
Current State and Prospects of Consumer Policy: An introductory Essay

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Abstract

In recent years German and European consumer policy has taken on a new dynamism. However, both in Germany and the European Union consumer policy remains on the defensive. This situation will only change if consumer policy's current deficits in terms of theoretical input and enforceability can be overcome. Consumer policy needs to establish its own theoretical framework. It can no longer afford to define itself merely as a corrective for undesirable developments in the field of competition policy. The goal must be a preventive consumer policy, one that sets limits on the provider/production-oriented development of markets and makes a positive contribution to sustainable development on both a regional and global level. Such a goal requires a fundamental reform of the instruments of consumer policy and policy-makers' understanding of their role. Consumer research has important contributions to make to such a reform.^{xx}

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1 Introduction

The current state of consumer policy is an ambivalent one. On the one hand, consumer policy has improved in terms of its status, prominence and political recognition in Germany as well as in the European Union compared to the situation in the 1980s and 1990s. Above all in the food and retail sectors, we are now seeing new preferences and a new type of consumer behaviour. On the other hand, the situation of consumers is becoming more and more difficult. While consumer policy is attempting to address certain selective problems, rapid changes in market conditions are leading to a whole range of new problems for consumers. In the following, I shall describe the achievements and deficits of consumer policy and present some ideas on the prospects of consumer policy. In general, current consumer policy can be described as being reactive rather than proactive. The political discussion and political decision-making process are mainly driven by actors from the supply side of the market, and they are guided by certain ideological perceptions concerning the role of market forces and state intervention. I have become increasingly convinced that, beyond the necessary strengthening of the institutional structures of consumer policy-making and the need of better and more effective policy instruments, it is above all the prevailing “belief system” (Sabatier 1993) that needs to be changed. And it is here that consumer policy research has a major role to play.

2 The current German and European institutional framework of consumer policy

To describe and evaluate the state of a given policy in general and of consumer policy in particular is not an easy task. *Scharpf* defined politics as follows: “Politics is about many things. But foremost among these, in modern democratic polities, is the function of selecting

and legitimating public policies that use the powers of the collectivity for the achievement of goals and the resolution of problems that are beyond the reach of individuals acting on their own or through market exchanges” (Scharpf 1997: 1). His conclusions certainly apply to policy-making for the benefit of consumers: “... social phenomena are to be explained as the outcome of interactions among intentional actors - individual, collective, or corporate actors, that is - but these interactions are structured, and the outcomes shaped, by the characteristics of the institutional settings within which they occur” (Scharpf 1997: 1). Consequently, this chapter will look at the institutional setting of current consumer policy and the kinds of political support and power resources it is able to draw on. It will describe the measures being taken and compare them with the problems consumer policy needs to solve. In the European internal market most legislation for the protection of consumers is a joint exercise involving both national and European policy-making. Both policy levels therefore need to be discussed.

3 More power through better institutions? The German case

In recent years, consumer protection has taken on a new dynamism in Germany. The establishment of the Federal Ministry for Consumer Protection, Nutrition and Agriculture in January 2001¹, and the creation of the Federal Agency for Consumer Protection and Food Safety and the Federal Institute for Risk Assessment in Autumn 2002 have improved institutional structures particularly with regard to the protection of consumers’ health within the framework of federal policy. These

¹ After the last elections in 2005 the name was changed to the Federal Ministry for Nutrition, Agriculture and Consumer Protection.

improvements also include the establishment of a scientific advisory board connected to the Federal Ministry for Consumer Protection². 2001 also saw an organisational strengthening of bodies representing consumer interests at the federal level when several autonomous organisations and their legal and political instruments were bundled under the umbrella of the Federation of German Consumer Organisations³.

Both reforms are 'children of crisis'. They were not the intentional result of political programmes and competition among political parties aimed at strengthening the basis for a better consumer policy. Rather, the organisational change within the structure of the German Federal Government was a response to the turbulence of the BSE scandal and European reforms in connection with its food safety policy. Nevertheless, the effect was positive. Together with corresponding organisational reforms within the German Bundestag it helped to give consumer policy a prominent place on the political agenda. The former 'back-bencher position' of the speakers of the parliamentary party groups for consumer policy now became interesting for ambitious Members of Parliament.

The creation of the Federal Ministry for Consumer Protection provided German consumer policy with 'cabinet rank.' However the chief responsibilities of the Federal Minister for Nutrition, Agriculture and Consumer Protection are essentially confined to food safety and consumer health protection. Other important areas of responsibility fall under other jurisdictions, such as those of the Federal Ministry of Justice, the Federal Ministry for Economics and Technology and the Federal Ministry of Finance. Furthermore, almost all ministries have areas of responsibility that are highly relevant to consumers. This applies, for example to the

² The ministry is hereinafter referred to using this simplified title.

³ The Federation of German Consumer Organisations is an umbrella organisation with 41 single member organisations. For further information visit www.vzbv.de

data-protection area, which is under the jurisdiction of the Ministry of the Interior, and the areas of construction, housing and transport, which are all under the jurisdiction of the Federal Ministry for Transport, Building and Urban Affairs. The same applies to the Federal Ministry for Health, the Federal Ministry for Education and Research, the Federal Ministry for the Environment and a range of other ministries. Given the cross-cutting character of consumer policy, the Federal Ministry for Consumer Protection has the role of 'consumer advocate' in the cabinet and within the inter-ministerial decision-making process. The degree to which this function can be exercised in individual cases is dependent on a range of preconditions. These include a cabinet-approved programme as well as the provision of sufficient resources in the form of so-called 'Spiegelreferate', i.e. sections which monitor on the consumer-relevant programmes of other departments.

However, there are also important exogenous factors such as the political weight of the responsible minister and the degree of political and public support he or she enjoys. In addition, the programmatic support for consumer policy within and provided by political parties is of central significance.

Unfortunately, the first Consumer Minister, Renate Künast from the Green party, did not use the 'window of opportunity' the BSE crisis offered to immediately formulate and present a comprehensive political programme for a new and modern consumer policy. Elsewhere, I have described the elements of such a programme for a new consumer policy (Müller 2001). The main message is that consumer policy needs to widen its horizon and scope. It should define its role, ambition and instruments in a way that takes it beyond a purely defensive and reactive sectoral policy that aims to protect consumers' health and economic security towards a more active cross-cutting policy. Such a policy would address consumers as actors on the demand side of the market who are essential in macro-

economic terms and in terms of the global objective of sustainable development.

