

National Approaches to Consumer Protection in France and Germany, 1970-1990.

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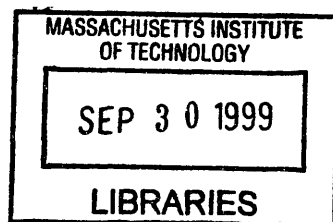
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ABSTRACT

This research investigates the growth of product market regulation in France and Germany from 1970 to 1990. It finds that these countries have pursued divergent strategies for regulating their domestic product markets. France has treated consumers as citizens, granting them special political protections against product risk. Germany has treated consumers as producers, emphasizing consumer information as a means of combatting market failure. This policy divergence resulted from the different institutional contexts in which the issues of consumer policy were first raised and resolved. As a consequence of these broad institutional differences, France and Germany have put in place divergent national consumption regimes, in which different sets of consumer and producer interests are systematically emphasized in government regulation. Such national divergence in consumption regimes is important because it will increasingly influence consumer and producer decisions about product choice, and these choices in turn set the terms of national variations of capitalism.

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Abbreviations

ADEC	Autorité des essais comparatifs of the INC (1987)
AFEI	Association française pour l'étiquetage d'information (1970)
AFOC	Association force ouvrière consommateurs (1974)
AGB-Gesetz	Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen – Law on Standard Term Contracts (1976)
AgV	Arbeitsgemeinschaft der Verbraucherverbände
BAG	Bundesarbeitsgemeinschaft der Mittel- und Großbetriebe des Einzelhandels
BAM	Bundesanstalt für Materialprüfung
BAU	Bundesanstalt für Arbeitsschutz
BDA	Bundesvereinigung der Deutschen Arbeitgeberverbände
BDI	Bund Deutscher Industrie
BEUC	Bureau européen des unions de consommateurs
BGH	Bundesgerichtshof
BKA	Bundeskartellamt
BMWi	Bundesministerium für Wirtschaft
BVP	Bureau de vérification de la publicité (1954, reformed 1971)
CICC	Comité industrie–commerce–consommateur of the CNPF (1975)
CDC	Comités départementaux de la consommation
CDEC	Commissions départementales d'équipement commercial (1996)
CDU	Christlich Demokratische Union – Christian Democratic Union
CDUC	Commissions départementales d'urbanisme commercial – Departmental Commissions of Commercial Town-Planning (1973)
CFDT	Confédération française démocratique du travail
CGC	Confédération générale des cadres
CGPME	Confédération générale des petites et moyennes entreprises
CGT	Confédération générale du travail
CIDCAPL	Comité d'information de défense des commerçants, artisans et professions libérales
CID-UNATI	Comité d'Information et de Défense – Union National des Travailleurs Indépendants
CNAPF	la Confédération nationale des associations populaires familiales
CNAPFS	Comité national des associations populaires familiales syndicales (1977)
CNC	Comité national de la consommation (1960), Conseil national de la consommation (1983)
CNFR	la Confédération nationale de la famille rurale (1944)
CNP	Conseil national de la publicité (1977)
CNPF	Conseil national du patronat français
CREDOC	Centre de recherche pour l'étude et l'observation des conditions de vie
CSC	Commission de la sécurité des consommateurs
CSCV	Confédération syndicale du cadre de vie (1976)
CSF	Confédération syndicale des familles (1946)
DGB	Deutscher Gewerkschaftsbund

DGCC	Direction de la concurrence et de la consommation
DGPI	Deutschen Gesellschaft für Produktinformation (1979)
DGWK	Deutsche Gesellschaft für Warenkennzeichnung (1971)
DIN	Deutsches Institut für Normung (DNA before 1975)
DITR	Deutsche Informationszentrum für Technische Regeln (1979)
DNA	Deutschen Normenausschuß (renamed DIN in 1975)
FDP	Freie Demokratische Partei – Free Democratic Party
FFF	Fédération des familles de france (1948)
FNCC	Fédération nationale des cooperatives de consommateurs (1912)
FO	Force ouvrière
GS	Geprüfte Sicherheit (1977)
GSG	Gerätesicherheitsgesetz (GtA before 1979)
GtA	Gesetz über technische Arbeitsmittel (renamed GSG in 1979)
GWB	Gesetz gegen Wettbewerbsbeschränkungen
HBV	Gewerkschaft Handel, Banken und Versicherungen
HDE	Hauptverband des deutschen Einzelhandels – German Federation of Retailers
HDHI	Hauptgemeinschaft der Deutschen Hausgeräteindustrie
INC	Institut national de la consommation – National Consumption Institute
ISO/TC	International Standards Organization Technical Committee
LaboCoop	Laboratoire coopératif d'analyse et de recherche (1955)
ORGECO	Organisation générale des consommateurs (1959)
PI	Produkt-Informationssystem (1980)
RAL	Deutsches Institut für Gütesicherung und Kennzeichnung (formerly Reichsausschuß für Lieferbedingungen)
RFP	Régie française de publicité (1968-9)
RPM	Resale price maintenance
SPD	Sozialdemokratische Partei Deutschlands – Social Democratic Party of Germany
StiWa	Stiftung Warentest
UDCA	Union de défense des commerçants et artisans (mouvement Poujadiste)
UFC	Union fédérale des consommateurs (1951)
UFCS	l'Union féminine civique et sociale
UNAF	l'Union nationale des associations familiales (1945)
UROC	L'Union régionale des organisations de consommateurs
UWG	Gesetz gegen den unlauteren Wettbewerb
VR	Verbraucherrat (within DIN)
VSV	Verbraucherschutzverein – consumer protection union

"It is a matter of knowing to what extent we should encourage the production and distribution of products in large quantity, permitting a certain number of defects for which the consumer will suffer the consequences, and to what extent we should place a heavier weight of responsibility on producers and distributors in order to pressure them to produce less, but also to produce better. Such a choice, whose economic and social consequences can be considerable, is essentially political."¹

-- Jacques Ghestin, *Le Monde*, 28 May 1975.

Introduction. The Politics of Consumer Market Regulation

Consumers make their selection of products for purchase within market institutions that have political origins. Non-physical characteristics of consumer products such as risk and information are increasingly controlled by national regulations designed to protect consumers against the potential hazards of new technologies, products, and product designs. These regulations have emerged from political struggles in which consumer and producer interests confronted one another over the degree of burden that should be borne on the one hand by industry and on the other hand by individual consumers. How these conflicting interests have been resolved has dictated the broad strategy of product market regulation that different countries have adopted. The

¹ "Il s'agit de savoir dans quelle mesure il convient soit d'encourager la fabrication et la distribution de produits en grandes quantités, quitte à admettre certains défauts dont l'acheteur subira les conséquences, soit de faire peser sur les producteurs et distributeurs une responsabilité plus lourde afin de les inciter à produire moins, mais à produire mieux.

combined impact of these new regulations within each country has been to generate distinctive national consumption regimes. These differing consumption regimes, in turn, are exerting an increasingly heavy influence on the design and production strategies of upstream industries through their impact on the consumer marketplace.

This focus on the institutions that define national consumption regimes adds a new avenue of research to political analysis of the economy. Researchers who have studied national varieties of capitalism have tended to focus either on production, with an emphasis on labor² and capital³ markets, or on distribution through the welfare system.⁴ Those researchers who have considered the role of consumption have tended to see it as derivative either of production⁵ or of distribution.⁶ Yet these approaches belie the classical economic view that consumption, rather than production, drives the free market economy.⁷ They also ignore recent findings in business management that consumer demand determines important aspects of business strategy.⁸ By focusing political analysis on product market regulations, the current research takes a first step in re-integrating consumption into our analysis of contemporary capitalism.

Un tel choix, dont les conséquences économiques et sociales peuvent être considérables, est essentiellement politique."

² David Soskice, *German Technology Policy, Innovation, and National Institutional Frameworks*, Discussion Paper FS I 96-319 (Berlin: Wissenschaftszentrum Berlin, 1996).

³ John Zysman, *Governments, Markets and Growth* (Ithaca: Cornell University Press, 1983).

⁴ Gøsta Esping-Andersen, *Three Worlds of Welfare Capitalism* (Princeton: Princeton University Press, 1990).

⁵ John Kenneth Galbraith, *The New Industrial State* (Boston: Houghton Mifflin Company, 1985).

⁶ Thorstein Veblen, *The Theory of the Leisure Class* (New York: A.M. Kelley, 1965).

⁷ Adam Smith, *The Wealth of Nations* (1776), book 4.

⁸ Michael E. Porter, *The Competitive Advantage of Nations* (New York: The Free Press, 1990), p 87; Horst Albach, *Culture and Technical Innovation: A Cross-Cultural Analysis and Policy Recommendations* (Berlin: Walter de Gruyter, 1994), pp 269-287.

Beginning in the 1970s, European consumers developed new patterns of consumption that led to a rapid growth in the total number of products on the market and a relative decline in demand for traditional mass-produced goods. This change has been interpreted as a major turning point in the history of production.⁹ But consumers did not act in a vacuum. In adopting new purchasing preferences, they took cues from the institutional context in which they functioned. On the one hand, the marketing industry was working to sell a conception of how new kinds of products should be integrated into the middle-class lifestyle. On the other hand, a combination of new government regulations and a growing consumer activism was helping to set the terms on which consumers perceived their interests. New forms of consumption tended to reflect the interests elicited by these policies. Sartori Gervasi writes: "New choices about consumption are not made at random. They conform to norms that guide behavior in every society. When the individual is uncertain about what choices are appropriate, he or she will look for guidance. The social cues surrounding every norm provide that guidance....The real problem, therefore, is to explain the emergence, development and elaboration of the various norms of consumption in society."¹⁰ By examining the political debates at the origins of national product market regulations, this dissertation offers one important answer to that problem.

⁹ See for example: Michael J. Piore, and Charles F. Sabel, *The Second Industrial Divide: Possibilities for Prosperity* (New York: Basic Books, 1984), pp189-191; Torben Iversen, and Anne Wren, "Equality, Employment, and Budgetary Restraint: The Trilemma of the Service Economy," *World Politics* 50 (July 1998), pp 507-546.

¹⁰ Sartori Gervasi, "Changes in the pattern of demand, consumer learning and firm strategies: An examination of postwar economic growth in the United States and France," in *Technology and Productivity: The Challenge for Economic Policy* (Paris: OECD, 1991), pp 94-95.

My research focuses on the development of product market regulations in France and Germany beginning in the 1970s. Both countries created a broad range of regulations governing product information, product safety, and product design. Yet distinctive national styles emerged across this range of regulations. These differing but coherent national strategies of consumption regulation, or consumption regimes, have become an important source of diversity in the face of growing pressures for regulatory integration that are associated with European unification. Germany's consumption regime, which emphasizes accurate product information and strong industry prerogatives, has been called an *information model* of regulation. France's consumption regime, which emphasizes strong consumer protections and weak industry prerogatives, could be called a *protection model* of regulation.

Behind these different models of consumption regulation lay very different conceptions of the role and position of the consumer in society. German consumers were understood to be market participants with a status equal to that of producers. Consumer protection in the German context thus implied improving the information deficit that the consumer faced in the marketplace. French consumers were understood to have a political rather than a market status. Consumer protection in the French context thus implied insulating and protecting consumers from the risks inherent in the marketplace. These divergent ideas concerning the national consumer identity resided at the core of the divergent regulatory strategies that France and Germany adopted.

One of the contributions of the research presented here is the explanation it offers of the mechanisms by which new and contrasting areas of regulation emerge from contrasting national constellations of interests and institutions. We commonly think of a

national consumer identity as a reflection of deeper cultural traditions of a country. Yet the cases of French and German consumer policy suggest that national conceptions of the consumer identity had their origins in a political struggle waged in the 1970s and early 1980s over the identity and social status of the consumer. At stake was the degree of burden that consumers and producers would bear for product-related risks. If consumers were seen primarily as economic actors in society, with a status similar to that of producers, it then followed that they should bear their share of the market risk. If, on the other hand, consumers were seen primarily as political actors, understood as consumer-citizens, then there was a strong case for insulating them entirely against market risk. Because each conception of the consumer entailed a distinctive, coherent set of policy prescriptions (what I call a policy model), early initiatives in consumer protection in France and Germany took the form of a political struggle between producers and consumers over what conception of the consumer would prevail in society.

How this struggle was resolved depended in large part on the way in which consumers and producers organized to pursue their interests. Interest organization played three distinct roles. First, in the case of consumer groups, strategies of organization determined their policy preferences. In France, beginning in the early 1970s, consumer groups pursued a strategy of grass-roots mobilization and popular demonstrations such as boycotts, price surveys, and political rallies. In Germany, consumer groups shunned individual membership and instead cultivated a technical competency that allowed them to participate constructively in technical policy debates. The French consumer movement was populist, whereas the German consumer movement was essentially technocratic. These stylistic differences affected the policy preferences of the consumer movement in

the two countries. In France, consumer groups favored policies that took advantage of their organizational strengths. They portrayed the consumer as politically active and sought policies that gave their own organizations a central role in consumer protection. In Germany, by contrast, consumer groups were unable to mobilize effectively and therefore favored policies that emphasized their technical knowledge and expertise.

But preferences alone did not generate policy outcomes. The second role of interest organization was to determine the relative political power of consumer and producer groups. In Germany, where producers have traditionally enjoyed a strong capacity for co-ordination, and where consumer groups did not pursue grass-roots mobilization, policy makers favored the preferences of producers over those of consumers. In France, by contrast, producers traditionally have exhibited little organizational capacity. Thus as consumer groups became progressively more organized, policy makers increasingly favored consumer preferences over those of industry. The populism of the French consumer movement gave French consumer groups a political weight that the German consumer movement did not have.

