COM(2001) 428 final of 25.07.01.

³⁹ See, on this background Ch. 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’, 7 (2000) *Columbia Journal of European Law*, pp. 1-19 at 6 ff..

⁴⁰ (Note 38), p. 8, note 1.

⁴¹ See ‘Enhancing democracy in the European Union. Working Programme’, SEC (200) 1547, 7 final of 11.10.2000; <http://europa.eu.int/comm/governance/work/en.pdf>; see also O. De Schutter, N. Lebessis & J. Paterson (eds.), *Governance in the European Union* (Luxembourg: Office for Official Publications of the EC, 2001).

⁴² The most recent bibliography on governance I am aware of lists 2.900 books and journal articles; available at <http://www.connex-network.org/govlit>.

Commission's monopoly over legislative proposals that were then adopted by the Council after consultation with the European Parliament, had long been eroded. The 'turn to regulation' that the 1985 White Paper had begun still lacked an appropriate institutional and political framework. What Europe now needed was the continuous management of its political economy; by the same token, however, it still lacked a central and genuinely European administration and was accordingly required to strengthen its co-ordination of European and national governmental and non-governmental actors. The turn to governance was accordingly inevitable; but what did this move accomplish?

Seen through the lenses of legal paradigms that we have used throughout this essay one trend is particularly strong in the 'classical' field of consumer protection within private law. Here the Commission appears to be moving back to the liberal beginnings of European consumer legislation in the 1970s. Very shortly after it had announced in its 2003 'action plan' on European contract law,⁴³ the Commission explained that it would prioritise a consolidation of the patchwork of European consumer protection directives.⁴⁴ Most significantly in the context of the present 'citizenship and consumption project' is the Directive 2005/29 'concerning unfair business-to-consumer commercial practices',⁴⁵ the consumer is again constructed as a market actor with economic interests whose 'transactional' performance European law seeks to further thus promoting the 'smooth functioning of the internal market'.⁴⁶ The same orientation is strongly visible in the an important initiative the Commission has recently presented, namely the draft directive on consumer credit⁴⁷ – and recent judgments of the ECJ point in the same neo-neo-liberal direction.⁴⁸

What is true in the field of contractual consumer legislation, however, cannot be true for protection against risks to health and safety. It is not possible to treat Europeans as 'shoppers' where they are anxious about their health and unwilling to consume genetically modified food. Within the health and safety arena, we can accordingly identify what appear to be counter-currents. Consumer health and safety concerns are pursued with great energy. The recently established European Food Safety Authority provides a telling example. According to its founding statute '[i]t is necessary to ensure that consumer *confidence* and the confidence of trading partners is secured through the open and transparent development of food law' [preamble (22)]⁴⁹. This would seem to indicate that the authority has nothing to do with politics, or with the control *over* the market by the consumer, but is rather, in a technocratic market driven logic, designed to

⁴³ Communication from the Commission. A More Coherent European Contract Law: An Action Plan COM(2003) 68 final of 12.02.2003.

⁴⁴ First Annual Progress Report on European Contract Law and the Acquis Review. COM(2005) 456 final of 23.09.2005

⁴⁵ OJ L 148, 22 of 11 June 2005.

⁴⁶ *Ibid.*, recital 3.

⁴⁷ See the Modified Proposal for a Directive of the European Parliament and the Council on credit agreements for consumers amending Council Directive 93/13/EC, COM(2005) 483 final of 07.10.2005.

⁴⁸ Recent examples include: Case C-481/99, *Heininger*, ECR 2001, I-234 (unfair contract terms) and Case C-402/03, *Skov*, Judgment of 10/1/2006, nyr (product liability law).

⁴⁹ Article 37(1) of Regulation 178/2002 of the European Parliament and of the Council, OJ 2002 L 31/16.

secure the position of the consumer (rather than citizen) *within* the market. Equally, this technocratic logic would seem to be confirmed by the statute's to principles of scientific neutrality: The members of the Scientific Committee and the Scientific Panels [of the EFSA] shall undertake to act independently *of any external influence*.⁵⁰ However, such stark strictly executive attributes must immediately be contrasted with an envisaged role for the agency's technocrats that is to be exercised as follows:

The members of the Management Board, the Advisory Forum and the Executive Director [of the EFSA] shall undertake to act independently *in the public interest*.⁵¹