As the first Consumer Minister, Renate Künast moved very late to create the internal organisational structures required to assert a presence and gain respect within the departmental decision-making process. She successfully threw the political weight that she certainly possessed as a member of the smaller coalition partner in the German government behind the ecologisation of the agricultural sector and the fight for healthier food. There can be no doubt that her efforts were central to the remarkable rise in the popularity of organic food and the increased demand for the products of regional agriculture as well as the fact that genetically modified food are still unable to gain a foothold in the German market. However, in sum, the first Consumer Protection Minister and her party did not muster the political will and lacked the political clout to fight for a policy reaching beyond crisis management and a narrow focus on 'fat kids and organic food'.

The impetus for the institutional reform of the consumer movement in Germany was also not a political one. German consumer organisations are dependent on financial aid from the government and the tax payer. This arrangement was chosen in light of the difficulties involved in organising consumer interests and collecting membership fees for the work of consumer organisations. It is also based on the nature of consumer protection as a collective good and the diffuse character of consumer interests. Mancur Olson has described this phenomenon (Olson 1965). The Federal Ministry for Economic Affairs, which at that time was responsible for financing consumer organisations, was keen to save money. Consequently, it obliged three separate consumer organisations at the federal level⁴ to merge

⁴ Until 2000, the Federal Ministry for Economic Affairs financed the "Arbeitsgemeinschaft der Verbraucherverbände (AgV)" - the Working Group of Consumer Organisations - as a political lobby organisation and service-provider for the consumer centers, the Verbraucherschutzverein - the association responsible for the legal

and make use of synergies for saving financial resources. Here again the effect was not intended but extremely positive.

As it turned out, the new Federation of German Consumer Organisations (vzbv) started its work in January 2001 during the peak of the BSE crisis. It was some days before Chancellor Schröder announced the transfer of responsibilities for consumer protection to the new Federal Ministry for Consumer Protection, Nutrition and Agriculture and appointed Renate Künast as the new Consumer Minister. At that time the vzbv had no approved budget and had to struggle with internal problems - the transfer of the AgV staff from Bonn to the new capital Berlin, the integration of the staff of three different organisations, each with its own social and professional culture, into one organisation. Despite these internal problems the new organisation made use of the 'window of opportunity'. It presented its programme and new ideas, which were taken up and widely publicised by the media. The result was the approval by parliament of an increased budget. In the following years the Federation of Consumer Organisations established itself as 'the voice of consumers'. Time and again, it also succeeded in putting new initiatives onto the political agenda that aimed to improve the consumer's position in legal and practical terms both in Germany and at the European level.

From a political scientist's point of view, the federation's role is interesting in so far as it acted as a lobbying organisation for a cross-cutting consumer policy. It tracked all consumer policy fields relevant for consumers and tried to influence the coordination process between the various ministries involved. The underlying intention was to help and strengthen the Ministry for Consumer Protection in the inter-ministerial coordination and conflict-solving process.

protection of consumer rights - and the Stiftung Verbraucherinstitut
- the foundation responsible for consumer education and training.

This strategy was hardly successful⁵. Because of a different definition of its role and scope of interest, the Federal Ministry for Agriculture, Nutrition and Consumer Protection increasingly refused to collaborate with the Federation of German Consumer Organisations. My explanation for this is that the people responsible for these cross-cutting issues at the 'working level' suffered from a lack of resources and support from the hierarchy, including the minister. As they saw it, they were being placed under pressure and unfairly criticised for having to accept problematic solutions for consumers because their minister was unwilling or unable to fight for better ones.

Today, in my view, consumer policy is in a precarious situation. The increase in its institutional strength and visibility has generated political expectations. The media are becoming increasingly interested in consumer problems and are demanding political initiatives to deal with them - not least, incidentally, because publication and broadcasting interests have led to the institutionalisation of units for consumer affairs in most media.

However, the reality of consumer policy power resources and democratic support reveals a totally different picture. Consumer interests do not play a role in German elections and are not a subject of competition between the different parties in elections. A policy survey conducted by the vzbv prior to the 2005 German elections produced detailed responses from all parties to questions regarding consumer protection.⁶ However, such themes did not play a role in the parties' public election campaigns. The parties assumed, not without justification, that consumer concerns would not play a role or only a very minor one when it came to

⁵ Successes such as the consideration of a number of consumer demands in the amendments to the Energy Economy Law and the Insurance Act owed more to the vzbv's direct lobbying of the relevant ministries.

⁶ http://.vzbv.de/mediapics/handlungsfeld1_bis_8_antworten_wahl_pruefsteine_2005.pdf

voters deciding who they would support. Whether this situation will ever be open to change from below, i.e. by changing voter preferences, remains an open question. My current view is that the diversity of consumer interests and the consequent difficulty of forming a collective identity in this area make such change unlikely. On the other hand, I remain convinced that the need to tame market forces and to protect consumers from undesirable developments in markets, particularly in light of the growing gap between rich and poor, are important to maintaining the stability of our democracy. I am equally convinced that in a global market that is increasingly immune to the influence of national, democratically elected governments, we must make every possible effort to mobilise consumer power in the interest of creating sustainable structures, i.e. which are socially just, ecologically acceptable and economically advantageous to all market partners (Müller 2007).