The third and final role of interest organization in consumer policy formation was in the capacity of consumers and producers successfully to implement their preferred policies. In both France and Germany, for example, businesses preferred to negotiate directly with consumer groups rather than to subject themselves to direct government regulation. They saw that this negotiation approach implied less government intrusion into business prerogatives. Yet it also required a level of business coordination that French industry was unable to achieve. Between 1978 and 1983, French consumer groups signed hundreds of agreements with industry associations treating issues of product

safety, quality, labeling, and price. Yet while business leaders advocated this negotiation approach as being preferable to direct government regulation, individual French companies commonly ignored the agreements for fear that compliance would place them at a competitive disadvantage with their non-complying competitors. Without stronger associational ties between companies, French industry was unable to achieve its own preferred policy goals.

In sum, this research project suggests that the tools of institutional analysis that have been deployed in comparative politics to explain periods of policy continuity can also be applied to understand periods of radical policy innovation. In such new areas of policy, competing ideas about regulatory solutions become politically contested. Interest groups struggle over which idea, or policy model, will eventually characterize and dominate the policy process. The way in which these competing interests are organized then shapes the nature and outcome of this struggle. One implication is that in entirely new areas of policy, the organization of interest groups rather than the regulatory form of the state decides what policy models becomes dominant.

The Economic Impact of National Varieties of Consumerism

Systematic national differences in consumption regimes matter not only because they set the context in which consumers shop, but also because of their likely impact on the production sphere. Dimensions of product design and manufacturing that were previously set entirely by private industry have increasingly become subject to public inspection and regulation. Risky products such as pharmaceuticals and food now face regulatory scrutiny at all stages of manufacturing and distribution. Even through the deregulatory efforts of the 1990s, and the push for regulatory harmonization in the

context of European integration, the number and distinctiveness of national consumption regulations has steadily grown. Indeed what we observe today as a deregulation of the business environment in advanced industrial countries might more accurately be understood as a transition away from regulation of the production sphere and towards a more detailed regulation of the national consumption sphere.

Through their impact on product markets these consumption regulations play a formative role in product manufacturing and trade. The goal of these regulations is consumer protection. But regulations that shape the consumer market for goods also necessarily influence the production sphere. Bruce Kogut writes, for example, that “across-country variation in demand characteristics...generates a parallel variation in product types. The cumulative capabilities of firms, developed in response to their home markets, provide the competitive basis for expansion overseas, yet at the same time, limit the feasible range of products.”¹¹ National regulations that favor consumer demand for higher-quality goods, for example, are also likely to encourage production strategies incorporating more highly trained labor. In this way regulatory differences in the consumption sphere may thus work to perpetuate the distinctiveness of national approaches to production.

Why have national consumption regulations remained distinctive in spite of the pressures of globalization and European integration? One reason is that all consumption regulation is at once consumer protection and industry protectionism. Paul Pierson has observed that new kinds of regulation create their own constituency, not only among the regulators, whose employment depends on their continued application, but also among

the regulated parties, who make investments to accommodate the new regulation.¹² This kind of audience formation has been particularly important for consumer protection. Although consumption regulations are typically implemented for reasons of consumer protection, they are often maintained, sometimes beyond their usefulness, because of the protectionism they provide to domestic industries.¹³ Initially unpopular with industry, distinctive national regulations designed to protect the consumer eventually create a constituency among producers that have adapted to meet the new requirements. Indeed, given the protectionism that consumption regulations can provide to domestic industry in the form of non-tariff barriers to trade, the growth of globalization might be expected to increase rather than decrease industry support for this kind of national distinctiveness.

The cumulative impact of distinctive national consumption regulations on industry may also play an increasingly important role in the macro-economy. In a recent cross-sectional analysis of European countries, Kees Koekijk, Zhen Kun Wang, and Alan Winters find that product-market regulations have a far greater impact on a country's economic performance than do, for example, national labor-market regulations.¹⁴ This study opens a new area of economic research. It suggests that a closer look at the origins and functioning of product market regulations may yield important insights into the sources of national prosperity. This sort of aggregate economic analysis is beyond the

¹¹ Bruce Kogut, "Country Capabilities and the Permeability of Borders," *Strategic Management Journal* 12 (1991), p 36.

¹² Paul Pierson, *Dismantling the Welfare State?: Reagan, Thatcher, and the Politics of Retrenchment* (New York: Cambridge University Press, 1994), p 43.

¹³ David Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Cambridge, Massachusetts: Harvard University Press, 1995), p 150.

¹⁴ They estimate that product market regulations are twice as significant to growth as are labor market regulations. Kees Koekijk, Zhen Kun Wang, and L. Alan Winters, "Market

scope of my research. But a sound understanding of the political origins of consumption regulations should offer a basis from which broader economic implications can be explored.

The Rise of French and German Consumerism

Beginning in the 1970s, Germany and France experienced a rapid growth in political activity focused on consumerism. This activity took the form of new legislative initiatives, new institutions within government to pursue the consumer interest, and a new mobilization by consumers in pursuit of a broad range of consumer protections. In Germany, for example, the number of consumer-related laws grew from a total of only 25 enacted in the post-World War II period up to the end of 1970, to a total of 338 through 1978.¹⁵ In France the number of laws and ministerial decrees relating to consumption increased from a total of only 37 to the end of 1970, to a total of 94 through 1978.¹⁶ These laws covered all aspects of consumer interests, including broader rights to consumer groups, better information to consumers, easier access to justice and to the policy-making process, and a higher level of product safety. In Germany both the Social Democratic and Christian Democratic Parties created sub-committees to write and promote consumer legislation, in 1972 and in 1973 respectively. In France, the ruling conservative coalition in 1976 created a new Secretariat for Consumption within the

Opening, Regulation, and Growth in Europe," *Economic Policy* 23 (October 1996), pp 443-467.

¹⁵ Willi Laschet, "Verbraucher sind auch Kunden," in Hartwig Piepenbrock, Conrad Schroeder editors, *Verbraucherpolitik Kontrovers* (Köln: Deutscher Instituts-Verlag, 1987), p 60.

¹⁶ "La Protection et l'information des consommateurs: des progrès décisifs," *Les Notes Bleues* (Paris: Service de l'information du ministre de l'économie et des finances, 1978), pp 14-20.

Economics Ministry, charged with designing new consumer protection laws. Two years later the government had even sponsored a political consumer organization, the Young Consumers. The opposition Socialist party, perceiving the electoral appeal of consumer defense, quickly created its own working group to draft and present alternative law proposals in the National Assembly.

Economics ministries in both France and Germany argued that better protected and better informed consumers would make wiser decisions and thereby would help to hold down price inflation.¹⁷ Governments had also grown concerned that producers, facing increasingly saturated markets, were designing obsolescence into their products. In France, the government called for consumers to keep products longer and to emphasize repair over replacement.¹⁸ It also called for companies to create consumer relations departments (*Monsieurs Consommateur*) within the company to respond to consumer complaints.¹⁹ Jacques Delors wrote in 1981 that "...consumer politics is inseparable from the broader politics of our economy and society, it is an essential component of the politics of defense of purchasing power."²⁰ In a similar vein, Hans Friedrich, the German Economics Minister, wrote in 1974 that "Competition requires active consumers....But if the consumer decides without sufficient perspective on the market to make a purchase, the competition becomes empty. What is the use – from the ordoliberal perspective – of a

¹⁷ Luc Bihl, "Le contre-pouvoir des consommateurs," *Le Monde*, 5 Dec 1979; "Beschluss zur Verbraucherpolitik," 10. ordentlichen Bundeskongresses des DGB, 1975.

¹⁸ Josée Doyère, "Les acheteurs sont mal protégés contre les défauts de fabrication," *Le Monde*, 28 May 1975.

¹⁹ "Un consommateur dans l'entreprise," *Figaro*, 21 Feb 1978.

²⁰ "La politique de la consommation est inséparable d'une politique économique et sociale d'ensemble, elle est un volet essentiel de la politique de défense du pouvoir d'achat." Bénédicte Epinay, "Le lobby consommateurs veut monter au filet: ses moyens le contraignent en fond de court," *Les Echos*, 3 October 1996.

higher quality refrigerator, if the consumer cannot recognize it before buying.”²¹ Thus consumer education became an important priority in both countries. France turned to its centralized control over the curriculum to insert consumer instruction into primary education. Germany created and funded the Stiftung Verbraucherinstitut in Berlin to train educators in issues of consumer protection.

Recognizing that government legislation alone could not solve the problems consumers faced, governments in both France and Germany also extended support to private groups acting in the consumer interest. Government financial support to these consumer groups grew strongly over this period. In France, for example, funds given by the government to consumer groups grew from 3.7 million francs in 1970 to 6.4 million francs in 1972. They doubled again in 1976, in 1977, and in 1980. Government support had grown over ten times in as many years. German government funding to consumer groups grew nearly as rapidly: from 12 million DM in 1970, to 33 million DM in 1975, and to 48 million DM in 1980.²²

Consumer representatives were also granted access to the policy process within the government. Both countries created new agencies to advise the government on how to pursue consumer-friendly legislation. Germany in 1972 created a Consumer Advisory Board to the government (*Verbraucherbeirat*). Any new legislation that might have an

²¹ “Der Wettbewerb braucht den aktiven Verbraucher. Dies ist für ihn eine Chance, bringt aber auch Verantwortung mit sich....entschliesst sich der Verbraucher aber ohne ausreichende Marktübersicht zum Kauf, so läuft der Wettbewerb praktisch leer. Was nützt -- ordnungspolitisch gesehen -- die bessere Qualität eines Kühlschranks, wenn sie der Verbraucher vor dem Kauf nicht erkennen kann?” Dr. Hans Friderichs (Bundesminister für Wirtschaft), “Aufgaben der Verbraucherpolitik,” *Bulletin des Presse- und Informationsamtes der Bundesregierung* 146 (5 December 1974), p 1465.

²² Jürgen Bornecke, *Handbuch der Verbraucherinstitutionen* (Bonn: Verlag Information für die Wirtschaft, 1982), p 230.

impact on the consumer was referred to this board and was required to include a description of its probable impact.²³ In addition to creating a new ministerial position oriented towards consumer interests, France also incorporated a discussion of consumer policy into the French Plan. France's National Consumption Committee (CNC), first created in 1960, became active in advising the government on new initiatives. The French government even created the position of Consumer Mediator to deal specifically with consumer grievances against the government itself.²⁴

Consumer groups, enabled in part by growing support from the government, organized consumers on the model of student and labor mobilizations of 1968. Conferences, consumer training sessions, product evaluations, and consumer boycotts abounded. Central funding for consumer associations grew dramatically, and along with this funding came a greater role for consumer representatives in the government. In Germany, for example, the 1976 law regulating the content of consumer contracts relied explicitly on the action of consumer groups to enforce the law. In France, consumer groups were increasingly called upon to represent the consumer interest in direct negotiations with industry.

But consumer group activism was not solely a revolution from above. Consumers themselves were expressing a growing interest in consumer issues. The growth in circulation of magazines that published the results of comparative product tests offers one indicator of the new interest. Like *Consumer Report* in the United States, these publications used advanced engineering techniques to evaluate product characteristics

²³ "Zwei DGB-Vertreter im Verbraucherbeirat," *Informations Dienst*, Bundespressestelle des Deutschen Gewerkschaftsbundes (11 August 1982), pp 1-2.

that would be of interest to the consumer. In France, the combined distribution of the journals *Que Choisir?* and *50 Millions de Consommateurs* grew from 50,000 in 1970 to over 700,000 in 1975. In Germany, circulation of the journal *Test* grew from 120,000 to 510,000 over the same period.²⁵ See Figure 1 below. These major publications were supplemented in both France and Germany by a smaller press that advocated policy positions and warned consumers of potential dangers or of duplicity. The proliferation of consumer publishing was particularly marked in France, where each new consumer organization tended to produce its own serial publication. By 1975 France had a total of 15 popular national consumer publications with a combined distribution of over 2 million.

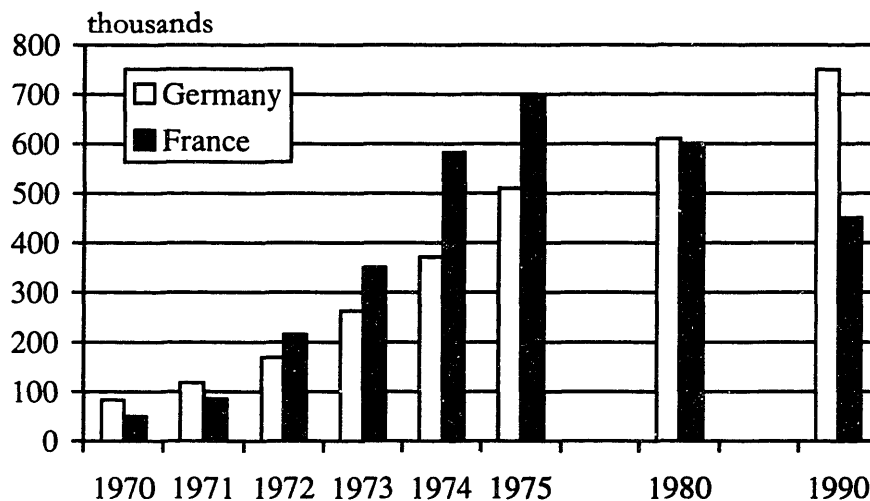


Figure 1. Product test magazine circulation in France and Germany, 1970-1990.

²⁴ "Les structures du consumérisme dans les états membres de la Communauté économique Européenne," *INC Hebdo* 729 (7 June 1991): 3-16.