The notion of 'in the public interest' provides the key: the embedding of Europe's agencies not only within a technocratic market driven logic, but also within a sphere of conflicting political interests. The distinction made in the design of European agencies between 'political' decision-making functions, undertaken by the Commission, and strict technocratic activities, delegated to bureaucrats and scientific expertise, is a false one. More importantly, it is seen to be a false one: the direct connection made between the agency and European public, the notion of executive functions exercised in a European public interest, tears away the veil of technocratic governance in Europe. Europe is no more simply dedicated to a clear purposive and supreme programme of technocratic intervention than it is to pursuit of a clear and comprehensive programme of legislative intervention on the basis of a unitary and representatively expressed democratic will. Instead, its agencies – the supposed core of its technocratic orientation – are shot through with political conflict and consideration, i.e., conflict and consideration that requires some form of reconnection between it's executive arm and a sphere of political contention in which legitimate political interests are formed.

Scientification and the centralisation of scientific advice are very visible characteristics of the present developments within European risk regulation. The strengthening of European policies goes hand in hand with a reliance on new – and increasingly de-formalised – modes of governance. The distinctive feature of these regulatory techniques is their reliance upon 'soft law' and their substitution for law's normative stubbornness with flexible management coupled with cognitive openness. The turn to expertise and flexible managerial responses seems, albeit only at first sight, at odds with the contemporaneous return of orthodox formalism in the realm of contract law. There is, however, no paradox and no contradiction within the perspective of the politicised consumer: legal formalism in contract law tends to replace political contestation over the social dimensions of private ordering with the objective mechanisms of market processes. The new modes of flexible expert governance tend to replace political contestation over socially acceptable exposure to risks by references to the objective standards of sound science. 'Sound science and the market' are natural allies.

Is this a normatively convincing and stable alliance? The present policy orientation of the European Commission has undoubtedly been imposed upon it by the failure of the Draft Constitutional Treaty. This failure had a destructive impact on the cohesion of the Union and, understandably so, also on the confidence of its exponents in the sustainability of their endeavours. The resort to 'sound science and the market' is

⁵⁰ Article 37(2) *ibid.*

⁵¹ Article 37(2), *ibid.*

therefore quite comprehensible. It is, however, also unlikely to confirm or restore the acceptance of Europe by its consumers – and it is by no means comprehensive and incontestable. The new formalism in private law remains embedded in mature legal systems, which have learned to live with competing rationalities and politicised consumers. The turn to sound science and expert management in the realm of health and safety is embedded in European-wide communicative networks amongst politically accountable actors and an ever more active civil society. The transformation of the European consumer into a citizen is still underway.

B) Globalisation as Regression: The WTO Panel Report on the GMO Dispute

Turning back to Karl Polanyi's thesis, we can now conclude that European consumer markets have not currently found their own final 'social embeddedness' within the dense legal structures originally foreseen for the internal market. At the same, however, the historical 'integration through law' legacy has not fully dissolved, nor can or will European markets be fully 'dis-embedded' by virtue of any new and austere economic liberalism or the erosion of rule of law by new modes of governance. The international constellation is, nonetheless, very different. Even though we might expect a social-embeddedness imperative to operate at international level, here, its powers will necessarily be of a very different kind. Of necessity, international contracting has created its own legal frameworks for international trade;⁵² frameworks within which national and European efforts to defend the health and safety of citizens have already proven to be powerful irritants and transformative accelerants.

This trend is most visibly demonstrated in relation to the transformation of the old GATT trade regime into the new WTO legal system. The main objective of the General Agreement on Tariffs and Trade (GATT), concluded 1947, was the reduction of tariffs introduced by states to protect their national economy. Since the early 1970s, however, non-tariff barriers to free trade have become the main focus for attention. This shift was necessitated by the intensification of domestic economic regulation, especially in the fields of health and safety, consumer and environmental protection (period of legal materialization). In 1994, the international trade system adapted to this situation by transforming the GATT into the World Trade Organization (WTO). The most important reforms included an overhaul of its procedures of dispute settlement and the conclusion of special agreements concerning non-tariff barriers to free trade such as the *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS) and the *Agreement on Technical Barriers to Trade* (TBT). These agreements aim at the balancing of their main economic objective, free trade, with the domestic regulatory concerns of WTO members.