4 More power through European policy and institutions?

If consumer themes do not or cannot play a decisive role in determining the outcome of elections, particular attention needs to be given to the question of democratic legitimation and power. *Scharpf* distinguishes between two faces of democratic self-determination: input-oriented legitimization or 'government by the people' and output-oriented legitimization, 'government for the people' (Scharpf 1999). It is this distinction that makes the role of the European Union and European institutions in the policy-making process for consumers extremely interesting. The much deplored democratic deficit in European politics refers to the lack of input-oriented legitimisation. However, European institutions can be seen as having the potential for realizing good policies not *by* the people but *for* the people. "Government for the people' derives legitimacy from its capacity to solve

problems requiring collective solutions ... (Scharpf 1999: 11). "What is required is no more than the perception of a range of *common interests* that is sufficiently broad and stable to justify institutional arrangements for collective action. Legitimacy, in other words, can also be achieved in constituencies with a 'thin' identity lacking organismic overtones. Moreover, such constituencies do not even have to claim exclusive or primary loyalty of their members" (Scharpf 1999: 11). Scharpf concludes: "There is, therefore, no conceptual difficulty in defining the European Union as the appropriate constituency for the collective resolution of certain classes of common problems" (Scharpf 1999: 11). We will see whether these include consumer problems.

In recent years, the institutional setting of consumer policy in the European Union has also been strengthened. From the legal and administrative point of view, consumer policy has been an established EU-policy field since the Maastricht-Treaty in 1992 and the creation of the Directorate General for consumer policy within the EU-Commission in 1995.⁷ Politically, consumer policy has been particularly strengthened by the widening of the legislative competencies of the European Parliament by the Single European Act and by the institutional changes adopted in Maastricht and Amsterdam.

The jurisdiction of the Directorate General for Health and Consumer Affairs (DG SANCO) is also limited. Important decisions affecting consumers are made in the Directorates General for the Internal Market and for Enterprise and Industry. In addition, projects relevant to consumers are developed in numerous other Directorates General. Here too, we are thus faced with the question of the status of consumer protection within the overall policies of the EU Commission, and

⁷ Now Directorate General for Health and Consumer Protection (DG SANCO) with two Commissioners: Androula Vassiliou for health and Meglena Kuneva for consumer affairs.

questions regarding a programme and instruments with which consumer issues can be successfully integrated into the decision-making processes of EU institutions. In the comments by the BEUC, the European umbrella association of consumer organisations in Brussels,⁸ on Consumer Policy Strategy 2007-2013 and on the DG SANCO discussion paper of 14th June 2006 these institutional weaknesses of EU consumer policy are identified (BEUC 2007). The BEUC deplores the lack of a benchmarking mechanism to measure to what extent the goal of integration of consumer policy into other areas has been achieved. It calls for “a communication (by the Commission) setting out the institutional and practical arrangements, including monitoring instruments, they have or will put in place to ensure the better integration of consumer policy across all policy areas. ... This Communication might include a commitment for every DG to report annually on consumer relevant projects and legislative proposals within its field of responsibility. ... By discussing (and revising) these reports at Commission level and making them public in the Commission’s Annual Legislative and Work Programme, consumer affairs will achieve more visibility than today and consumer orientation in EU policies will be put into focus” (BEUC 2007: 7).

In the meantime, the Commission has picked up some of the proposals. In January 2008, it announced ‘Consumer MarketWatch’ as a new instrument “to investigate markets from a consumer perspective to assess if they are functioning effectively for consumers – or if further investigative or corrective actions are necessary”.⁹ So far, we have looked at the institutional structure and input factors of German and European consumer policy. Let us now move to the outcome.

⁸ BEUC, the European Consumers’ Organisation, visit www.beuc.eu

⁹ <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/70&format=HT> ... 31.1.2008

5 The outcome of European and German Consumer Policy: Measures and their problem-solving capacity

Consumer policy is an area of multi-level problem-solving. A large amount of new consumer legislation is more or less initiated by the EU-Commission and decided by the Council of Ministers and the European Parliament. German consumer politics have to transfer EU-legislation into German law with little or no room for legislative action of its own. In the case of conflicts the jurisdiction of the European Court of Justice plays an important role. In areas which have not yet been harmonised, German legislation and governance can play a role. In any case, German consumer policy is responsible for the implementation of legislative measures and for providing the framework enabling consumers to make use of their legal rights.

I shall now describe the role the European Union has played in improving the legal position of German consumers together with the convictions driving the European policy-making process. I shall then explain the role of German consumer policy, its priorities in light of existing consumer problems and market failures. Finally, I shall discuss the specifics of the German regime of consumer protection and what kind of challenges it offers for an effective and pro-active role of German consumer policy.

European consumer policy has two different faces. On the one hand, in the past years it has introduced a series of consumer regulations and labelling rules, the utility of which for the consumer is in most cases dependent on administrative supervision and/or the provision of sufficient advisory and informational resources at a national level. On the other hand, consumer policy has generated reforms and legal prescriptions which have focused on a liberalisation and opening of markets in the interest of producers.

It is clear that a range of improvements to consumer rights would not have come about without the European Union. This applies to the reform of the European Food and Feed Law and to labelling regulations in the food area, as well as to the CO₂ emissions and energy consumption of vehicles and old buildings. It also applies to contract law (including that pertaining to doorstep selling and guarantees), the introduction of certifications of competence and liability for insurance agents and financial-product brokers, the reduction of roaming charges for international mobile telephone calls, and the abolition of excessive transfer fees charged by banks for European payment transactions - to name a few examples.

The positive contributions made by EU consumer policy contrast with regulations and concepts whose primary goal is the promotion of growth and of 'Europe as a business location.' This goal has in some cases taken precedence over social considerations and the protection of consumers. Examples include the 'Television without Frontiers' directive¹⁰, the Nominal-Quantity regulation¹¹, the New Approach and its effects on German metrology, the safety of medical products and other aspects of product safety (Szent-Ivanyi 2007). Particularly problematic in this context is the commission's policy of co-regulation, which in effect places decision-making authority over the detailed formulation of European law in the hands of technical committees and expert commissions. These committees are dominated by experts from the business sector. Their lack of personnel and financial resources mean that consumer organisations have hardly any chance in this context of presenting and asserting consumer interests.