²⁵ Hans B. Thorelli and Sarah V. Thorelli, *Consumer Information Handbook: Europe and North America* (New York: Praeger Publishers, 1974); Business International, *Europe's Consumer Movement: Key Issues and Corporate Responses* (Business International:

Consumer groups also began a set of outreach programs in order to make more direct contacts with consumers. In Germany this effort primarily took the form of consumer information centers that proliferated through the 1970s. These centers, staffed by volunteers and coordinated by state-level consumer associations (Verbraucherzentralen), provided detailed product information and offered advice on future purchases. In France, consumer outreach also had as one of its goals the dissemination of accurate product information. In an early success for the consumer movement, over 200,000 people, including the Prime Minister, attended a five-day "Salon Consommateurs" in Paris in 1972, organized by the National Consumption Institute (INC).²⁶ But French consumer groups were more militant than their German counterparts and became increasingly effective at mobilizing consumers to participate in boycotts, price surveys, and political rallies. The French Consumer Union (UFC), to take one of many examples, managed over the course of the 1970s to establish a base of 170 local consumer unions with a total active membership of 50,000.²⁷ These unions exerted a strong scrutiny and control over product markets in France. Mobilizations by the Marseilles union of the UFC, for example, forced General Foods to have *Space Dust*, a candy marketed in the United States under the name *Pop Rocks*, withdrawn from the French market even before the Ministry of Health was able to evaluate complaints.²⁸

1980), pp IV/5-IV/27; "La Politique d'information des consommateurs dans les états membres," *INC Hebdo* 729 (7 June 1991), pp 23-6.

²⁶ "Defense timorée du consommateur aisé," *Libération*, 29 May 1975.

²⁷ Josée Doyère, "Les associations de consommateurs," *Le Monde Dimanche*, 16 November 1980.

²⁸ François de Muizon, "L'Union fédérale des consommateurs demande l'interdiction des bonbons pétillants *Space Dust*," *Le Matin*, 23 Feb 1979.

The reason for the growth of a consumerist agenda in France and Germany and the explanation of its timing in the early 1970s is a complex question that this research does not directly address. As in most countries where a consumerist politics has arisen, the proximate focus of this new activism was a set of product failures. The product failures that accompanied the arrival of consumerism in Europe were indeed dramatic. In 1962 the German-manufactured sleeping pill *Contergan* (marketed as *Thalidomide* in the United States) was shown to cause birth defects when taken by pregnant mothers. It is now estimated that *Contergan* caused more than 12,000 birth defects around the world, a large percentage in Europe. In 1972 a French baby powder marketed as *Talc Morhange* was found to have been improperly manufactured, leading to the death of 36 children and injuries to another 240. Of these, 5 suffered permanent brain damage.²⁹ Spain's consumer protections, which have been incorporated as a basic right in the country's constitution, were stimulated in large part by the marketing of industrial machine oil as *Colza* cooking oil in 1981. The product killed 650 people and injured an additional 25,000 before it was taken off the market.³⁰ Yet these product tragedies were also not the sole cause of national consumer protection movements. Germany's mobilization around consumer issues, for example, followed the revelation of the *Contergan* tragedy by a full decade. This lag requires an explanation.

²⁹ Gérard Cas, *La défense du consommateur* (Paris: Presses Universitaires de France, 1980), p 23.

³⁰ "Espagne" le procès des huiles frelatées," *INC Hebdo* 641 (2 June 1989), p 25.

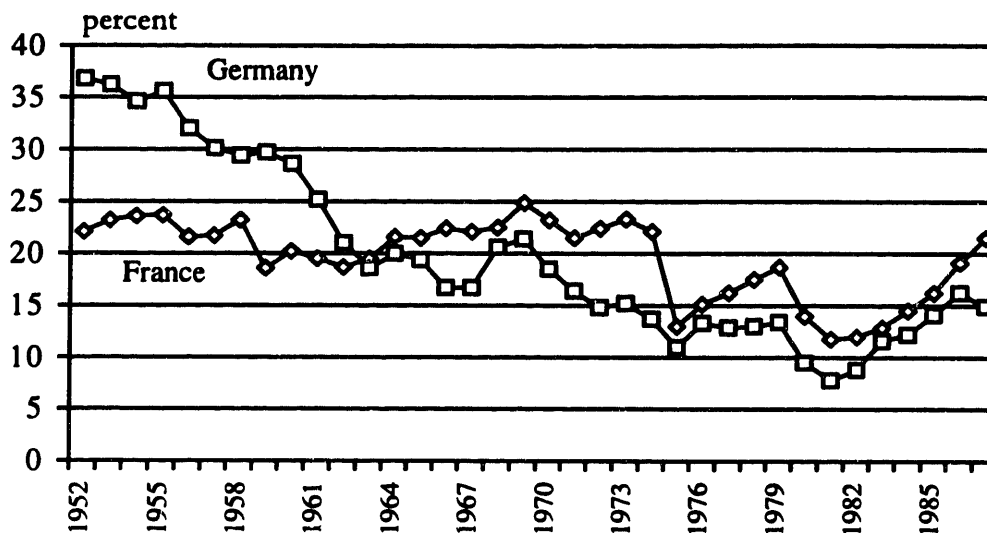


Figure 2. Manufacturing profitability in France and Germany, 1952-1987.³¹

A second underlying cause for the rise of consumer protectionism appears to have been the decline in business profitability in the early 1970s. See Figure 2 above. George Stigler has argued that all government regulation of industry has the goal of increasing company profits.³² This insight appears to hold true for product market regulation. French and German companies, facing a dramatic fall in profitability in the wake of the 1973 oil embargo, came to feel that the fate of future profitability lay in part with the consumer. Business associations in both countries called on the government to intervene to help better inform consumers. In 1976, Jean Levy, former president of the cosmetics company l'Oréal and president of France's largest professional association, the Conseil National du Patronat Français (CNPF), wrote: "Even if, with rediscovered growth, the French take up

³¹ Philip Armstrong, Andrew Glyn, and John Harrison, *Capitalism Since 1945* (Oxford: Blackwell, 1994), p 352.

again for a time some of their old [shopping] habits, industry and retailing should have no illusions. The consumer in crisis is the consumer of tomorrow.”³³ Germany’s peak industry association, the Bund Deutscher Industrie, called on the government in 1974 to intervene in the consumption sphere in order to educate consumers.³⁴ Business also recognized that industrial products could be dangerous, and producers were on the whole no longer confident of their own ability to provide adequate consumer protection. In a 1980 survey of companies across Europe, Business International found that only 34 percent of respondents felt that market forces would operate to protect consumers at least to the same degree as would government regulation. Indeed 66 percent of producers felt that market forces would provide less protection.³⁵ Producers seemed to feel that new kinds of product market regulation could help to stabilize demand for, and increase consumer confidence in, their products.

Summary of the Argument and Findings

This dissertation rests on three separate research findings that are discussed in detail in the three chapters in Section I below.

³² George Stigler, “The Theory of Economic Regulation,” *Bell Journal of Economics and Management Science* 2 (spring 1971), pp 2-31.

³³ “Meme si, avec l’expansion retrouvée, les Français reprennent, pour un temps, certaines de leurs anciennes habitudes, industriels et commerçants ne doivent se faire aucune illusion. Le consommateur de la crise est bien le consommateur de demain.” In “Accord Patrons-Consommateurs,” *Information Consommation OR-GE-CO* 16 (May-June 1976), p 6.

³⁴ “[Consumers] sind gegen modischen Wechsel sichtbar unempfindlicher geworden und messen der längeren Lebensdauer von Produkten in der Rangfolge der Kaufmotive einen höheren Stellenwert bei.” *BDI Jahresbericht 1973/4* (Köln: BDI 1974), pp 45, 68.

³⁵ Europe’s Consumer Movement: Key Issues and Corporate Responses (Business International, 1980), pp I-6-7.

The first chapter (Chapter 1. National Approaches to Product Market Regulation) presents empirical evidence for the recent emergence of a large and growing body of national regulation that focuses on product markets and characteristics rather than on the production process itself. In both France and Germany, this new body of regulation was introduced beginning in the early 1970s. Despite the plural institutional forms and regulatory goals of these new policies, France and Germany have adopted systematic, nationally distinctive approaches to product market regulation. These consistent constellations of product market regulations constitute national varieties of consumerism.

The second chapter in this section (Chapter 2. The Political Struggle Over Consumer Policy) proposes that the nature of these consumption regimes emerged from a policy struggle in which the organization of producer and consumer interests was decisive. Consumption regulation constituted a new area of policy for both France and Germany. Policy formation in this new area should therefore be understood not in terms of policy continuity, but instead as an instance of radical policy innovation. In new areas of policy, ideas play a central role in policy formation. Consumers and producers in this context competed to determine which policy ideas would dominate.

The third chapter (Chapter 3. How National Varieties of Consumerism Drive Product Choice) proposes that the national consumption regimes that emerged from this policy contest have a powerful and growing impact on national production strategies. This is consistent with economic and management theories that posit consumer sovereignty, and it suggests that producer decisions concerning labor force requirements, product quality, and product innovation depend increasingly on the consumption regime in which producers sell their goods. The German consumption regime, for example,

which emphasizes protection through accurate product information, has also come to reinforce a competitive dynamic that favors high-quality production and an incremental approach to innovation. The French consumption regime, by contrast, which attempts to insulate consumers from product-related risk, generates demand for lower quality products and a more radical style of product innovation. Empirical evidence for the impact of product-market regulations on product choice focuses on the cases of risk regulation through product liability law, and information regulation in the area of comparative product testing.

Section II (Chapters 4 and 5) of this dissertation describes the evolution of two interest groups in society—retailer and consumer associations—that played important roles in pushing for a particular social identity of consumers in France and Germany. The experience of these groups suggests that national consumption regimes were not merely imposed from above, but also emerged from interest groups acting independently within society.

Chapter 4 investigates how consumer associations, during a period of rapid expansion in the 1970s, pursued different organizational strategies in France and in Germany. French consumer groups came to favor grass-roots mobilization, strikes, and confrontation with industry; German consumer groups had few individual members but cultivated a high level of technical expertise that permitted them to engage with industry on specific issues of design.

Chapter 5 describes how traditional retailers in both countries responded to the pressures exerted by modern styles of distribution. French retailers rallied around the interests of consumers in opposition to the growing power of industry. German retailers

avored a close alliance with industry that put consumers at a disadvantage but ensured a stable rate of profit. These different strategies reflected different societal conceptions of the consumer interest. Whereas French retailers emphasized protecting consumers by insulating them from industry, German retailers understood their own interests and those of consumers to be an extension of production interests. Hence emergent national consumer identities were grounded not exclusively in government regulatory treatment but also in the formation of the consumer identity by interest groups in society.

Section III (Chapters 6 through 8) presents the core empirical findings of my research concerning eight areas of product market regulation in France and Germany. They reveal the dynamic of policy formation in what were for both countries new areas of policy.

Chapter 6 describes approaches to product information regulation in France and Germany. Germany has intervened forcefully in its economy to ensure a high level of reliable product information to consumers. In France, early efforts to impose an information approach to consumer protection faltered in the early 1980s, leading to a heavy reliance on industry self-regulation.

Chapter 7 describes French and German approaches to risk regulation in the areas of product liability law and national product safety standards. France has placed a heavy legal burden of responsibility for product safety on the shoulders of industry. Germany has promoted a strategy of industry self-regulation that has enforced high standards of product quality by making industry-wide standards of design and production mandatory for all manufacturers.

Chapter 8 describes cases of direct regulation of product standards, product pricing, and of the terms of sale for consumer goods. France and Germany have proved equally willing to intervene in the economy in order to support consumer interests, but Germany has focused on measures that encourage high quality, whereas France has focused on measures that lower price.

The cases presented in Section III reveal that policy-makers in almost all instances proceeded tentatively, and policy approaches changed over time as important economic actors came to understand their interests in relation to the new consumer politics. The cases also reveal the way in which diverse policy decisions, made by a variety of actors, have nonetheless come to produce a systematic set of consumer market outcomes that, taken together, have generated well-developed but differing national consumption regimes. These cases make a compelling argument for the role of politically contested ideas in generating divergent strategies of product market regulation, at least in France and Germany and probably generally.

Section I. National Varieties of Consumerism

Research in the field of political science is strangely silent on the politics and national institutions of consumption. Where they are invoked, consumer interests are typically adduced in a simplistic manner. Trade theories that address the consumer interest, for example, typically focus on price preferences without looking at competing risk or quality preferences.³⁶ Interest group theorists have pointed to the diffuse interests of consumers as a problem of collective action, but they have also tended to overlook the powerful political impact of the consumerist agenda.³⁷ As Steven Vogel has demonstrated in the case of Japanese consumerism, simplistic assumptions about consumer preferences are likely to be misleading.³⁸ Like national approaches to meeting the interests of production, national approaches to meeting the interests of consumers tend to be highly distinctive.

Given the importance of consumers as both economic and political actors, why have they received so little systematic study? Jonathan Frenzen *et al.* suggest propose the lack of academic concern for the consumer arises from the historical situation of the social sciences. The fields of economics, sociology, and political science, they argue, were created at a time when industrial production was maturing and consumer demand

³⁶ David Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Cambridge, Massachusetts: Harvard University Press, 1995).

³⁷ Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge, Massachusetts: Harvard University Press, 1965); Roberta Sassetilli, *Power Balance in the Consumption Sphere: Reconsidering Consumer Protection Organisations* (Florence: European University Institute Working Paper, 1995).