There are obvious parallels to the European experience after the abolition of tariff barriers. But there are also important differences. The Members of the WTO did not

⁵² See, recently Gralff-Peter Calliess, 'Reflexive Transnational Law. The Privatisation of Civil Law and the Civilisation of Private Law', 23: 2 (2002) *Zeitschrift für Rechtssoziologie*, pp. 185-216; *Grenzüberschreitende Verbraucherverträge, Rechtssicherheit und Gerechtigkeit auf dem elektronischen Weltmarktplatz*, (Tübingen: Mohr/Siebeck 2006).

confer 'positive' regulatory powers upon that organisation, although they agreed that WTO law should impose restraints on the exercise of their domestic regulatory powers. WTO law cannot simply copy the European turn to 'positive' integration via-re-regulation. The co-originality of market and regulation, postulated by Polanyi, must find its expression within different mechanisms. Currently, the most important of these mechanisms that accompany the restraints imposed on domestic regulatory policies is an intense process of quasi-legal norm-production at the international level, organised by both non-governmental and governmental actors, and especially so in the field of product safety.⁵³

The GMO Case and its Object

As indicated, we will restrict our discussion on the impact of globalisation on the position of consumers to one single case, namely the dispute between the EU, the US, Canada and Argentina on the legitimate or otherwise use of genetically modified organisms (GMOs) in foodstuffs.⁵⁴ There are many reasons for this specific focus. Foodstuffs are highly politicised products; accordingly, no legal system has ever been able fully to dispense with more or less comprehensive or stringent regulatory supervision over them. GMOs represent the technologically most advanced and, at the same time, most controversial of all foodstuffs, if not of all consumer products. This is so for a broad range of reasons.⁵⁵ GMO production requires highly developed technologies, within which the US is the world's leader, but which have also been mastered to a greater or lesser degree by countries such as Argentina, Brazil and India. The socio-economic implications of new GMO technologies are necessarily ambivalent: India, for example, with a high percentage of its labour force occupied within the agrarian sector, is a scene of great conflict about GMOs as development imperatives clash with employment concerns.⁵⁶ The most intensive controversy, however, focuses on the risks of GMOs. Sceptics and GMO promoters agree to a large degree that the 'safety' of genetically modified foodstuffs has not been 'positively' challenged.⁵⁷ The main concern of the critics, however, is with the production process; the risks of contamination of non GMO-crops by GMOs released into the environment. The debate is also and in an illuminating way all about the importance of consumer anxieties and consumer choice. Do we have a 'right to know' what we are eating?⁵⁸ Are governments entitled to require the labelling of GMOs because a majority or significant minority of

⁵³ See Ch. Joerges & E.-U. Petersmann (eds.) *Constitutionalism, Multilevel Trade Governance and Social Regulation*, (Oxford: Hart 2006).

⁵⁴ See note 6 *supra*.

⁵⁵ For a summary cf. the *amicus brief* submitted in the GMO dispute (note 6) by D. Winickoff, S. Jasanoff, L. Busch, R. Grove-White & B. Wynne, also published in 30 (2005) *Yale Journal of International Law*, 30, 81-125.

⁵⁶ See, S. Zarrilli, 'International trade in GMOs: Legal frameworks and Developing Country Concerns', in Italienerin in F. Francioni & T. Scovazzi, *Biotechnology and International Law*, (Oxford: Hart 2006), pp. 231-254.

⁵⁷ See, W. van den Daele, 'Legal framework and political strategy in dealing with the risks of new technology — the two faces of the precautionary principle', in J. Somsen (ed.), *Regulating Biotechnology*, (Cheltenham: Edward Elgar, forthcoming 2007).