¹⁰ General Position of the vzbv, BDWi, dfb, ivd, vbe regarding the proposal of the EU commission on changes to television guidelines,

<http://www.vzbv.de//start/index.php?page=themen&task=dok&dok>

¹¹ vzbv press release 27. 9. 2006

6 Lisbon Strategy requires structural subordination of consumer interests

A structural or programmatic subordination of consumer interests is particularly evident in the area of services of general interests. Here the EU Commission is pursuing a general liberalisation and privatisation policy - without a sufficient empirical analysis of the possible effects, particularly on low-income consumers and those living in rural regions. Germany has a long and good tradition of public-services provision above all in the area of municipal services such as water supply and sanitation, waste management and public passenger traffic. It includes the calculation of charges on the basis of the principle of solidarity¹² and the cross-subsidization of public services from other sources of revenue. Decisions are made within a framework of municipal self-administration by politically legitimised municipal bodies. As a rule, the goal is to keep the burden placed on socially deprived citizens and consumers within limits.

Consideration should be given to the possible effects on consumers before sacrificing this tradition to a schematic policy of liberalisation and privatisation. Such consideration should extend to democratic stability in the member states of the European Union. German Basic Law postulates the principle of the provision of equal living conditions in all regions of the country. In the course of demographic development and the increasing problems in rural regions associated with it regarding the provision to residents of basic public services at equitable prices, the realization of this constitutional task is being placed at risk. In my view,

¹² The German water supply associations are examples of this kind of mutual support. For instance, the Wasserverband Nord in the northern German state of Schleswig-Holstein ensures that consumers living on the North Frisian Halligen in the Northern Sea pay the same price for their water supply as those in the city of Flensburg.

German policy-makers should not be released from their obligation to search for suitable, socially acceptable solutions for these problems on the grounds that the EU is pursuing a policy of the liberalisation, privatisation and commercialisation of public services. Considerable concern is also being caused among consumer organisations by the increasing trend toward the maximum harmonisation of consumer protection regulations. Such an approach runs the risk of reducing consumer protection to an agreed but relatively low level. Such a risk is currently evident in the review of the 'consumer acquis'. Tellingly enough, in its consultation process regarding the Green Paper,¹³ the Commission sees the only alternative to the concept of maximum or full harmonisation as one in which the Europe-wide regulation of minimum standards is linked with the principle of 'country of origin'. What is meant here is the law of the country in which the producer or provider is based rather than the law of the country in which the purchaser or consumer lives. This approach is defended with the argument that small and medium-sized enterprises in particular cannot be expected to inform themselves about the different legal regulations of countries in which they want to sell their products and services.

For me, this argument, which is advanced, surprisingly enough, by the DG SANCO, shows that EU consumer policy has still not established itself on a par with economic policy. The economic-policy credo of the EU, which in EU jargon is usually linked with a reference to the Lisbon Strategy¹⁴, amounts to an orientation to the concept of free trade and classic competition theory. The focus here is on the liberalisation and opening of markets and the conviction that the satisfaction of consumer interests is a virtually automatic consequence

¹³ Green Paper on the Review of the Consumer Acquis, adopted by the Commission on 8. February 2007. <http://ec.europa.eu/consumers/rights/consacquisen.htm>

¹⁴ The Lisbon Strategy was decided at the summit in March 2000 and relaunched in 2005.

and side-effect of the guaranteeing of freedom and competition in producer markets. A necessary counterpart to this model is provided by the consumer model and 'Leitbild' formulated by the European Court of Justice. It is the 'average consumer, who is reasonably well informed and reasonably observant and circumspect'. This view demands of consumers a relatively high degree of individual responsibility as well as the ability and preparedness to inform themselves comprehensively about a purchasing decision, to compare and evaluate what the market is offering.

EU consumer policy-makers are of course also aware of the phenomenon of information asymmetry described by George Akerlof using the example of 'lemons market' for used cars. According to this model, the provider of a good or service usually has access to information that is not available to the consumer (Akerlof 1970). When choosing their instruments, policy-makers therefore place great emphasis on informational consumer protection. They aim to increase market transparency by compelling producers and service-providers to provide adequate labelling and information. Ensuring consumers have better access to information is seen as allowing the market mechanism to function with the least possible degree of legal regulation and providing a level playing field for autonomous actors on both the supply and demand side of the market. In my view, this goal can in principle not be criticised. The same can be said of the EU Commission's argument that it is the task of EU member states to create appropriate provisions in terms of consumer education and consumer advice that enable consumers to make use of their rights to information.

My misgivings regarding the dominance of informational consumer protection in EU consumer policy are of a fundamental nature. They concern the neglect of the transactional costs to the consumer. For most consumers, the consumption of essential goods and services is not a full-time occupation. What

investment of time and effort can be demanded of consumers? How realistic and reasonable is the expectation that consumers in specific areas of nutrition, product safety, the use of information and communication technology, building-contract law and financial services geared to investment and retirement provisions should be able to attain sufficient expertise to avoid becoming victims of dubious providers?

German consumer policy has largely embraced the philosophy of informational consumer protection. It is oriented to the 'Leitbild' of the 'responsible, informed consumer.' At the same time it relies largely on voluntary information and repeatedly finds itself encountering resistance or a lack of resolve when it comes to making the right to information legally binding.

In recent years it has been above all the market in food that has changed in Germany. We have seen an increasing demand among a comparatively small but affluent group of consumers for organically produced food, products of humane animal husbandry, regional products and 'fair trade' offerings. This development is not only the result of German consumer policy. Numerous activities by consumer, animal-welfare, environmental and Third-World initiatives have contributed to the creation of a broadly shared awareness of the ethical responsibility of consumers. The openness of the media to consumer themes has also made a significant contribution in this respect.

It is interesting to note just how quickly the retail sector has adapted to this new customer base. Today, organic and fair-trade products can be found on the shelves of practically every discounter - 'cheap' and 'ethically correct' are no longer mutually exclusive categories. In my view, these developments offer two lessons. First, consumers are not only self-interested. The ethically responsible consumer is not a fiction. Second, markets can be changed by a relatively small group of consumers. Competition is helpful in this respect. The struggle for market shares among German discounters is

a particularly harsh one. When Lidl or Plus supplement their range with 'politically correct items,' they do so in order to "snatch" a few percent of their competitors' turnover and to attract a new customer segment. They do not do it because they believe that all their customers have become 'organic freaks' and are ready and able to pay higher prices. I believe that an awareness of this situation is important for the design of consumer-policy instruments.