³⁸ Steven Vogel, "When Interests Are Not Preferences: The Cautionary Tale of Japanese Consumers," *Comparative Politics* (forthcoming).

seemed to be monolithic, uncritical, and unsaturated.³⁹ The study of consumption, where it existed, was understood to be largely derivative of the social situation of production, with consumer preferences emerging directly from income level or class identity. One recent scholar of consumption, Grant McKracken, in attempting to trace the history of national consumer cultures, laments that “the history of consumption has no history, no community of scholars, no tradition of scholarship.”⁴⁰ Given the lack of scholarship upon which to build, one of the important goals of this research has been to create a useful theoretical framework for understanding the political context of national consumption regulation.

This section presents a theoretical account of the nature, origin, and likely economic impact of distinctive national consumption regimes in France and Germany. Chapter one proposes a typology of product market regulations and argues that France and Germany have pursued systematically divergent strategies for product market regulation. These different national approaches to regulation constitute distinctive, coherent national consumption regimes. Chapter two explores the origins of this policy divergence. It argues that consumption regulation in the 1970s constituted an entirely new nexus of public policy. The differing conceptions of the consumer interest that came to be embraced at that time in France and Germany derived in large part from the way in which consumer and producer interests were organized. Chapter three explores the economic impact of different national consumption regimes on consumer and producer product

³⁹ Jonathan Frenzen, Paul M. Hirsch, and Philip C. Zerrillo, "Consumption, Preferences, and Changing Lifestyles," in *The Handbook of Economic Sociology*, eds. Niel J. Smelser and Richard Swedberg (Princeton, New Jersey: Princeton University Press, 1994), p 414.

strategies. It argues that the German approach has reinforced consumer demand for traditional high quality goods, while the French approach has created a market for lower quality but more innovative goods.

⁴⁰ Grant McCracken, *Culture and Consumption: New Approaches to the Symbolic Character of Consumer Goods and Activities* (Bloomington: Indiana University Press, 1988), p 28.

Chapter 1. National Approaches to Product Market Regulation

Faced with similar pressures, different countries have adopted different strategies for supporting consumer interests in the domestic economy. A survey of eight specific areas of consumer policy in France and Germany shows a systematic variation in the way these countries have regulated consumer product markets. France has adopted an approach that emphasizes product safety, embodied in the principle *caveat venditor* (let the seller beware), a relatively low level of product information, and significant government intervention in the production process. Germany has adopted a *caveat emptor* (let the buyer beware) standard that places greater product risk on the consumer, and emphasizes a relatively high level of product information and a higher degree of industry self-regulation than in France. Because the product market regulations that constitute these national approaches are diverse in subject and application, any political analysis must begin with a typology.⁴¹

Product market regulations as a whole fall conceptually into two categories: market regulations and direct product regulations. Because consumer purchases are commonly too small to warrant individually negotiated contracts and extensive information seeking, most advanced industrial societies have moved to regulate the way in which information and risk should be distributed in *all* consumer transactions. Hence

⁴¹ Researchers focusing on the trade impact of these policies typically distinguish between regulatory barriers, those created by positive government action, and structural barriers that result from a lack of government action. Researchers studying regulation more generally typically distinguish between economic and social regulations. Because of the political focus of this research, I have created a typology that I feel best distinguishes the politically-relevant goals of product market regulations.

market regulations set the general conditions of exchange for any consumer purchase by distributing the burden of risk and information between producer and consumer. Product risk is distributed via regulatory policies such as product liability law, standards of product safety, and product recall requirements. Product information is distributed through the application of standards of advertising, content labeling, and the diffusion of technical product information.

Direct product regulations, by contrast, focus not on the market in which consumers operate but on the qualities of consumer products themselves. These qualities include standards of design, product pricing, and terms of sale specifying what services and post-distribution assistance will accompany the product. Unlike market regulations, which establish the general context in which consumers and producers interact, direct product regulations intervene to set consumer-friendly standards in production and distribution. They typically have implications both for consumer information and for consumer risk. These direct product regulations may be elaborated and imposed either by industry associations, as in Germany, or through intervention by consumer groups and the government, as in France.

All countries rely on a combination of *market regulations* and *direct product regulations* to protect consumer interests, but not necessarily to the same degree. The extent to which one or the other approach is emphasized as a policy tool depends on the perceived identity of the consumer in society. In Germany, where the consumer is understood to be primarily an economic actor, sharing the same kinds of rights that producers and distributors enjoy, consumer regulation tends to emphasize market regulation. Roberta Sassetilli has labeled this emphasis on market-based protection a “fair

trading package.”⁴² In France, by contrast, where the consumer is perceived to have special political rights that derive from the conception of the consumer citizen, the government has been more inclined to rely on direct product regulation.

Apart from this difference in emphasis, however, different conceptions of the consumer identity in France and in Germany have also generated divergent approaches to regulation within the separate areas of market regulation and direct product regulation. In the realm of market regulation, France has tended to interfere minimally to ensure the quality of product information available to consumers, while aggressively pushing the burden of product risk onto producers. Germany has taken the opposite strategy, favoring a high standard of information combined with a more even distribution of product-related risk between producers and consumers. The French approach compels the producer to guard the interests of the customer. The German approach offers the consumer a high level of information in order to guard her own interest.

	France	Germany
<i>market regulation</i>	emphasizes risk reduction	emphasizes information provision
<i>direct product regulation</i>	ends (consumer) focused	process (industry) focused

Figure 3. Strategies of market regulation and direct product regulation in France and Germany.

⁴² Roberta Sassetilli, *Power Balance in the Consumption Sphere: Reconsidering Consumer Protection Organisations* (Florence: European University Institute Working Paper, 1995), pp 26-28.

In the realm of direct product regulation, Germany has worked to set standards of design *within* the production sphere, and industry has been given broad leeway to stipulate the design, price, and terms of sale for its products. France, by contrast, has tended to impose standards on industry either directly from the government or through negotiations with consumer associations. When the safety of a particular product is at stake, for instance, Germany encourages industry to solve the problem on its own, whereas French industry typically looks to the state to set appropriate safety requirements. These national differences in market regulation and direct product regulation are recapitulated in Figure 3 above.

My research focuses on the formation of eight areas of consumer policy that appeared at approximately the same time in both France and Germany. This sample of policies by no means exhausts the extraordinary variety of consumption regulations that have been created in the past thirty years, but they were selected to be representative. Within market regulation, three policy areas focus on product information: product advertising, product labeling, and product testing. Two other policy areas focus on product risk: product liability, and product safety standards. Within direct product regulation, three policy areas have been studied: product design standards, product price setting, and terms of sale.⁴³ Each of these eight areas of regulation operates at a general level, with application to all types of products.⁴⁴

⁴³ These areas of regulation stipulate design features of the product, the non-physical services that accompany the product, and the price at which the product is sold.

⁴⁴ Some industrial sectors have developed their own specific regulations. The pharmaceutical and agricultural industries, for example, have been the focus of especially detailed sector-specific regulation. While this study limits its scope to general product regulations, its conclusions will offer useful hypotheses about how specific product sectors have been regulated and why.

Market Regulation Focused on Product Information

Product information is a form of consumer protection employed in all advanced industrial countries. But systematic differences in the purpose and standards of product information have emerged in France and Germany. Germany imposes a higher standard of product information than does France, and enforces this standard more rigorously. In Germany, product information is perceived to meet the joint interests of industry and consumers. German regulations have in general worked to protect the rights both of consumers and of industrial producers to accurate information in the consumer marketplace. France, by contrast, enforces a lower standard of product information that typically ignores potential information needs of consumers and producers.

Product Advertising. Product advertising is one of the important channels of information dissemination in any economy. France and Germany have adopted different standards for truth in advertising. In France, advertising must meet a standard of factual truth that has been interpreted to allow generous leeway for creativity and humor.⁴⁵ In Germany, advertising is judged both on its factual truth and also on its actual tendency to mislead. Through legal interpretation, even factual advertisement can be construed as misleading by German standards if it would mislead more than 10 percent of the population.⁴⁶ The standards enforced by the two systems are different as well. Misleading advertising in France is punishable as a criminal offense with up to two years in prison

⁴⁵ Jean-Jacques Biolay, *Le Droit de la Publicité* (Paris: Presses universitaires de France, 1986), p 79.

⁴⁶ Gerhard Schricker, "Soll der einzelne Verbraucher ein Recht zur Klage wegen unlauteren Wettbewerbs erhalten?" *Zeitschrift für Rechtspolitik* 8 (1975), p 195.

and a fine of 250,000 francs.⁴⁷ In Germany, by contrast, advertising regulation is governed by competition law enforced through a combination of self-regulation by the advertising industry and legal oversight by registered consumer associations.⁴⁸

Product Labeling. Product labeling is another area of consumer policy in which France and Germany have applied different standards. In France, professional and consumer associations came together in 1970 to collaborate on a new organization, the French Association for Labeling Information (l'Association française pour l'étiquetage d'information, or AFEI). AFEI undertook to design and disseminate product labels that combined accuracy with usefulness to consumers. Their first label was issued in 1972. By 1980 AFEI had created labels for 1,300 different kinds of products.⁴⁹ This collaboration between consumers and producers has resulted in information standards dictated by the actual needs of consumers. In Germany, by contrast, labeling for consumer products is controlled from within Germany's Standards Institute (Deutsches Institut für Normung, or DIN). This was not always the case. In 1974 the independent benchmarking group, Deutsches Institut für Gütesicherung und Kennzeichnung (RAL), attempted to create a board of consumer and producer representatives to set labeling standards. DIN worried that control of product labels was tantamount to standard setting and would undermine their own authority. Seeing competition from RAL, they had the project eliminated by the

⁴⁷ Jean Beauchard, *Droit de la distribution et de la consommation* (Paris: Presses Universitaires de France, 1996), pp 314-316.

⁴⁸ Gesetz gegen unlauteren Wettbewerb, or UWG.

⁴⁹ AFEI was eliminated in 1984. Pierre Frybourg, (president of AFEI) "L'Etiquetage d'Information," *Revue de la concurrence et de la consommation* 12 (1980): 14-16; "L'Etiquetage informatif vous aide dans vos achats," *Information Consommation Or-Ge-Co* 27 (Mar-April 1978), pp 3-4; Jacques Dubois, "L'affichage des prix...ne doit etre qu'un premier pas," *Information Consommateur* 1 (1972), pp 3-4.

Economics Ministry. DIN instead created its own product information system operated from within DIN, consistent with DIN product standards.⁵⁰

Product Testing. A final source of product information for consumers comes from organizations that publish the results of comparative product tests. France began providing public funds for product testing in 1970, Germany in 1974. The results of the tests were published in monthly magazines similar to the US Consumer Union's *Consumer Reports*. A survey of European consumers found that 26 percent of German consumers and 13 percent of French consumers changed their purchasing decisions based on these test results.⁵¹ But the manner in which the tests have been conducted is different in the two countries. In general, the German tests are considered to be a tool for consumers and producers alike. Indeed producers whose products receive very low grades often remove those products from the market before any are sold.⁵² In France, by contrast, product tests are seen as a consumer counter-force against producers.⁵³ This difference of emphasis has affected the standard of information required of the product tests. In France these publications commonly evaluate the aesthetic qualities of products,

⁵⁰ "Grundsätze für Gütezeichen," *Bundesanzeiger*, 23 March 1974.

⁵¹ George H. Gallop, *The International Gallop Polls: Public Opinion 1978* (Wilmington, Delaware: Scholarly Resources, 1980), p 366; The actual question read: "Have you ever heard of laboratory tests carried out to compare the price and quality of various brands of goods on sale to the public? To what extent do you think the organizations that carry out these product comparison tests and publish their results can be trusted? Speaking for yourself and your family, would you say that because of your knowledge of the results of such tests on any products, you have changed your buying habits?"

⁵² "Verbraucheraufklärung zur Gewinnung von Markttransparenz unerlässlich ist, und zwar nicht nur im Interesse der Verbraucher, sondern schlechthin unter volkswirtschaftlichen Gesichtspunkten." Stiftung Warentest, *Zeichen setzen für Verbraucher* (Berlin: Stiftung Warentest, 1996), p 14.

⁵³ "Seuls les essais comparatifs sont susceptibles de **gener** [bold in text] véritablement les producteurs et distributeurs et donc de permettre une défense efficace du consommateur."

including the results of reader surveys of champagnes and perfumes. German tests, by contrast, only address measurable physical properties of goods. The difference in emphasis is also reflected in the legal standard of truthfulness that is applied to the tests. If a French company feels that its product has been wrongly criticized in a product test, it must show not only that a factual error was made but also that the error was intentional and therefore defamatory.⁵⁴ In Germany, producers participate in the testing process and are able to contest errors at several stages during the evaluation itself.⁵⁵ Hence not only does Germany maintain a higher standard of factual information in product testing than does France, but it also perceives the tests as aiding both consumers and producers.

Market Regulation Focused on Product Risk

In the absence of regulation, the burden of risks deriving from defective or dangerous products typically falls on the consumer. So long as products were simple and familiar, this principle of *caveat emptor* required only that consumers pay close attention to what they purchased. With the evolution of more complicated and highly engineered products, however, and with the greater differentiation of production and consumption spheres, the consumer lost the ability to evaluate product risk effectively.⁵⁶ Faced with

Jacques Dubois, "L'Étiquetage d'information et les essais comparatifs," *Information Consommateur* 4 (1970), p 2.

⁵⁴ "...une charte des bonnes relations entre les organismes d'essais comparatifs, les producteurs et les consommateurs." Claude Duchamp, "Les essais comparatifs," *Revue des études coopératives* 186 (1977), p 77.

⁵⁵ The test would be illegal when "...das Vorgehen des Testveranstalters 'als nicht mehr vertretbar (diskutabel)' erscheint." Werner Brinkmann, "Rechtsprobleme des vergleichenden Warentests in der Bundesrepublik Deutschland," *Zeitschrift für Verbraucherpolitik* 1 (1977), p 257.