⁵⁸ See, on this controversy P.H. Sand, 'Labelling Genetically Modified Food: The Right to Know', 15:2 (2006) *Review of European Community & International Environmental Law*, 185-192.

their constituency refuses to accept them?⁵⁹ The EU has accordingly ‘perfected’ its authorization procedures by means of the establishment of an ethical advisory body.⁶⁰

The GMO controversy has a long history.⁶¹ The present legalized stage⁶² began in the spring of 2003 with the request for formal dispute settlement consultations by the US, supported by Argentina and Canada. In that request the complainants argued that the EC had imposed a *de facto* moratorium on approvals of biotech products and ‘national marketing and import bans on biotech products’ issued by Member States of the EU and approved by it. Following the request, the panel was formed in March 2004. Its report was announced several times and then postponed. The conclusions of the Panel’s preliminary report of 7 February 2006 were made public soon thereafter.⁶³ Having received the responses to its preliminary report, the WTO panel published its modified report on 29 September 2006. It now covers 1087 pages and has 10 annexes.⁶⁴

Three Core Issues

The reasoning in WTO reports is highly formalized. The reports reconstruct the arguments of the parties to the disputes, of all other participants and of the *amici curiae*; they document how they have replied to their adversaries – and then take great pains to furnish a *lege artis* interpretation of the agreements on which they must base their findings and conclusions. There is of course much more in the reports than can be addressed here – but not everything is important in the light of the leitmotif of this essay: what form of social embeddedness of the market for GMOs does WTO law, in the view of the panel report, seek to achieve?

The answers to this query seem surprisingly simple. We single out and differentiate between three aspects: (1) The authority of science; (2) the autonomy of politics and (3) consumer choice.

⁵⁹ See, ‘Europeans and Biotechnology in 2005: Patterns and trends’, 64.3 (2006) *Eurobarometer*; see also *GM Compass* (2006), June 22 2006, <http://www.gmcompass.org/pdf/documents/eurobarometer2006.pdf>

⁶⁰ See, P. Dabrowska, *Hybrid solution for Hybrid Products? EU Governance of GMOs*, Ph.D Thesis EUI Florence 2006, pp. 200 ff.

⁶¹ G.C. Shaffer & M.A. Pollack, ‘Reconciling (or Failing to Reconcile) Regulatory Differences: The Ongoing Transatlantic Dispute over the Regulation of Biotechnology’, in D. Andrews, M.A. Pollack, G.C. Shaffer and H. Wallace (eds.) *The New Transatlantic Agenda and the Future of Transatlantic Economic Governance*, (Florence: European University Institute 2005), pp. 167–229.

⁶² See, for a detailed survey of the arguments brought forward by the parties, the intervenors and the E.-U. Petersmann, ‘The WTO Dispute Over Genetically Modified Organisms: Interface Problems of International Trade Law, Environmental Law and Biotechnology Law’, in F Francioni & T. Scovazzi, *Biotechnology and International Law*, (Oxford: Hart 2006), pp. 173-200.

⁶³ The full preliminary report was made public by Friends of the Earth (see http://www.foe.co.uk/resources/press_releases/leaked_wto_report_us_misle_28022006.html) an indiscretion on which the final report (note 6) lamented upon at some length (see para.s 1.124-1.137).

⁶⁴ ‘European Communities – Measures affecting the approval and marketing of biotech products’ (DS291, DS292 and DS293). Findings and conclusions: http://www.wto.org/english/tratop_e/dispu_e/291r_conc_e.pdf. Full panel report: http://www.wto.org/english/news_e/news06_e/291r_e.htm.

Supremacy of Science

The US and the EU differ in their regulatory approaches to GMOs significantly in two respects. The US focuses on the health risks posed by the food produced whereas the approach of the EU is much more comprehensive in that it places a much greater emphasis on environmental risks.⁶⁵ In their safety assessments, US authorities tend to approve products unless there is some scientific evidence confirming risk allegations, whereas the EU has committed itself to the 'precautionary principle'. That principle has had constitutional authority within the EU since the Maastricht Treaty of 1992;⁶⁶ each and every legislative, administrative and judicial act must respect it. The rules and principles governing the resolution of conflict between the two legal orders are to be found in the SPS Agreement. All of them point to the authority of science. That is by no means surprising.

As already underlined, the WTO does not have any 'positive' legislative competences, but recognizes in principle the regulatory autonomy of WTO Members. In order to ensure the compatibility of regulatory policies with its commitment to free trade it makes use of underlying conflict of laws principles, asking Members to exercise some self-restraint in the interpretation and application of their domestic law and, where this does not suffice, seeking to resolve conflicts with the aid of a meta-rule to which all the parties can be expected subscribe. As such, WTO law reproduces the old European model to overcoming national regulatory policies that created obstacles to trade. Classically, the European model identified legitimate policy objectives for national regulation (such as health, safety and environmental protection) and then required member states to provide scientific evidence that these regulatory concerns were, in fact real.⁶⁷ Through its resort to science, Europe invoked a non-partisan objective authority that national policy makers could accept. This is of course not to say that Europeans would not know that the assessment and risk management of risk involves political and policy questions such as the acceptability of risks and regulatory responses to them.⁶⁸ And yet, the standards of science as well as the techniques of risk assessment can claim some meta-political validity. Where scientists cannot agree, they nonetheless continue to interpret their controversies as a scientific exercise and entrust the scientific community with the competence to assess their claims.