One example of the considerable resistance to a legally binding expansion of information rights is seen in the three attempts required to pass the consumer information law at the end of 2007.¹⁵ German consumer policy confronts difficulties even in cases in which it endeavours to translate EU prescriptions regarding the extension of consumers' information rights into German law. A particularly cogent example is the inadequate implementation of the system of energy-use certification in buildings and housing. However, there has also been progress in the legal area. Two gratifying developments have been the amendment to the Insurance Contract Act introduced by the Federal Ministry of Justice and the passing of the ordinance on the duty to furnish information in the case of insurance contracts. The rights of insurees have thus been fundamentally strengthened. For the first time, consumers are now in a position to easily compare the products offered by different insurance companies.¹⁶

A further observation relating to German consumer policy is also connected with Akerlof's theory of information asymmetry. The assumption by mainstream German consumer policy that this theory implies a need to concentrate on informational consumer protection is correct. Nevertheless, the actual motivation behind the theory of information asymmetry - namely the (re-)

¹⁵ Hintergründe und Erläuterungen zum Verbraucherinformationsgesetz, http://www.bmelv.de/cln_045/nn_751678/DE/02-Verbraucherschutz/VIG/VIG_neu

¹⁶ see www.vzbv.de/go/presse/959/3/14/index.html

establishment of a balance between providers and consumers - is not really understood, or at least is not translated into political action. This seems the only way to explain the fact that German consumer policy regularly shrinks away from implementing the relatively gentle instrument of consumer information in cases where the requirement to provide such information would actually lead to low-quality providers being pushed out of the market.

A prime example is found again in the thoroughly diluted implementation of EU prescriptions for the energy-use certification of residential buildings. Comprehensive, transparent certification of energy use would lead to a sharp reduction in the market competitiveness of poorly insulated, energy-inefficient buildings and housing. While this was precisely the aim of the EU guidelines, their translation into German law was linked with so many limitations and exceptions that the result was the opposite of market transparency. Further examples of this reluctance to create market conditions in which substandard products would be immediately identifiable can also be found in the areas of food-labelling and obligatory information provision by financial-service providers.

German consumer policy is thus characterised by light and shadow. In my view, the lack of enforceability is not even the most important deficit of German consumer policy. German consumer policy suffers from an irritating lack of conceptual frameworks and an inadequate empirical foundation. It also suffers from a lack of clarity in terms of its self-perception as an independent policy area and the definition of its role as a policy-engineer of conditions pertaining to the demand side of the market. The conceptual tasks facing German consumer policy only become comprehensible once one is familiar with the structures and shortcomings of the system of consumer protection that currently prevails.

7 Shortcomings of the German consumer protection system

A pronounced dominance of civil law and a lack of low-level dispute resolution procedures that can offer help to consumers prior to court proceedings are typical aspects of German consumer law. The rights of consumer organisations to institute collective actions are not in themselves adequate to fill these gaps. State monitoring systems required by administrative legal regulations in the areas of, for example, food and feed law and product safety have, as a rule, only a minimal deterrent effect. A lack of staff means that their role is essentially a reactive one. Furthermore, the level of monitoring varies widely (Müller 2004), due to the splitting of responsibilities between the federal level, the Länder and municipalities.

The German model of consumer policy is appropriately described in a comparative study of consumer protection regimes in selected OECD countries as follows: The German system is "non-interventionist, dependent on private action, mostly by individuals, where consumer protection is weak because of the framework of law and institutions; dispute resolution procedures not comprehensive; consumers mostly left to resolve problems themselves" (DTI 2003).

By contrast, the public perception of consumer policy is very different. Consumer protection is commonly accused of being over-regulated and over-bureaucratised. This accusation is false but in my view understandable. German consumer policy often tends to actionism, acting too late and without a conceptual framework. Several examples can be cited.

In recent years, consumer policy at the federal and Länder levels has gained publicity above all on two themes: obesity and poor nutrition among a section of consumers and the ban on smoking in public buildings and restaurants. In the first case, consumers have been blamed for something that is actually the result of undesirable developments in the marketing of food and

a lack of consumer education. At the same time, in negotiations in Brussels German consumer policy-makers have mounted stiff resistance to the proposed directive on nutrition and health claims for a long time. In the second case, German consumer policy-makers have confirmed their dubious reputation among consumers for excessive regulation and bureaucracy. The comparatively limited complexity of these two themes and the fact that they lend themselves easily to attention-grabbing headlines might well be seen as further evidence of German consumer policy's lack of a comprehensive conceptual framework and a programmatic deficit.

8 Indifference towards complex subjects

At the same time, consumer policy has allowed itself to be overwhelmed by developments on financial markets and in the fields of energy policy as well as information and communication technology. While consumers are being confronted with demands for higher retirement provisions by social and financial policy-makers, consumer policy representatives have failed to address issues such as the sale of municipal housing stock to foreign investors and the transfer of mortgages by German banks to private equity firms (Knops et al. 2007). The same applies to the practice by many banks of calculating the risk of loans and their costs on the basis of a 'scoring' of borrowers without giving customers the opportunity to examine the data that is used (Korczak/Wilken 2008).

In the field of energy and climate policy, consumer-policy representatives have acquiesced to the restoration of 'occupation zones,' i.e. the old supply areas of the established electricity and gas providers, resulting from the EU liberalisation of the electricity and gas market. In the context of the promotion of renewable energies and combined heat and power generation, they have not mounted any resistance at all to a strategy that makes

private end-users pay for climate policy. With the help of a legally binding hardship clause, energy-intensive industries have been largely shielded from climate policy measures at the expense of consumers. EU policy has now introduced regulation of the monopolistic structures of the electricity and gas sector. However, German consumer policy seems only slowly to be recognising the positive and decisive role it could play in the development of climate-policy strategy.

The main issue here concerns efforts to increase the energy efficiency of heating for buildings and housing. In view of the costs being passed to tenants and housing-owners, it would seem an appropriate task for consumer policy representatives to fight for instruments and regulations that take into account the room for manoeuvre available to consumers affected by cost increases (Müller 2008). A further possible field of action involves reducing the amount of electricity used by household appliances and information and communication technology, as well as the energy requirements of vehicles. Without the support of consumers, market penetration of energy-efficient appliances and vehicles will be slow. Consumer policy would find it a rewarding task if it were able to contribute to an accelerated introduction of such products.