⁵⁶ Claus Offe, "Ausdifferenzierung oder Ingegration – Bemerkungen über strategische Alternativen der Verbraucherpolitik," *Zeitschrift für Verbraucherpolitik* 5/1+2 (1981), p 120.

this change, most advanced industrial countries have created regulations to distribute the cost of unexpected product-related loss more equitably. Countries differ substantially in the way in which they allocate responsibility for product-related loss to consumers and producers.

In France, product risk is assumed to lie exclusively with the producer. Safe products are understood to have the status of a political right for consumers, and the state has traditionally taken that as a mandate to regulate product safety very closely. In Germany, by contrast, product safety is viewed primarily as a procedural matter, meaning that any product that has been designed and produced in the appropriate way is understood to have met the producer's obligation to safety. While the German approach may appear to favor industry, it takes advantage of and reinforces the quality orientation of the German production system in a way that ultimately benefits the consumer through the provision of high quality goods. Hence product risk in Germany is shared between producers and consumers, and the government has traditionally been reluctant to interfere in this balance of risk.

Product Liability. The legal standard for distributing the burden of product-related loss is addressed in product liability law. Product liability appeared as a distinctive area of law in France and Germany only in the 1960s. Even the term product liability came into use in Europe only in 1964.⁵⁷ Over the course of the 1960s, France evolved a strict standard of liability, similar to that employed in the United States, which required only that the plaintiff show damage, and prove that the damage was caused by a defect in the product. Under this strict standard, producers, and in many cases distributors, are held

liable for product-related loss even if no amount of care could have prevented the damage.⁵⁸ Germany, by contrast, has applied a negligence standard of product liability to producers. This means that companies were legally liable only if damage resulted from a product defect *and* if that product defect was due to negligent behavior by the producer. Negligence, moreover, has been defined in purely organizational terms. German companies were not held responsible for a product defect if it resulted from a properly trained employee working under the proper organization of management, even if the worker did actually cause the defect.⁵⁹ Stated otherwise, the German producer has an obligation of means requiring that appropriate care be taken in production. The French producer had a legal obligation of ends that cannot be diminished by any level of care in production.⁶⁰

Product Safety. Product liability law can be effective when loss is reparable, or as a form of compensation for personal injury, but in cases where damage is likely to be devastating or irreversible, governments have commonly focused on the safety of products before they come on the market in order to ensure an adequate level of consumer safety. The patterns of responsibility found in product liability standards is mirrored in national regulation of product safety. Thus Germany has helped to ensure the safety of products by making standards established within the industry standard-setting

⁵⁷ Børge Dahl, "An Introduction to the Product Liability Debate," *Journal of Consumer Policy* 3/1 (1979), p 16.

⁵⁸ Geneviève Viney, "The Civil Liability of Manufacturers in French Law," in *Comparative Product Liability*, ed. C. J. Miller (London: Comparative Law Series, 1986), p 77.

⁵⁹ Henricus Duintjer Tebbens, *International Product Liability: A Study of Comparative and International Aspects of Product Liability* (The Hague: Asser Institute, 1979), pp 74-75.

body (Deutsche Industrie Normung, or DIN) mandatory for all consumer products. In France, by contrast, the state has mandated minimum standards for a wide range of inherently dangerous consumer products, from toys to motorcycle helmets, and enforced these standards through its Consumer Safety Council. Hence in Germany industry itself sets the terms of product safety. In France this responsibility lies heavily on the government.

These differences also carry over into other policies that relate to product safety. French ministries have broad powers to recall products from the market if they find that these pose a danger to consumers. The Germany government, by contrast, can only *recommend* that products be withdrawn. Germany has also opposed participation in a Europe-wide accident-reporting network championed by France as an early warning system for dangerous products.⁶¹ Critics in German industry worried that this might lead to a politicization of technical issues surrounding product safety.

National Approaches to Direct Product Regulation

The move to regulate consumption addressed not just market regulation of information and risk, but also extended into the specifications of particular products on the market. As with market regulation, French and German approaches to this sort of direct product regulation have proceeded along different paths. In Germany, regulation of product specifications has remained within the production sphere. In France, by contrast,

⁶⁰ Oliver Berg, "La notion de risque de développement en matière de responsabilité du fait des produits défectueux," *La Semaine Juridique* 27 (1996), p 276.

⁶¹ Hans-Wolfgang Micklitz, "Comparative Analysis of the National Country Reports on Post Market Control and Perspectives for a European Setting of Post Market Control," in *Post Market Control of Consumer Goods*, ed. Hans-Wolfgang Micklitz (Baden-Baden: Nomos, 1990), p 418.

the government has imposed product specifications from the outside, either through direct intervention, or by empowering consumers to negotiate directly with companies. These different strategies have been driven by the divergent goals of direct product regulation in France and Germany. For France, direct product regulation strove to impose consumer interests on the product design process. In Germany, direct product regulation was designed primarily by and for industry as a means of maintaining an industry-wide standard of high-quality production.

Product Design. Both France and Germany during the 1970s took the extraordinary step of integrating consumer interests directly into product design. Driven in part by concerns over a move towards the planned obsolescence of products, consumer advocates inside and outside the government became increasingly skeptical of the efficiency of market mechanisms for transmitting genuine consumer interests to producers. Germany proposed, in its *First Consumer Report* of 1971, that the consumer interest be incorporated into the process of industrial standard setting by Germany's standards-setting body, DIN.⁶² While industry initially opposed this "in-house solution" to consumer representation, the government forced the issue by making it a requirement for subsequent government support to DIN.⁶³ The first Consumer Council (Verbraucherrat) was incorporated into DIN in 1975. By 1982 consumer representatives

⁶² *Verbraucherbericht*. Bundestagsdrucksache VI/2724 (1971).

⁶³ "partnerschaftliche Im-Hause-Lösung." Christian Joerges, Josef Falke, Hans-Wolfgang Micklitz, and Gert Brüggemeier, *Die Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft* (Baden-Baden: Nomos, 1989), p 186.

were participating in the work of design committees for nearly two thousand different consumer products.⁶⁴

France pursued a different strategy for including consumers in the process of product design. Rather than granting consumer representatives direct access to industry associations, the Economics Minister René Monory called instead for consumer associations to function as a counter force to industry: "The consumer counter-force must be encouraged."⁶⁵ Beginning in 1978, consumer groups were encouraged to meet directly with industry groups, who were newly organized in the Committee on Industry, Commerce, and Consumption of the Conseil National du Patronat Français (CNPFF-CICC). Consumers and producers then negotiated so-called product accords that specified aspects of product design, durability, and production for different industrial sectors. In 1982, consumer groups even began to negotiate quality contracts with individual companies. Whereas the product accords had not been binding on producers, these new quality contracts *required* that participating companies incorporate the negotiated standards.⁶⁶ Hence, in contrast to Germany, which incorporated consumer interests into industry's standards-setting board, France supported negotiated agreements between industry and consumer groups concerning product specifications.

Product Price Setting. Beyond setting the design specifications of products, France and Germany have also regulated, directly or indirectly, the way in which product

⁶⁴ Annemarie Bopp-Schmehl, Uwe Heibült, and Ulrich Kypke, *Technische Normung und Verbraucherinteressen im gesellschaftlichen Wandel* (Frankfurt am Main: Haag & Herchen Verlag, 1984), p 216.

⁶⁵ "Le contre pouvoir consommateur doit être développé." René Monory, *Inauguration des Locaux de L'institut national de la consommation* (Paris: Ministre de l'economie, Service de l'information, March 1979), p 3.

prices were determined. France relied until 1986 on a direct government regulation of product pricing, whereas Germany gave manufacturers wide latitude to set product prices. In France, beginning in 1973, all prices required approval from the government before the product was placed on the market.⁶⁷ By 1976 it had become clear that the government-imposed prices were not holding down inflation, and a new system of negotiated price ceilings was put in place. Under this scheme, price ceilings for each category of product were negotiated between the government and responsible industry organizations. Once the price ceiling was set, manufacturers wishing to sell their goods below the negotiated price required no government approval. Those wishing to sell above the negotiated price had to apply, as before, to the Economics Ministry.⁶⁸

In Germany the government responded to the inflation caused by the first oil shock by prohibiting resale price maintenance (RPM). This practice, banned in France since 1960, had permitted manufacturers to stipulate the price at which retailers would sell their goods. Expecting that the purchasing power of large retailers would help to keep consumer prices down in the absence of RPM, the government attempted to eliminate the practice in 1973.⁶⁹ Yet other restrictions on retailing have nonetheless allowed manufacturers to continue to dictate the resale price of their goods. Retailers, for example, are still issued “recommended” price lists by manufacturers. These lists, which are not made available to consumers, have been found by the Federal Cartel Office

⁶⁶ Jean Calais-Auloy, *Droit de la consommation* (Paris: Editions Dalloz-Sirey, 1992), pp 49-50.

⁶⁷ Hervé Dumez, and Alain Jeunemaître, *Diriger l'économie: L'Etat et les prix en France, 1936-1986* (Paris: Harmattan, 1989).

⁶⁸ Reinhard Angelmar, and Bernard Yon, “New Product Price Controls in France” in *Journal of Consumer Policy* 2/1 (1978), pp 43-49.

(Bundeskartellamt, or BKA) to be tantamount to price fixing.⁷⁰ Moreover, restrictions on the size and competitive practices of retailers have worked to keep them weak in relation to industry, giving producers further leverage to dictate resale prices.⁷¹ Whereas the French government tightened its administrative control of price setting, Germany left price setting primarily in the hands of industry and relied on wage bargaining to ensure that higher prices would be reflected in higher salaries.

Terms of Sale. A final area of direct product regulation focuses on the terms of sale for consumer products. Manufactured goods come bundled with a set of services that includes repairs, replacement in the case of defect, prompt delivery, consumer financing, and others. Unlike the product itself, these down-stream services are typically controlled by the distributor rather than by the manufacturer. By the early 1970s governments in both France and Germany had moved to regulate the general terms of sale for products. Germany's Justice Minister first proposed regulating terms of sale in 1972.⁷² The consumer agenda of France's Seventh National Plan advocated a similar kind of regulation in 1974.⁷³ But despite the similar initiatives, the goals and standards adopted in the two countries were very different.

In France, a Commission on Abusive Clauses created in 1978 reviewed the terms of consumer sales contracts and made recommendations on what types of terms should be

⁶⁹ Norbert Reich, "Neue Tendenzen des kartellrechtlichen Verbraucherschutzes in der BRD," *Zeitschrift für Verbraucherpolitik* 1/3 (1977), p 236.

⁷⁰ Verbraucherbeirat Jahresbericht, 1977.

⁷¹ See, for example: Olaf Sosnitza, *Wettbewerbsbeschränkungen durch die Rechtsprechung: Erscheinungsformen und Ursachen auf dem Gebiet des Lauterkeitsrecht* (Baden-Baden: Nomos Verlagsgesellschaft, 1995), p 144.

⁷² "Die Parteien entdecken die Verbraucher," *Süddeutsche Zeitung*, Thursday, 31 October 1972.

proscribed.⁷⁴ The explicit goal was to protect consumers against deceptive practices in retailing. In principle, the recommendations of the commission would be applied through regulations issued by the Economics and Finance Ministry.⁷⁵ In fact, under pressure from industry, the government issued only two such regulations during the next ten years, acting on only 4 of the 30 recommendations generated by the Commission.⁷⁶ The extent of France's regulation was to prohibit producers or distributors from exempting themselves from legal liability.

In Germany, by contrast, the terms of sales specified in the 1976 Law on General Business Conditions (*Allgemeines Geschäftsbedingungen Gesetz*, or *AGB-Gesetz*) were highly specific and were designed with the support and consultation of industry. The new German law specified 17 terms of sale that were expressly forbidden in consumer contracts (*AGB-Gesetz* §11), plus an additional 23 terms that had to be explicitly agreed to by the consumer (*AGB-Gesetz* §10).⁷⁷ Whereas the French law was designed to protect consumers against industry malfeasance, the German law was seen by industry as a protection against the incursion of lower quality products into German distribution.⁷⁸

⁷³ Jacques Dubois, "Les consommateurs dans le 7ème plan," *Information Consommation OR-GE-CO* 15 (March-April 1976), pp 1-2.

⁷⁴ Jean Marchand, "Le consommateur mieux protégé contre les pièges des contrats," *La Croix*, 1 Feb 1978.

⁷⁵ Gilles Paisant, "Le point sur les clauses abusives des contrats," in *Après le Code de la consommation, grands problèmes choisis: Actes du colloque du 24 février 1994 de l'Université de Reims*, ed. Jean Calais-Auloy and Hervé Causse (Paris: Litec, 1995).

⁷⁶ Bulletin officiel de la concurrence, la consommation, et de la repression des fraudes, 1978 to 1988.

⁷⁷ Erika Schork, "Geschäft mit den Geschäftsbedingungen," *Süddeutsche Zeitung*, Thursday, 13 July 1972.

⁷⁸ Joachim Beimowski, *Zur ökonomischen Analyse Allgemeiner Geschäftsbedingungen* (Munich: Verlag V. Florenz, 1989), p 15.