What has been practiced with such remarkable success within the EU suggests itself equally as a conflict mediating strategy in international arenas. The acceptability of technically complex and potentially harmful products cannot be assessed without the help of pertinent expertise. And vice versa: where WTO members raise objections against free access to their markets, they can be expected to provide scientific evidence

⁶⁵ See G.C Shaffer & M.A. Pollack (note 51), pp. 169 ff.

⁶⁶ Now Article 174(2) EC Treaty.

⁶⁷ See, Ch. Joerges, 'Scientific Expertise in Social Regulation and the European Court of Justice: Legal Frameworks for Denationalized Governance Structures', in Ch. Joerges, K.-H. Ladeur & E. Vos (eds.), *Integrating Scientific Expertise into Regulatory Decision-Making. National Traditions and European Innovations* (Baden-Baden: Nomos 1997, pp. 295-324.

⁶⁸ Cf. A.W. Gouldner, 'Cosmopolitans and Locals: Towards an Analysis of Latent Social Roles', (1957) *Administrative Science Quarterly*, 281-306 and (1958), 444-480.

supporting the legitimacy of their policies. This is exactly what the SPS Agreement provides for.⁶⁹

Nonetheless, a question remains: what if science cannot help to resolve controversies because scientists agree that they are confronted with uncertainty they cannot hope to overcome? This need not be the end of methodologically disciplined discourses. Such discourses have, however, come to an end, where one party adopts a version of the precautionary principle in which the quest for scientific evidence is rejected *a priori*. The borderlines are by no means obvious as the efforts of European Courts document.⁷⁰ It would be too much to expect a WTO body to explain that its own mandate ends where science has no answers on offer. In the Hormones Case⁷¹ the WTO Appellate Body found that the '[precautionary] principle has not been written into the SPS Agreement as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement.' The panel in the GMO case follows suit in a more elegant way: Recalling 'that according to the Appellate Body, the precautionary principle has not been written into the *SPS Agreement* as a legitimate ground for justifying SPS measures';⁷² the panel went on to explain that 'even if a Member follows a precautionary approach, its SPS measures need to be 'based on' (*i.e.*, '-sufficiently warranted' or 'reasonably supported' by) a risk assessment. Or, to put it another way, such an approach needs to be applied in a manner consistent with the requirements of Article 5 (1).'

Alternatively, the WTO clearly feels entitled to impose the yardstick of science it finds in the SPS agreement regardless of the constitutional positions taken up and applied by its member states.

Distorting Politics

Resort to science in such trans-scientific matters is to invoke an emperor without clothes, one might object. If scientific uncertainty is a 'fact', the insistence on science as the legally prescribed arbiter of controversies does not make sense. A variety of alternatives are conceivable. The closest to the logic of the panel report is a broad understanding of 'science' and 'risk assessment'. In the pronouncements of the

⁶⁹ 'Members shall ensure that any sanitary or phytosanitary measure is ... is based on scientific principles and is not maintained without sufficient scientific evidence ... (Art. 2 (2))'. 'Members may introduce or maintain ... a higher level of sanitary or phytosanitary protection ... if there is a scientific justification, ...' (Art. 2 (3)). 'In the assessment of risks, Members shall take into account available scientific evidence...' (Art. 5 (2)). 'In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time' (Art. 5 (7)).

⁷⁰ Most prominently ECJ, Case C-236/01, *Monsanto v. Italy*, [2003] ECR I-8105. See previously Judgements of 11 Sept. 2002, Cases T-13/99, *Pfizer*, and T-70/99, *Alpharma*, available at <http://curia.eu.int>.

⁷¹ WTO Appellate Body Report, *European Communities - Measures Concerning Meat and Meat Products (Hormones)* ('*EC - Hormones*'), WT/DS26/AB/R and WT/DS48/AB/R, adopted 13 February 1998

⁷² Para. 7.0365 note 1905.