A further example of the indifference of consumer policy-makers to the central problems facing consumers is found in developments in and around the information and communication technology sector. Consumers now have new possibilities of gaining information and tracking markets as well as new purchasing possibilities in the e-commerce field. However, for the consumer the new technologies also entail an increased level of risk in technological and above all economic terms. The monitoring and appropriation of consumer data, the construction of customer profiles and hidden cost information mean that internet transactions can involve unforeseen risks for consumers. Moreover, the largely uncontrolled transmission of electronic data is leading

to significant burdens on consumers in the form of unsolicited and misleading advertising.

The following example illustrates particularly clearly the ineffectiveness of prevailing laws. A consumer is still bound to a sales contract even if this contract has been agreed on the basis of misleading advertising as defined by the law against unfair competition (UWG).¹⁷

This law does not allow consumers to assert their rights as consumers. The only possibility open to them is to sue the originator for fraud. This means that if consumers decide not to submit themselves to the strain of a legal action - for instance, because the damage involved is relatively minor - or are unable for other reasons to pursue legal actions, the provider is not prosecuted for this legal violation.

Economic policy-makers are doing a better job for their clientele than are consumer policy-makers. Amendments to copyright law and the introduction of copy-protection and DRM¹⁸ systems have taken into account the protection of commercial copyright and the concerns of providers of all types of data carrier. However, a comparable level of protection for consumer rights in the 'digital world' appears a long way off. A typical example is RFID (radio chip) technology. Experts calculate that in three to four years most goods in the retail trade could be equipped with these radio chips. This means that there is still time to create a legal framework in this area that should cover, for example, information claims by consumers regarding the use of RFID, the deactivation or removal of RFID chips after the purchase of goods and an effective system of data

¹⁷ The UWG only provides for a right to forbearance on the part of consumer and enterprise associations. As a rule this is not linked to material sanctions directed against enterprises. The creation in 2002 of the possibility of skimming excess profits based on evidence of intentional behaviour has done little to change the situation. In any case, the UWG does not provide a basis for the assertion of individual consumer rights.

¹⁸ Digital rights management (DRM) is used to control access to and use of digital services.

protection. However, consumer policy-makers seem content to bide their time while appealing to retailers to agree on voluntary codes of conduct. This approach is also not doing firms any favours, since it is in their interest to have a clear legal framework applying to all providers before introducing such technologies. This would counter concerns that some firms may suffer a competitive disadvantage against other providers if efforts to ensure consumer protection are largely voluntary.

The deplorable state of consumer policy can be summed up as follows: Currently, consumer policy in Germany and in the European Union is an established but rather weak policy field. Its achievements are mainly connected with its competencies as a sectoral policy, and it has difficulties influencing policies relevant to consumers in an intermediate way. It also typically fails to integrate consumer concerns into the decision-making process in economic policy at an early stage. Hence, it falls short of playing its intended role as a cross-cutting policy. We will now look at the future prospects of consumer policy and discuss in which direction consumer policy is likely to develop and how it should develop.

9 Prospects of consumer policy: ways and means towards an active consumer policy

The democratic and pluralistic society policy-making is an incremental process. Its capacity to solve problems step by step is largely dependent on good and professional 'political engineering'. This includes the communication of reliable programmes and strategies as well as input factors such as institutional improvements which can be decided by the political system itself. However, far more is needed than these incremental strategies to change external power resources. That is why politics also need visions, convincing values (Leitbilder) and well-defined objectives to mobilise

enthusiasm, broad support and acceptance. Fundamental changes and sudden leaps which offer new room for far-reaching action are possible. Normally, they will only occur in a peaceful manner if there is a consensus regarding the core convictions of political elites.¹⁹

In the coming years consumer policy has to work on both levels. It has to improve the existing consumer tool-box and it has to work towards changing the prevailing 'belief system'. In other words, consumer policy has to convince the 'political elites' that consumer policy is not a barrier to economic prosperity and a well functioning market economy but one of its central pillars. It has to analyse the macro-economic impact of consumer demand, the impact of the market and of competition on the structural problems of the domestic and global society to become helpful, relevant and necessary. Consumer policy needs to broaden its reach beyond its protective function and shape the political process. For this purpose, consumer policy requires a foundation that provides it with legitimacy. Such a foundation cannot be created via the usual process of 'political power-play.' Consumer policy needs to draw on the help of science and scholarship to create its own theoretical framework (Überbau) that is independent of the supply-oriented economic sciences.

10 The improvement of the consumer policy tool-box

The EU Consumer Policy Strategy 2007-2013²⁰ claims its role lies in empowering consumers, enhancing their welfare, effectively protecting them. This strategy could

¹⁹ Sabatier has distinguished three levels of a "belief system" and convictions which influence the possibility of reaching a consensus and politically agreed solutions among political elites: the main core, the policy core and secondary aspects. See: Sabatier 1993:132

²⁰ The Commission adopted the strategy on 13 March 2007, http://ec.europa.eu/consumers/overview/cons_policy/doc/cps_0173_eu.pdf

be the basis for a reformative approach. However, it will only succeed if the member states (including Germany) clarify their own understanding, objectives, fields and instruments of action. In other words, German consumer policy has to formulate a clear programme and its own strategy. A thorough evaluation of the strengths, weaknesses and effectiveness of existing consumer policy tools should be the starting point of such programmatic work. This includes an empirical study of the situation of consumers, in particular with regard to vulnerable consumer groups.

Why this focus on clear programmatic fundamentals? In a competitive democracy political programmes are required to ensure the calculability of policy and the positive and negative sanctioning of those in positions of responsibility. This applies above all to a policy field such as consumer policy, in which numerous policy areas shape the conditions in which consumers actually consume. The task of a consumer-policy programme would be, on the one hand, to formulate the goals and general framework toward which the potential originators of consumer problems should orient their policies. Consumer policy could thus present itself to voters as a 'political advocate' for consumers. On the other hand, German consumer policy finds itself in a process of decision-making and problem-solving that needs to involve collaboration between different levels of policy-making: the German Länder and municipalities, national government policy and of course the European Union. If democratic controls and effective criticism are to be exercised here, a clearly identifiable coordinating force is required that can assume responsibility for the shaping of this political process.