Summary

Taken together, these eight policy areas reveal systematic variation in the French and the German approaches to consumption regulation. Within market regulations, Germany has enforced a stringent standard of information, while France has imposed a particularly high burden of risk on producers. Within direct product regulation, Germany has tended to rely on industry institutions, whereas France has attempted to create a counter-force to industry by using a mixture of administrative oversight and empowered consumer organizations. See Figure 4 below.

policy area	France	Germany
<i>Market Regulation</i>		
<u>Product Information:</u>		
Product Advertising	standard of factual accuracy	Strict standard that does not mislead the public
Quality Labeling	designed in collaboration with consumers	Designed within industry
Product Testing	independent of industry and subjective	Strictly objective with industry collaboration
<u>Product Risk:</u>		
Product Liability	strict standard	Negligence with reversed burden of proof
Product Safety	administrative oversight	Mandatory industry standards
Product Recall	controlled by ministries	Voluntary for industry
<i>Direct Product Regulation</i>		
Product Design Standards	negotiated with consumers	Consumers participate on industry standard board (DIN)
Product Price Setting	set though negotiation with the administration (until 1986)	set mainly by producers
Terms of Sale	administrative initiative, narrow scope of application	Strict requirements set by law with a broad scope

Figure 4. Summary of Product Market Regulations in France and Germany.

Product market regulation, taken as a whole, incorporates an extraordinarily broad range of policies, of which our survey has described only some of the most prominent. One author has estimated that France alone has generated over 300,000 different government texts that define and regulate product markets.⁷⁹ How can we have confidence that the trends identified above hold true across the entire range of national product market regulations? The following section argues that national consumption regimes should be understood as general national strategies because they derive from country-specific conceptions of the consumer interest, which in turn have their origins in the political struggle between consumer and producer interests.

⁷⁹ Alexandre Carnelutti, "Consommation et société," *Revue française d'administration publique* 56 (October-December 1990), p 585.

Chapter 2. The Political Struggle Over Consumer Policy

The previous chapter has established that France and Germany have pursued systematically different approaches to consumer protection. In Germany, the consumer is seen as an economic actor. Consumer problems are understood in terms of market failure. Appropriate solutions therefore stress restoring proper functioning of the market, including correcting information asymmetries, enforcing an equitable distribution of contractual risk, and encouraging competition in product quality. In France, the consumer is seen as a political actor. Consumer problems are understood in terms of a failure of political rights. Appropriate solutions therefore stress a better political representation of the consumer interests, including consumer mobilization, government protection of consumer rights, and an insulating of consumers from risks deriving from production. In sum, the German consumer has the characteristics of a producer, while the French consumer has the characteristics of a citizen. This chapter explores the origins of these differing concepts of the consumer interest.

Because product market regulation emerged as a new area of policy in France and Germany in the 1970s, debate over policy solutions took the form of a discussion of the identity of the consumer in society that was unusually broad. French and Germany policymakers faced a choice among competing conceptions of the consumer and of the consumer's role in society. Was the consumer primarily an economic actor, an interest group, or a political actor? While each of these views was in some sense true, each conception entailed a different constellation of regulatory responses to consumer grievance. Thus from each distinctive conception of the identity of the consumer emerged

a coherent model of how consumer policy should be regulated. Each alternative policy model was coherent in that it offered policy proposals for all areas of consumer protection. But the policy models were also mutually exclusive. Because their prescriptions were often contradictory, each country could espouse only a single policy model for consumer protection, and that implied and required a single conception of the consumer identity.

As we have seen, Germany came to adopt the information model, and France came to adopt the protection model. These approaches did not emerge from deep national traditions of consumer protection. Indeed in many areas of consumer regulation such national traditions simply did not exist. Instead, the policy models that came to dominate in France and Germany emerged from a heated political struggle that took place between producers and consumers in the 1970s and early 1980s over the identity of the consumer. At stake in this conflict was the degree of responsibility that consumers and producers faced for product-related risk. If the consumer was understood as an economic actor, then the consumer should rightfully face the full burden of market uncertainty. If instead the consumer was understood as a political actor, then protection against product-related loss could be understood as an absolute political right. Product market regulation in each country emerged from a conflict over what policy model would prevail.

Who won and who lost this struggle depended on the relative capacity of consumer and producer groups to organize in support of their interests. In France, where consumer groups enjoyed a strong grass-roots mobilization and industry was poorly organized to pursue its collective goals, policy outcomes tended to emphasize the interests of consumers over those of producers. Indeed policymakers shifted their policy

model away from the interests of industry as consumer mobilization grew. In Germany, by contrast, where producers were well organized and consumer organizations did not have a strong membership, policy outcomes instead emphasized the preferences of producers. This situation suggests that even in periods of radical policy innovation, interests and institutions may play a central role in determining what policy idea emerges as the dominant regulatory model.

The first section below, titled “Three Conceptions of the Consumer”, describes three policy models from which France and Germany selected their distinctive strategies of product market regulation. It also summarizes the way in which the organization of consumer and producer interests in France and Germany led policymakers to select from among these different models.

The second section, titled Explaining Regulatory Divergence in Radically New Areas of Policy , steps back to discuss the theoretical challenges of explaining policy divergence in an entirely new area of policy. It considers, and for the most part rules out, alternative arguments for the way in which France and Germany have regulated product market regulations. It then proposes an approach grounded in the notion of politically contested ideas.

The third section, titled Policy Preference Orderings and the Role of Institutions, describes how consumer and producer groups ranked the three available ideas concerning the consumer identity and their corresponding policy models. It also describes three ways in which the organization of producer and consumer interests influenced their ability to pursue their preferred policy model.

The final section, **The Policy Conflict over National Models of Consumer Protection**, describes the historical process by which interests and institutions interacted to favor an information model in Germany and a protection model in France.

Three Conceptions of the Consumer

Because consumer protection was a new issue in both Germany and France, discussions about specific areas of regulation took place in the shadow of a broader discourse about the nature of consumer identity. How was the consumer to be understood? Was the consumer primarily an economic actor, or instead a political actor? Did consumers constitute a new interest group, or merely a collection of unrelated individuals with product grievances? Depending on how one answered such questions, different kinds of policy solutions were likely to seem more or less appropriate in addressing consumer demands. Because of their implications for policy, ideas about consumer identity and the consumer's role in modern society became the focus of a policy struggle between the interests of consumption and of production.

Three policy models in particular took center stage in the policy debates in France and Germany. See Figure 5 below. The first, what might be called the protection model, views consumers as an endangered group in society in need of protection against the negative consequences of industrial production. This idea of the consumer drew on the experience of the United States, where policies of the 1950s and 1960s had placed a high burden of responsibility on producers. In this model, the consumer is seen foremost as a citizen-consumer. Consumer protection in this view is understood as a basic right of consumers. Solutions therefore focus on creating new consumer rights, on insulating consumers from market risk, and on mobilizing consumers to protect what they perceive

to be their political rights. Regulatory solutions under this protection model tend to focus on the end goal of consumer safety rather than on intermediate procedural goals. This protection model also tends to encourage private law approaches to enforcing individual consumer rights. A strict standard of product liability, for example, is a hallmark of this protection model of the consumer. In legal parlance, the fundamental principle of the protection model is *caveat venditor*.

policy model	<i>protection</i>	<i>negotiation</i>	<i>information</i>
country example	United States	Sweden	Britain
consumer identity	citizen	interest group	economic actor
analysis of problem	expropriated rights	lack of discussion	market failure
proposed solution	<ul style="list-style-type: none"> ◆ create new rights ◆ insulate consumers from market risk ◆ mobilize consumers 	<ul style="list-style-type: none"> ◆ create forums for negotiation ◆ make outcome of negotiations binding 	<ul style="list-style-type: none"> ◆ provide consumers with better information ◆ reinforce quality production
regulatory emphasis	<ul style="list-style-type: none"> ◆ focus on ends ◆ encourage private law enforcement 	<ul style="list-style-type: none"> ◆ focus on fair discussions ◆ encourage mediation 	<ul style="list-style-type: none"> ◆ focus on procedure ◆ encourage industry self-enforcement
legal principle	<i>caveat vendor</i>	<i>pacta sunt servanda</i>	<i>caveat emptor</i>

Figure 5. Three Policy Models for Product Market Regulation.

A second model, what has been called the information model, views the consumer as an economic actor in society operating on a par with other economic actors, including

manufacturers, suppliers, and workers. This idea of the consumer drew on consumer protection policies that had been developed by the Labour government in Britain in the 1960s and that emphasized the need for better consumer information. In this information model, the consumer is understood to have the status of another producer. Consumer problems are interpreted in terms of market failure rather than as a breakdown in political rights. Solutions therefore focus on overcoming information asymmetries between producers and consumers, and on reinforcing the mechanisms of quality production in order to offer consumers a better set of market options. Regulatory solutions under this model focus on ensuring fair business procedures and encouraging industry self-regulation. The fundamental legal principle of the information model is *caveat emptor*.

A third model of consumer protection, what might be called the negotiation model, views consumers as a societal interest group capable of representing its interests directly to other interest groups in society. This model is based on the experience of the Swedish consumer movement in the 1960s and early 1970s, and it assumes that consumers and producers share many common goals, and that through discussions they can come to agreement on a mutually-satisfactory regulatory approach to consumer protection. In this negotiation model, consumers are viewed as an important emerging interest group in society. Consumer problems are understood to derive from a lack of discussion between consumer groups and producers. Appropriate solutions consequently emphasize the creation of forums in which fair negotiations can take place, as well as state enforcement of the outcomes of such negotiations. Regulatory approaches in this negotiation model tend to emphasize a standard of fairness and encourage mediation. A distinguishing characteristic of this approach is the Consumer Ombudsman, an

administrative position, first established Sweden in 1971, that has autonomy from the government and is charged to spearhead the consumer interest in negotiations with industry. The fundamental legal principle of the negotiation model is *pacta sunt servanda*, contracts are honored.

At the time when consumer-oriented policies were being created in France and Germany, these competing conceptions of the consumer identity and interest served three important roles. First, they helped to bring coherence to a broad range of policies that had previously been seen as unrelated. Regulations in fields as diverse as advertising, product standards, and retail contracts came to be understood in terms of a single broader debate in society surrounding the interests and condition of the consumer. Second, each conception of the consumer carried with it a coherent analysis of the problem and appropriate solutions. Each conception thus acted as a policy model, a useful shorthand for a broad set of coherent policy proposals spanning the range of consumer issues. Of course, since consumer interests were in fact multiple and diverse, no single policy model could be comprehensive. But each of the three conceptions had the advantage of presenting a coherent policy program. Third, these ideas about consumer identity became the focus of policy struggles among the major social actors in France and Germany. Individual policy decisions that might otherwise have eluded public debate took place in terms of broader conflicts over the relevant conception of the consumer identity. In sum, these ideas about consumer policy drew attention to the new area that was policy, provided a blueprint for coherent strategies of policy formation in this new area, and set the broad terms on which political struggles over policymaking were waged. Which of the three policy models was to emerge as the predominant model of consumer protection

in each country depended on a political struggle between the interests of consumers and producers.

Available evidence suggests that policymakers at the time genuinely came to think of consumer regulatory issues in these terms. We know that French and German policymakers were conscious of these three different options, first, because they conducted detailed studies of the regulatory approaches adopted by other countries. Because the United States, Britain, and Sweden all preceded France and Germany in regulating consumer markets, they offered obvious models to draw from. In France, these studies took place either in the context of the Consumer Committee for the French Plan, or were initiated by consumer groups themselves.⁸⁰ Ralph Nader was invited twice to France in the early 1970s to introduce the US model of the consumer citizen. In Germany, the Commission for Economic and Social Change undertook a five-year survey of the entire German economy that included several studies of foreign approaches to product market regulation.⁸¹ Evidence exists, for example, that German policymakers very seriously considered adopting the negotiation model, or Swedish approach.⁸²

In addition to these surveys of foreign regulatory approaches, French and German policymakers met frequently in the context of European efforts to draw up common standards for product market regulations within Europe. Consumer directives adopted by the Committee of Ministers in the European Economic Community included those

⁸⁰ See for example Michel Génin, and Bernard Suzanne, "Les rapports de l'industrie de consommation en Suède et aux Etats-Unis," *Les Cahiers de l'ILEC* 7 (1963), pp 5-54.

⁸¹ For a summary of their findings see Kommission für wirtschaftlichen und sozialen Wandel, *Wirtschaftlicher und sozialer Wandel in der Bundesrepublik Deutschland: Gutachten der Kommission* (Göttingen: Verlag Otto Schwartz & Co., 1977), Chapter 9.

⁸² Wolfgang Hoffmann, "Die Anwälte der Konsumenten: Viele Verbraucherverbände—wenig Erfolg," *Zeit* (Friday, 26 March 1971), p 29.

devoted to door-to-door sales (1973), misleading advertising (1972), unfair clauses in contracts (1976), after-sales service (1978), consumer representation in standardization bodies (1979), consumer education and information (1971 and 1979), protection and defense of consumer collective interests (1978), consumer legal assistance (1981), and consumer access to justice (1981).⁸³ Although none of these directives proved effective, they did generate an ongoing debate on consumer issues among European policymakers. Moreover, a new Committee on Consumer Policy in the Organization for Economic Cooperation and Development began publishing annual comparative studies on national approaches to consumer policy in 1972.⁸⁴ In sum, French and Germany policymakers appear to have been extremely well informed about the policy alternatives they faced.

These three models of consumer protection were also not conceptually arbitrary. Rather, they can be seen to map out the entire space of possible responses to consumer grievance. Conceptually, a continuum exists between a pure information approach to consumer protection, on the one hand, in which consumers are given the tools to make wise purchases, and on the other hand a pure protection approach in which consumers are entirely insulated from product risk. The resulting space of possible policy approaches to consumer protection is depicted in Figure 6 below. The vertical axis expresses the degree to which producers are themselves made responsible for product-related risk. In practice, this dimension corresponds to mandatory safety requirements, product liability standards, product recall programs, and such. The horizontal axis expresses the degree to which

⁸³ Thierry M. Bourgoignie, "Consumer Law and the European Community: Issues and Prospects," in *Integration Through Law: Europe and the American Federal Experience*, eds. Thierry Bourgoignie and David Trubek (Berlin: Walter de Gruyter, 1987), p 95.

information about products is provided to consumers. In practice, this dimension corresponds to standards of truth in advertising and labeling, comparative product testing, consumer education, and such.