Appellate Body in the Hormones case just cited⁷³ the recognition of uncertainty resulting from incomplete knowledge and disputes between experts seems to mirror conservative interpretations of the precautionary principle. Thus, the ECJ in its most important judgment on the precautionary principle has explained that this principle must not be understood as legitimating ‘a purely hypothetical approach to risk, founded on mere suppositions which are not yet scientifically verified’;⁷⁴ it requires instead ‘a risk assessment which is as complete as possible in the particular circumstances’.⁷⁵ A second alternative is the extension of risk assessments to production processes and/or to their use. Both alternatives, however, imply that non-scientific criteria will have an impact on risk evaluations.⁷⁶ Once one becomes aware of this implication it is difficult to explain why socio-economic considerations about the social costs and benefits of a new technology should be illegitimate *per se*. To rephrase this observation from a different perspective: since the legal system cannot refuse to take a decision simply because state of the art expertise does not provide it with guidance, the resort to trans-scientific criteria must suggest itself. Socio-economic considerations concerning, for example, the impact of the introduction of new technologies on the agricultural sector are not simply irrational.⁷⁷

Two further implications need to be underlined. First, where uncertainty prevails, diversity in the assessment of the given problem will be unavoidable. Second, such diversity needs a framework within which it can be managed. The EU seems particularly well equipped in that respect. The ECT recognizes explicitly the right of Member states to move beyond the level of consumer protection foreseen in legislative acts (Article 95 (5) ECT; Article 153 ECT) and its commitment to precaution also suggests that in cases of scientific uncertainty the Member States should retain autonomy. Furthermore, each and every piece of pertinent secondary legislation contains safeguard clauses with exit options for Member States who find the majority response unacceptable (most significantly in the present context, the authorization of genetically modified organisms).⁷⁸

Diversity in a system understanding the establishment of a common market as its *raison d’être* is, however, apparently difficult to accept. Recourse to the safeguard identified by the ECJ is available only on the basis of ‘evidence which indicates the existence of a specific risk’ and not for reasons ‘of a general nature’.⁷⁹ The search for uniform standards within the European market is clearly visible in such remarks.⁸⁰ The Court

⁷³ Note 71.

⁷⁴ Case C-236/01, *Monsanto v. Italy*, [2003] ECR I-8105, para. 106.

⁷⁵ Case C-236/01, *Monsanto v. Italy*, [2003] ECR I-8105, para. 107.

⁷⁶ See A. Herwig, ‘The Precautionary Principle in Support of Practical Reason: An Argument Against Formalistic Interpretations of the Precautionary Principle’, in Ch. Joerges & E.-U. Petersmann (note 53), pp. 301-326.

⁷⁷ But of course hardly acceptable within system building upon free trade as their *raison d’être*. For the WTO system cf. Zarrilli (note 51).

⁷⁸ See on the European authorisation procedures in detail P. Dabrowska (note 58), pp. 177-372.

⁷⁹ Case C-236/01, *Monsanto v. Italy*, [2003] ECR I-8105, para. 109.

⁸⁰ See the analysis of J. Corkin, ‘A Manifesto for the European Court: Democracy, Decentred Governance and the Process-Perfecting Judicial Shadow’, PhD Thesis EUI Florence 2006, Section V 2 C (pp. 504 ff.). Cases T-366/03 and T-235704, *Land Oberösterreich and Austria v. Commission of the EC*, Judgment of 05.10.2005, nyr.

confirmed that safeguard procedures must be understood in ‘in the light of the precautionary principle’ and may therefore justify a temporary derogation, but only, however, where ‘it proves impossible to carry out as full a risk assessment as possible ... because of the inadequate nature of the available scientific data’.⁸¹

And yet, what the European Court refused finally to do, was to subject European governments to an ‘objective’ standard, such as is advocated by the proponents of sound science. The WTO Panel, by contrast, was far less timid: notwithstanding doubts about the completeness of scientific evidence, the Panel insisted upon the exclusive validity of a yardstick, which, its indeterminacy notwithstanding, both overrules precautionary reservations in cases of uncertainty and de-legitimises political processes and solutions. If you cannot prove that GMOs are not safe, you have no reason to reject them.