However, the function and explanatory power of consumer-policy programmes is not limited to the identification of the need for state action and the responsibility of state actors. Since in an open society the state and policy cannot and should not regulate everything, policy programmes must clearly identify the

limits of state action and the contributions that need to be made by consumers, producers and other market participants.

In my view a consumer-policy programme must above all provide answers to the following questions:

- How much state control do we need and how can "self-correctional processes" be mobilised in producer markets?
- How can consumers be better helped to help themselves?
- What limits need to be placed on the liberalisation and privatisation of essential services to ensure that socially deprived groups are not subject to exclusion and systematic disadvantage?
- What kind of support should consumer research provide to strengthen consumer policy-making?

What then are the fundamental aspects of such a consumer-policy programme? I do not think that the call for more state involvement and more ex post controls is the solution to current deficits in the field of consumer protection. What we need to do is comprehensively "prune" commercial and consumer law. The aim of this process should be to correct the current form of ex post consumer protection by means of instruments that stimulate an interest on the part of business in honest business practices and a preventive form of consumer protection through the use of market-oriented incentives. To achieve this we need to improve our system of sanctions in such a way that criminal law as well as liability law, compensation law and profit-skimming law can be effectively brought to bear in cases where firms have infringed consumers' rights. The burden of proof must be structured in such a way as to take into account the asymmetry of information.

A genuine extension of consumers' rights to information is particularly important in the case of credence goods²¹, such as health and care services. However, information rights can only be of help to consumers if they have a choice. Such rights must not be linked with an "obligation to collect" (Holschuld) on the part of consumers and thus replace effective preventive sanctions. Rather, these rights must supplement the system of sanctions. What is above all required is a systematic formulation of consumers' rights to information as well as corresponding obligations to provide information on the part of firms.²² And a key aspect is the creation of an extensive network of consumer-advice centers and low-level arbitration boards, where consumers can get help and advice. This in turn requires the development of a reliable and specifically tailored financial concept.

In my opinion, the social implications of the liberalisation and privatisation of public services currently being promoted by German and European policies are being criminally neglected. As already mentioned, this applies to the possible effects on infrastructure in rural areas and access provided to consumers living in these regions to essential facilities and services such as passenger and rail transport. However, it also applies not least to the affordability of essential infrastructural services, the future security of facilities, and externalisation effects such as the potentially detrimental effects on environmental protection. In my opinion, a consumer-policy programme cannot simply bracket out such fundamental problems. Irrespective of the question as to whether such essential services are to be provided by private

²¹ Credence goods are goods whose quality cannot be reliably judged by the consumer either before or after purchase.

²² This does not mean merely adding to current information rights. Enterprises should be obliged to provide information in a way that enables consumers to make comparisons and gain an overview of the market. The ordinance referred to above on the duty to furnish information in the case of insurance contracts is a good example.

firms or the state, this programme should promote a regulatory framework that counters both the danger of inefficiency and the exclusion and disadvantage of socially deprived consumer groups. What such a framework might look like can be demonstrated using the example of the opening of letter post to private competition. In order to prevent 'cherry picking' of the new postal services, the latter should be obligated to meet certain quality standards.²³

Consumer policy will need research results and scientific advice to successfully develop and reform itself. But it has a 'chicken and egg problem'. Consumer research is rather weak in Germany and elsewhere. The proposed consumer programme should therefore include measures to broaden and to improve its own research resources. Consumer policy should finance and manage a comprehensive consumer research programme.²⁴ Similar activities are needed at the European Union level.

11 The role and contribution of consumer research

Saying that research is important to good and successful policy-making may seem like a truism, but this is not the case in the context of consumer policy. Consumer policy suffers from a 'power- and theory deficit'

²³ As of 1.1.2008, due to the introduction of competition in the letter-post sector, the Deutsche Post AG is no longer bound by the prescriptions of the Postal Universal Service Ordinance (PUDLV), for example with regard to letter boxes and post offices. The ordinance concretises the generally observed minimum standards required by the Postal Law. Currently the Post AG is adhering to the prescriptions of the PUDLV on a voluntary basis. It is conceivable it will cease to do so if faced with increasing competition from other providers. Consumer protection organisations fear that this could lead to a deterioration of postal services in rural areas.

²⁴ A good example of how this might be done is offered by the German environmental policy and programme introduced in the early 1970s. See: Müller 1986: 68 ff. and Müller 1999: 207-224

(Müller 1999). In this sense consumer research should not only provide support but also legitimacy.

11.1 Current state of consumer research

In my former position as Executive Director of the Federation of German Consumer Organisations, one of my preoccupations was with working towards an improvement of the state of consumer research in Germany and in the European Union. The result of a study on the 'state of the art' of consumer research in Germany, and the contributions of researchers and research managers to a conference on the subject have been published (Verbraucherzentrale Bundesverband zur Verbraucherpolitik 2005).

Reisch has described the current state of consumer research as a "point cloud" of numerous sectoral research approaches (Verbraucherzentrale Bundesverband zur Verbraucherpolitik 2005: 122). What these have in common is a primary focus on the consumer as an individual. In this context, consumer policy has the function of providing protection for the consumer in terms of health and material well-being, of ensuring his fitness as a 'sovereign, responsible economic citizen' and of limiting economic power by establishing a general framework for 'fair competition' between enterprises on the market. For business and a supply-orientated economic policy, consumer and economic policy thus represent a zero sum game in the sense that increasing consumer protection is equated with increasing disadvantage for business. It is thus hardly surprising that, despite the threat of a worldwide shortage of resources, increasing ecological destabilization and social injustice - which are largely caused by current unsustainable production and consumption patterns - consumer policy has to struggle with the perception of being a barrier to competition and trade.

The political debate in Germany is symptomatic of the prevailing interpretation of consumer policy. Proposals for a rejuvenation of the economy and the creation of jobs focus exclusively on the supply side of the market. In spite of stagnating private demand, such proposals propagate passing costs to consumers and thus further limiting their purchasing power. In my view this short-sightedness can be explained not least by the fact that, as yet, consumer research has not developed an independent theory of the function of collective consumer demand for goods and services. Instead it has relied on theories of economic competition and subordinated itself to them.