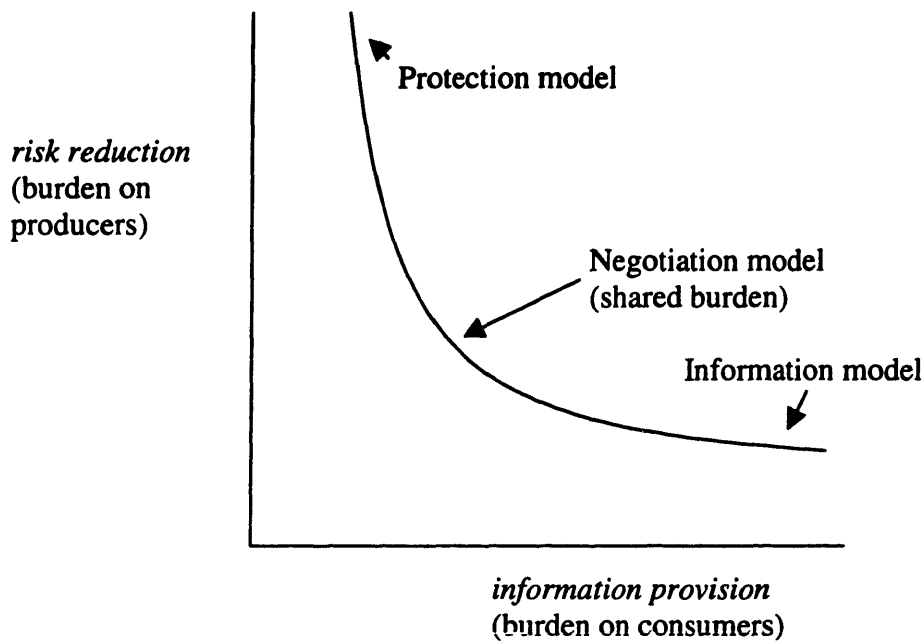


Figure 6. Three models of consumer protection.

The concave curve in Figure 6 describes the line of equivalent consumer safety. Consumers, in other words, may be equally safe when faced either with a reduced burden of risk and little product information, or with a high burden of risk and a high level of information. In practice, of course, neither solution is entirely satisfactory. No matter how

⁸⁴ Organisation for Economic Co-operation and Development, *Consumer policy in member countries* (Paris, Organisation for Economic Co-operation and Development,

well informed a consumer may be, certain risks necessarily remain unknown. Similarly, no matter how assiduously product risks are assigned to producers, certain kinds of losses, especially those to consumer health, can never be adequately avoided or remunerated. The curve describing equivalent consumer safety therefore never fully converges with either axis.

Different strategies of consumer protection impose different burdens on consumers and producers. A strategy that emphasizes information provision places a high burden on consumers. This strategy corresponds to the information model that came to predominate in Germany. Conversely, a strategy that emphasizes risk reduction places a high burden on producers. This strategy corresponds to the protection model that came to predominate in France. But there also exists a third, compromise strategy, in which consumers and producers can jointly benefit by sharing the burden of consumer protection. This third option describes the negotiation model. By distributing the burden of product safety between consumers and producers, this negotiation approach can also lower the overall social cost of consumer protection. In sum, the policy models that defined the policy debates in France and Germany were not merely ad-hoc borrowing from foreign experience. Instead they appear to map out the full range of conceptual solutions to the general problem of consumer protection.

Interest Organization of Consumers and Producers

Consumers face a collective action problem in protecting their interests. The problem stems from their large numbers. The benefits of consumer protection are diffused among all consumers, while the costs to industry are concentrated on individual

1972).

sectors or even single companies. Because the benefits of consumer protection legislation to any individual consumer are necessarily small, individual consumers have few incentives to organize in order to protect their collective interests. Indeed, of all collective actors, consumers face perhaps the greatest barriers to organization. Mancur Olsen himself describes the problem clearly:⁸⁵

"Let us now ask what would be the expedient course of action for an individual consumer who would like to see a boycott to combat a monopoly or a lobby to repeal the tariff, or for an individual worker who would like a strike threat or a minimum wage law that could bring higher wages. If the consumer or worker contributes a few days and a few dollars to organize a boycott or a union or to lobby for favorable legislation, he or she will have sacrificed time and money. What will this sacrifice obtain? The individual will at best succeed in advancing the cause to a small (often imperceptible) degree. In any case he will get only a minute share of the gain from his action. The very fact that the objective or interest is common to or shared by the group entails that the gain from any sacrifice an individual makes to serve this common purpose is shared with everyone in the group."

Olsen (op. cit.) describes two broad strategies that permit individual actors to overcome free-rider problems in order to pursue their collective goals. The first strategy is for representative groups to offer selective benefits to individual members. In the case of workers, who like consumers have faced important obstacles to organization, trade unions are able to draw in members by offering them insurance policies or unemployment

⁸⁵ Mancur Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities* (New Haven: Yale University Press, 1982), p 18.

benefits. For consumer groups, the benefits of membership in a consumer association usually include access to useful product information and technical or legal advice. This was the approach adopted by French consumer groups. The large number of consumer publications that emerged in France in the 1970s had the goal of drawing in individual members through the information they provided. The early members of consumer groups were not connected with trade unions.⁸⁶ By the late 1970s, however, each of the large French trade unions had created its own affiliated consumer groups. Trade union experience with public actions and popular mobilization helped further to boost the grass-roots membership of the consumer movement. Product boycotts, political rallies, and price surveys all constituted typical consumer group activities in France. Chapter 5 details the mobilization strategies of the French consumer movement.

The second strategy described by Olsen for empowering diffuse interests is to devolve group decision-making powers to one or more representative bodies. These representatives hold the legal right to speak on issues that bear on all consumers. Collective wage-bargaining by trade unions is one instance of this strategy. For consumer groups, privileged access granted by the government to policymaking forums within the government and with business means that consumer groups do not need to seek an increase in the number of their individual members in order to advocate consumer protection policies. This approach was adopted by consumer groups in Germany. These groups were technically specialized and enjoyed privileged access to technical and policy discussions by business associations and government ministries. They thus did not work to cultivate a grass-roots consumer membership. Rather than competing with each other

⁸⁶ Michel Wieviorka, *L'Etat, le Patronat, et les Consommateurs: Etude des mouvements*

for consumer patronage, individual consumer groups specialized in specific activities, such as product testing (Stiftung Warentest), consumer policy training (Stiftung Verbraucherinstitut), and consumer legal protection (Verbraucherschutzverein). Because each of these organizations were formed through legislative action, it is perhaps not surprising that they focused on technical responsibilities and shied away from consumer mobilization. But even regional consumer associations, which were not bound to a single technical field, were wary that a grass-roots membership would unduly politicize consumer protection and undermine the missions of their organizations.⁸⁷ Most still do not permit individual members. This lack of popular mobilization around consumerism is puzzling in part because of the high level of political activism that Germany experienced during this period around issues such as the environment and nuclear energy.⁸⁸ But it was also an important reason for Germany's adoption of the information model.

One German consumer group that did try to adopt the French approach of mass membership and selective benefits was the Deutsches Verbraucherbund, created by Hugo Schui in 1965. In return for a 6 DM annual fee, members received a copy of the magazine *Der Wecker* ("The Alarm Clock"), legal protection against producers and distributors, 500 DM subsidy to pursue individual consumer law suits, and access to inexpensive airline tickets to the United States. *Der Wecker*, as the name implies, was radical in approach and launched heavy criticism at the government and parliament for their

de consommateurs (Paris: Presses Universitaires de France, 1977), p 73.

⁸⁷ Hartwig Piepenbrock, "Die Legitimation der Verbraucherverbände zur Wahrnehmung von Verbraucherinteressen," in *Verbraucherpolitik kontrovers*, eds. Hartwig Piepenbrock and Conrad Schroeder (Köln: Deutscher Instituts-Verlag, 1987).

⁸⁸ In comparison to France, where the consumer movement was strong and the environmental movement relatively weak, Germany's consumer movement was weak and its environmental movement was strong.

complacency in relation to consumers.⁸⁹ Moreover, because members of the Verbraucherbund paid dues, Schui was able to offer legal support of the kind that government-sponsored consumer groups were legally prohibited from offering. The group had an impressive 50,000 members in 1970 (about 4,000 members per year took advantage of the low airfares).⁹⁰ This early success suggests that a grass-roots consumer movement of the kind that emerged in France might have been possible in Germany. But as government support to official consumer groups grew, membership in the Deutsches Verbraucherbund declined. Eventually Schui moved to New York to create Consumers International.

The different strategies by which French and German consumer groups overcame their collective action problems was to play an important role in determining what model of consumer policy would emerge in France and Germany. In France, where consumer groups pursued a strategy of grass-roots mobilization, they also became politically powerful. Because of their political influence they were able to push a heavy burden of consumer protection onto industry. In Germany, where consumer groups pursued an organizational strategy of devolved powers that freed them from the need to mobilize individual consumers, consumer groups as a consequence had little political strength. Instead they cultivated technical competencies that allowed them to participate fruitfully in detailed production policy and decisions. This strategy meant that German consumer groups did not have the political power to push a heavy burden of consumer protection

⁸⁹ Wolfgang Hoffmann, "Die Anwälte der Konsumenten: Viele Verbraucherverbände—wenig Erfolg," *Zeit* (Friday, 26 March 1971), p 29.

⁹⁰ "Vebände: Asoziale im Frack," *Der Spiegel* (Monday, 21 September 1970), pp 60-61.

onto industry, but they did have the capacity to engage industry directly on technical questions of consumer safety.

Consumer policy outcomes in both France and Germany, however, depended as much on the organization of producers as on the organization of consumers. As David Vogel has argued in the case of the United States, businessmen face considerable obstacles to organizing in order to pursue their collective interests in the political sphere.⁹¹ As with consumers, the extent to which business interests were able to organize played an important role in determining which conception of the consumer would predominate in national policymaking.

In Germany, where producer groups enjoyed strong associational ties and were organized under strong sectoral trade associations, industry was able to meet consumer protection issues with a unified position. In France, where industry was less organized, and individual companies were not bound by sectoral associations, industry came to the policy table with a fragmented position and fewer capabilities for self-regulation. A more detailed exposition of the role played by the organization of production interests in France and in Germany appears in the discussion of policy preferences below. In general, however, the result of the differing organizational forms of production was that German producers enjoyed both a higher level of political power and also a greater capacity for effective self-regulation than did their French counterparts.

⁹¹ David Vogel, "Why Businessmen Distrust Their State: The Political Consciousness of American Corporate Executives," *British Journal of Political Science* (1978), p 72.

Policy Models for Consumer Protection in Different National Contexts

In general, in countries like France in which consumers mobilized at the grass-roots level and producers were disorganized, as they were in France, consumer policies tend to reflect consumer interests rather than producer interests. Consumer groups with strong membership could cultivate political interest in their cause by portraying the interests of consumers as universal interests. Boycotts and rallies organized by consumer groups demonstrated the political weight of these groups. Industry, for its part, was not sufficiently organized to offer a viable alternative to the influence of consumer groups in the form of self-regulation. This resulted in a political conception of the consumer identity and a focus on a strategy of consumer protection that placed a high burden on industry. This French approach drew heavily on the regulatory strategies adopted in the United States, where a similar logic of consumer and industry organization predominated.

		<i>consumers</i>	
		more mobilized	less mobilized
<i>producers</i>	more organized	negotiation model (Scandinavia)	information model (Germany)
	less organized	protection model (France, USA)	(low level of protection)

Figure 7. Interest organization and consumption regimes.

Conversely, in countries such as Germany in which consumers did not mobilized and producers were organized, as they were in Germany, consumer policies tended to embody producer interests more than consumer interests. Industry associations were able to coordinate their efforts in order to push for the idea of consumers as purely economic actors. Consumers for their part were politically weak, and therefore unable to push for the idea of distinctive consumer rights. Moreover, consumer groups were themselves wary of a more confrontational approach to consumer protection, for fear that they would lose their monopoly on representing the consumer interest in government and business discussions. This combination of consumer group accommodation and industry initiative resulted in an economic conception of the consumer identity and a focus on a strategy of consumer information.

Alternative combinations of consumer and of producer organization strategies help to shed light on the consumer policies adopted in other countries. Where consumers have been mobilized and business is also organized, for example, as is the case in Sweden and other Scandinavian countries, consumer policies have tended to rely on a strategy of negotiation between consumers and producers in order to set consumer policies. Why did consumers groups in these countries pursue a strategy of mass mobilization? The consumer groups there were able to build on strong cooperative movements whose members were already mobilized around consumer issues.⁹² Over 13 percent of all stores in Sweden were cooperatively owned in 1960, compared to less than 3 percent of stores

⁹² In 1967 consumer cooperatives accounted for 18 percent of commerce de détail in Sweden. M. T. Chevalier, "Protection du consommateur en Suède," *Consommateurs actualité* 334 (28 May 1982), p 4.

in both France and Germany.⁹³ Because both consumers and producers were politically strong, the government encouraged them to negotiate standards of consumer protection that were binding on both parties.