This final tendency, the de-legitimation of political process, is very clear in the Panel’s treatment of European submissions. Europe’s final regulatory regime for GMOs did not appear out of the blue. Rather, it was many years in the making. The first directive appeared in 1990;⁸² yet, in the light of on-going political debates and discussions, many revisions were to be made with the, the European Council of Environmental Ministers agreeing on a final common platform for a new framework only in June 1999.⁸³ By the same token, the final regulatory directive took longer to detail. Although the WTO panel report did not question the seriousness of such lengthy political processes directly, it nonetheless found a very convenient and indirect means of de-legitimising them. Having once decided that the SPS agreement was applicable to the authorization of GMOs, the panel could then point to Article 8 SPS Agreement in connection with Annex C 1 8a). These provisions require that applications must not be treated with ‘undue delay’. The right of applicants seeking authorization for their products trumps all other; it is irrelevant that time may be required to overcome internal political difficulties. The panel found that the completion of the approval process had been ‘unduly delayed’ in 24 cases. It therefore requested the EU to bring the measures ‘into conformity with its obligations under the SPS Agreement’, effectively asking the EU to complete the approval process for the outstanding applications.

Equally indirect and effective was the panel’s critique of the autonomy which Member States of the EU feel entitled to claim when resorting to ‘safeguard measures’. The national bans on the marketing and import of EU-approved biotech products imposed in France, Germany, Austria, Italy, Luxembourg and Greece were found to be incompatible with WTO law. This conclusion was based on the panel’s understanding of a proper handling of these measures under European law. The panel did not question the approval procedures, which allow individual EU member states to impose SPS measures that differ from EU-wide measures, but opined that, after the EU’s scientific committee had already assessed the risks of the biotech products and judged them to be safe, the challenged EU member states had not undertaken risk assessments in line with the requirements of the SPS Agreement that would ‘reasonably support the prohibition’.

⁸¹ Case C-236/01, *Monsanto v. Italy*, [2003] ECR I-8105, para. 109.

⁸² See Dabrowski (note 60) Ch. 2.1, pp. 43 ff

⁸³ For instructive details cf. van den Daele (note 57).

WTO law as specified in the risk assessment provisions of the SPS Agreement governs. National bans can be accepted only if based on an SPS-compliant risk assessment.

‘Sound Science and the Market’

The opening of national markets is dependent on the establishment of transnational regimes ensuring the trustworthiness of free trade with complex and potentially hazardous products. This observation remains valid. The WTO panel report can be read as explicitly confirming that the market will always be ‘socially embedded’. The type of embeddedness the report advocates is, however, of a specific kind and the regulatory frameworks it is ready to endorse operate with a very limited mandate. The report recognizes implicitly the right to introduce new technologies. It follows that reasons must be given for restricting their introduction. Safeguarding important private and public goods, such as the health of consumers, are unquestioned. The restrictions imposed, however, need an objective basis - and science rather than politics provides the grounds on which restrictions can be based. The consumer can feel safe. He is not actively contributing, however, to his regulatory environment: ‘sound science’ is now the consumer’s guardian.

How will the epistemic community of WTO lawyers read the report. So far I am aware of just two, both critical, analyses.⁸⁴ There will certainly be more. In the meantime, however, the EU has decided not to appeal the against panel report – with Commission Trade Spokesman Peter Power declaring “The impact of that judgment is entirely of historical interest”.⁸⁵ Is the spokesman right? Karl Polanyi not only argued that the liberal project of a disembodied market is purely utopian; he also concluded that the disembedding of socially embedded markets cannot be successful.⁸⁶

⁸⁴ O. Perez. “Anomalies at the Precautionary Kingdom: Reflections on the GMO Panel’s Decision”, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=940907; Ch. Conrad, „Im Spannungsfeld von WTO-Recht und nationaler Sozialregulierung: Kritische Erörterung der Anwendbarkeit des SPS-Abkommens auf die Regulierung gentechnisch veränderter Produkte anhand des EC-Biotech-Streits“, Ms. Bremen 2006 (on file with author).

⁸⁵ See, <http://www.euractiv.com/en/trade/eu-accepts-trade-ruling-gmos/article-159918>.

⁸⁶ This is at any rate how Fred Block interprets Polanyi’s argument (note 26), at. pp. xxv-xxvii.