11.2 Research for a consumer policy as a driving force of sustainable development

Supply-orientated competition theory continues to suffer from an incapacity to counter the failure of the market through the externalization of ecological, cultural and social costs of production and consumption. In the global market, a complete internalization would only be possible on the basis of an international framework, which has to be agreed between the collectivity of national political actors. Given the widely differing levels of economic development of the individual states, such a hope seems utopian.

It may become realistic, however, if political actors discover a number of common interests. An independent theory for the demand side market should be helpful to define these common interests. What we are concerned with here is the functional capacity of the market as a common good, which Scherhorn has demonstrated in the case of the global financial market (Scherhorn 2008: 142). What is needed is a governance model that incorporates the shaping of the demand side of the market as a political (and not necessarily state-based) task. In principle, we are thus concerned with formulating the theoretical basis for an eco-social

market economy on a global scale. Consumer policy research can make a valuable contribution to realizing such a vision. As a political scientist, I call upon my fellow scholars to take up this vital research subject.

In view of the current state of global trade and competition, sustainable production and sustainable consumption constitute more than a survival strategy for our planet and the precondition for sustainable future development in the developing world. They also constitute the precondition for maintaining social peace and democratic systems in the industrial countries. Current mechanisms of the global economy, characterized by the boundless mobility of capital and a philosophy of free trade that provides an almost unlimited capacity for social and environmental dumping, can only be kept in check by demand, i.e. by affluent consumers in the developed nations.

The social market economy that, at least in Germany, ensured a broad level of affluence, stable systems of social security and a high level of acceptance of the democratic polity during the post-war period on the basis of an equilibrium between two social partners – the representatives of capital and labour – today requires the power of the consumer as a third social partner²⁵. However, this power does not emerge from the isolation of and fixation on the individual consumer but can only unfold as a collective power. It follows that this collective force requires a political entity which not only upholds consumer concerns in a defensive sense as a corrective to supply-orientated economic policy but also understands itself in offensive terms as a driving force for a socially and environmentally sustainable economy on a national, European and global scale.

To summarize my message: An empowerment and reorientation of consumer research is needed. Consumer

²⁵ This concept was formulated by Gustav Dahrendorf, the founder of the first umbrella organisation of German consumer organisations, AgV, after the second world war. See Müller 2007: 15-19

research must become more political. It needs to examine critically large-scale trends in the world economy and to substantiate arguments as to why a free-trade concept that as is the case of the WTO regime relies exclusively on unimpeded trade between producers is no longer in keeping with the times. In addition, it needs to examine the conditions of domestic markets and uncover the empirical basis of distortions which are widening the gap between rich and poor consumers that is threatening the stability of our democratic political system. Above all, the role of the European political decision-making process and its underlying perceptions and convictions should be a topic of consumer research. Possibly, European policy, because of its greater independence from short term political deliberations and national “power plays,” may be able to compensate for some of the political weaknesses of national consumer policy.

Again, consumer research should see itself as an independent partner of primarily supply-orientated economic research and confront the latter with the specific mechanisms and conditions characterizing market demand.

Consumer policy can provide help and financial resources for a reorientation of consumer research. However, the content and viability of such research programmes must come from the research community itself. Large-scale, consistent and well co-ordinated research themes are far more viable than a collection of individual, sectoral projects. In my view, the central focus of such programmes should not be on the refinement of analytical tools relating to sustainable consumption, such as life-cycle assessment, material-flow accounting and labelling. What is most needed at present is an investigation of the current destabilization of the national economies of the industrial countries and the development of the newly industrialized and developing countries from the point of view of consumer demand. As in the case of consumer policy, institution-building within the consumer research

community is imperative, and will be the first step towards establishing more politically relevant and fruitful forms of consumer research.

12 Conclusion

The prospects of consumer policy are not hopeless. Three assets underpin my optimism: A considerable and growing number of consumers are now aware of their purchasing power and are prepared to bring ethical, ecological and social values to bear on their decisions. This development gives competing retailers, rather than producers, a key role. The example of the market for organic food shows that retailers will respond to preferences if they are rewarded by a 'critical mass' of consumers. The media will be a major driving force in the process of increasing consumers' responsibility and awareness - in so far as journalism maintains a degree of independence and is not completely shaped by commercial imperatives. In most cases, the media does not initiate debates on ethical or other normative issues. It reports. That is why the activities of civil society and independent consumer groups are so important. I am sure that their influence will grow with the number of domestic and global problems that politics finds itself unable to resolve.

The political role of the European Union will increase in the future. Without the strengthening of EU-institutions, European nation states will not be able to maintain a 'level playing field' in international and global policy-making. However, the EU cannot play a powerful international role if it does not overcome its democratic deficit and its lack of acceptance by European citizens. Scharpf demonstrates that the EU has the capacity to compensate for its lack of direct legitimisation - 'government by the people' - with an effective, problem-solving form of 'government for the people'. I support this hypothesis. At present, however, the EU is guided chiefly by a perceived need to improve

the internal market for *producers*. It has to discover that a policy which includes consumer interests in its range of common interests will provide a much broader and more stable foundation for its legitimacy. Changing the 'belief system' of the European Union will not be a trivial exercise. If consumer research does not take a role in this process, increasing social problems will effectively force the issue.

The best driver - I hesitate to call it an asset - is the growing instability of the international economy. The danger of climate change and the shortage of energy and other resources will endanger the interests of economic and financial stakeholders and shareholders. Innovative entrepreneurs will become increasingly interested in being rewarded by consumer demand. Upcoming economies like China are and will increasingly be confronted with ecological and social problems. The concept of sustainable development may be a vision that suffers from too much rhetoric and not enough substantial action. However, its realization will become a necessity for economical, ecological, social and - above all - political reasons. The necessary changes to production patterns will only be instituted in time if they are propelled by consumer demand. These changes will not occur automatically. Consumer policy has a major responsibility to help with changing the framework for trade in a more favourable and sustainable direction.

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