The problem with this account is that it presents as a *fait accompli* policies that only emerged after being the subject of protracted and intensive political struggle in both France and Germany. To elucidate the political struggles within each country, an institutional explanation of this kind must also take seriously the interests of consumer and producer groups. Taking interests seriously in this case means distinguishing among three different roles that different institutional forms of interest organization have played in the elaboration of consumer policies in France and Germany. First, institutions helped to set the preference ranking of consumer and producer groups among different possible models of consumer protection. Second, institutions helped to determine the political power wielded by consumer and producer groups in pursuit of their preferred policy models. Finally, institutions also limited consumer and producer groups in their ability to act on strategies that they decided were to their collective benefit. A central proposal of my research is that in periods of policy innovation, institutions function in all three roles to determine what policy model predominates in each country. The following section sets out the conceptual framework for this analysis and considers the most compelling alternative explanations. Following that is a detailed elucidation of the three roles that institutions play in the determination of consumer policy outcomes.

⁹³ James B. Jefferys, and Derek Knee, *Retailing in Europe: Present Structure and Future Trends* (London: Macmillan & Co., 1962), p 65.

Explaining Regulatory Divergence in Radically New Areas of Policy

The question of how one conception of the consumer identity has come to prevail in France and another in Germany presents both challenges and opportunities for comparative political analysis. One challenge is to explain divergence in an entirely new area of policy. Steven Krasner has suggested a useful analogy between policy evolution and the model of punctuated equilibrium in evolutionary biology. A punctuated-equilibrium interpretation of policy formation implies that institutions and policies evolve rapidly during unsettled times and then experience long periods of little or no change. As in evolutionary biology, the punctuated-equilibrium analysis implies different mechanisms of change from those employed in an equilibrium, or steady-state analysis. The punctuated-equilibrium model of policy discontinuity appears to describe accurately the transformation of French and German consumer identities in the 1970s, and the elaboration of a broad range of new government institutions focused on protecting the consumer. Yet Krasner himself does little to explain the mechanism by which these new policies and institutions arise out of existing national frameworks. Where he does address the mechanisms of institutional discontinuity, Krasner attributes the new forms either to outside intervention in the form of foreign influence, or to chaotic mechanisms by which important outcomes arise from small initial policy differences.⁹⁴

Herein lies an important opportunity of studying the emergence of product market regulations in France and Germany. This area of regulation offers us a view of an entirely new area of policy in formation. In it, similar sets of issues generated systematically different policy outcomes in each country. What these new product market regulations

suggest is that different consumption regimes emerged in France and Germany as a result of a complex interaction of ideas, interests, and institutions. In both countries, ideas about the consumer identity and interest were politically contested by consumer and producer groups. These contested ideas, and the policy models that they engendered, set the terms of policy struggle in both countries. Which policy model finally emerged as the dominant national strategy of consumer protection depended on the way in which consumer and producer interests were organized to pursue their preferred model. A full account of French and German consumer policy formation will be elaborated in the section titled *The Policy Conflict over National Models of Consumer Protection* that starts on page 102. This section describes alternative explanations and sets a broad theoretical context for this research project.

Alternate Explanations of New Policy Formation

Some of the most powerful explanations in comparative politics rely on a single causal factor to explain policy divergence between different countries. This section considers interest-based, institution-based, and ideas-based explanations of divergence in consumer policy. Taken individually, none of these explanations offers a compelling account of the differences that emerged in French and German consumption policies. The following section therefore explores how combinations of these factors have been brought together by other researchers to offer more compelling explanations of policy divergence in new areas of policy.

⁹⁴ Stephen D. Krasner, "Approaches to the State: Alternative Conceptions and Historical Dynamics," *Comparative Politics* 16/2 (January 1984), p 242.

Interest-based influence on consumer policy. One of the most powerful kinds of explanation in political science explains outcomes as a result of the interplay of economic interests. A prominent set of arguments based primarily on economic interests posits the priority of producer interests in all economic regulation.⁹⁵ Anthony Giddens, to take one example, has suggested that national consumer policies emerge from national production interests.⁹⁶ Michael Piore similarly has suggested that the national infrastructure of mass consumption has worked to reinforce the Fordist model of production. The problem with such explanations is that the interests of production are not necessarily unified. While producers were in general opposed to product market regulation that impinged on their economic autonomy, labor unions took different views of the consumer movement. On the one hand, workers were also consumers. On the other hand, consumer protection in the form of product recall actions or product boycotts could have negative repercussions for the workforce. French and German labor unions resolved these conflicting interests differently. In France, trade unions became strong allies of the consumer movement and helped to mobilize a radical consumer base. German unions shied away from the consumer movement, siding instead with the interests of German industry. Any explanation grounded purely in economic interest cannot adequately account for these differing economic interests of French and German unions.

On the other hand, different production sectors also did not have unified goals in relation to product market regulation. David Vogel has argued that many national product

⁹⁵ George Stigler, "The Theory of Economic Regulation," *Bell Journal of Economics and Management Science* (spring 1971) pp 3-21.

⁹⁶ Anthony Giddens, *Beyond Left and Right: The Future of Radical Politics* (Stanford, California: Stanford University Press, 1994).

market regulations have been elaborated with the goal of impeding import competition.⁹⁷ On this view, we should observe a conflict of producer interests between the tradable and non-tradable sectors. Yet what we observe in both France and Germany is a broad strategy of product market regulation imposed equally on tradable and non-tradable sectors. Indeed, one of the strongest regulatory initiatives in both France and Germany focused on the travel industry, where fraud over vacation packages led to strong consumer mobilization. In 1976, France's Secretary of Consumption Christian Scrivener put in place a program called "Vacances sans surprises" that created 225 information sites and 14 commissions to deal with consumer vacation litigation.⁹⁸ Germany's Justice Ministry pushed for similar protections against overbooked of tours and exorbitant travel agent fees.⁹⁹ Indeed, one finding of my research is that the politics of national product market regulation were focused on domestic issues of consumer safety and competition rather than on economic goals relating to trade.

A final problem with the purely interest-based argument is determining *which* interests matter, for consumer interests were also becoming organized at this time. Albert Hirschman has suggested that the emergence of consumer protection regulation in all advanced industrial countries can be attributed to a mass wave of disappointment with new durable goods. Frustrated with what the market offered, consumers turned to the

⁹⁷ David Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Cambridge, Massachusetts: Harvard University Press, 1995).

⁹⁸ The title plays on the French homophones for "surprises" and "extra prices." *Le Monde*, 23 Jun 1976.

⁹⁹ See for example: Hans de With (Parlamentarischer Staatssekretär beim Bundesminister der Justiz), "Verbraucherschutz-Politik wird konsequent fortgesetzt: Zahlreiche Reformvorhaben in dieser Legislaturperiode," *Sozialdemokratischer Pressedienst*, P/XXXII/73 (18 April 1977), p 2.

public sphere for redress.¹⁰⁰ On this view, national approaches to product market regulation must be understood as the outcome of conflicting interests of consumers and producers. The problem is that this insight quickly takes us beyond a purely interest-based argument. First, consumer interests are themselves not necessarily unified. Consumer protection policies draw from a combination of concerns over product price, safety, information, fraud, quality, and convenience. Which of these interests were emphasized in France and Germany depended to a large extent on how consumer interests came to be organized in the two countries. Second, the relative ability of consumer and producer groups to pursue their policy preferences also depended to a large degree on how they were able to organize their members. Hence institutional factors worked to dictate both the policy preferences of consumer groups and their ability to pursue those preference when faced with opposition from industry.

Institution-based influence on consumer policy. A second common approach to policy analysis explains current policies in terms of institutional continuities in which past structures place constraints on current policy options. Scholarship on historical institutionalism has tended to emphasize the role of institutions in maintaining policy continuity.¹⁰¹ An important source of this continuity is the mechanism by which increasing returns to existing configurations of institutions tend to create path dependencies. In Paul Pierson's terse formulation, "Once in place institutions are hard to

¹⁰⁰ Albert O. Hirschman, *Shifting Involvements: Private Interest and Public Action* (Princeton, New Jersey: Princeton University Press, 1982), p 65.

¹⁰¹ Colin Hay, and Daniel Wincott, *Interrogating Institutionalism Interrogating Institutions: Beyond 'Calculus' and 'Cultural' Approaches*, Program for the Study of Germany and Europe, Working Paper 8.3 (Cambridge, Massachusetts: Center for European Studies, 1998).

change."¹⁰² Path dependency arguments within Political Science have tended to emphasize the insight that institutions are hard to change. Theories such as that of path dependency are important because they help us to understand how existing institutions persist and evolve. But the theory of path-dependency is less applicable to the formation of altogether new institutions. It tends to obscure the mechanisms of punctuation and the details that lie behind the presumptive "Once in place...". In France and Germany, for example, newly created product safety, product testing, and product advertising regulations had no direct institutional antecedents.

One might imagine that French and German approaches to consumer protection can be understood in terms of older, deeply rooted national regulatory institutions. Germany's approach to product market regulation, for example, appears broadly corporatist, with industry exercising a high degree of self-regulation. France's approach appears broadly statist, with the government intervening to protect consumers against the economic forces of production. Consistent with the bias of contemporary historical institutionalism, however, this approach assumes a high degree of institutional continuity over time. The problem in the case of consumer policies is that we also observe important divergences from these national institutional archetypes. In a move that seems to borrow from corporatism, for example, France came to rely on organized consumer interests to negotiate product safety and quality standards directly with industry. Germany, in a move redolent of French statism, relied on a high level of government intervention in the economy in order to enforce standards of product information. My research suggests that

¹⁰² Paul Pierson, *Path Dependence, Increasing Returns, and the Study of Politics*, Working Paper Series of the Program for the Study of Germany and Europe (Cambridge: Center for European Studies, 1997), pp 15-16.

institutional analysis must play a central role in explaining national approaches to new areas of regulation, but that broad national regulatory traditions alone are not decisive. The role of institutions is discussed beginning on page 99 below.

Ideas-based influence on consumer policy. Another policy explanation focuses on the determining role of ideas in new policy formation. New areas of policy necessarily rest on a conceptual rather than an empirical or intuitive understanding of the issues at stake. This is especially true of product market regulations, where the scope of regulation is broad and the details of regulation are often technical or arcane. But like interests and institutions, ideas alone do not sufficiently explain divergent national policy outcomes. To see why, consider two different interpretations of the role of ideas in new policy formation. These might be called the strong and weak models of ideas.

The strong model sees ideas as encompassing and exclusive, and emphasizes the cognitive constraints that national policy traditions can place on policy actors.¹⁰³ On this view, policy makers are constrained by limited capacities to conceive of possible policy solutions because they operate under the influence of unchallenged assumptions, persistent discursive styles, unarticulated predispositions, even linguistic conventions. Peter Hall suggests that such cognitive constraints have the character of paradigms in the sense employed by Thomas Kuhn.¹⁰⁴ “Like a *Gestalt*, this framework is embedded in the very terminology through which policymakers communicate about their work, and it is influential precisely because so much of it is taken for granted and is not amenable to

¹⁰³ Junko Kato, “Review Article: Institutions and Rationality in Politics – Three Varieties of Neo-Institutionalists,” *British Journal of Political Science* 26 (1996), pp 573-581.

¹⁰⁴ Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1970).

scrutiny as a whole.”¹⁰⁵ Moreover, Hall argues, this policy paradigm approach is especially powerful in cases of radical—what he calls ‘third order’—policy change. Strong policy ideas are so powerful that they blind policymakers to other possible alternatives.

The problem with this strong model for the role of ideas in the case of consumer policy is that major policy innovators at the time show signs of actively searching for a new conceptual framework in which product markets might be appropriately regulated. France and Germany considered a broad set of regulatory options before pursuing divergent policy programs. Government officials in both countries commissioned reports on the strategies adopted in foreign countries, funded research on the potential impact of different strategies at home, and convoked discussion groups at which domestic interests groups could present their ideas and concerns. Far from being constrained by an overarching policy paradigm, French and German policymakers appear to have been consciously seeking to create a useful paradigm for the consumerist agenda. It therefore seems more likely that policymakers were working from a palette of ideas. The role of ideas in the case of consumer policy is closer to the role that Anne Swidler attributes to culture. In times of policy innovation, ideas, like culture, act as a toolbox from which policymakers make selections based on other considerations.¹⁰⁶

An alternative conception of the role of ideas in policy formation that we may call the weak model puts ideas in the hands of policy experts. Unlike the strong model, ideas in the weak model do not suffuse society but instead are propagated from policymakers at

¹⁰⁵ Peter A. Hall, "Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain," *Comparative Politics* (April 1993), p 279.

the top. Hugh Heclo, for example, argues that policy formation during periods of policy innovation relies on a process of “puzzling” by informed administrators trying to do what is right. Ideas resolved within this policy setting then spread through society. This style of explanation has been reprised by researchers who study policy networks as the source of distinctive national policies.

The problem with this weak model of ideas in the case of consumption policy is that elite government policy makers did not act together in France and in Germany. Instead, new consumer policies rested on a conception of the social identity of consumers that arose independently within different spheres of government. Whereas some regulations were created through legislative action, others were imposed by government ministries. Moreover a number of specific policy areas were decided almost entirely through the courts rather than by legislative or ministerial initiative. Product liability is one example of this kind of court-made regulation. Most striking is the fact that these independent court decisions about consumers tended to pursue the same national strategies of product market regulation as regulations promulgated by government policymakers. The weak model of ideas, in which government policy makers propose ad-hoc solutions to policy problems, fails to explain how these different policy actors arrived independently at similar conceptions of the consumer interest.

Nevertheless, ideas about the consumer identity and interest did play a central role in the formulation of consumption policies in France and Germany. As described above, three different conceptions of the consumer came to constitute different possible alternatives for how consumer demands should be met: consumer as economic actor

¹⁰⁶ Ann Swidler, “Culture in Action: Symbols and Strategies,” *American Sociological*

similar to a producer, consumer as citizen, and consumer as interest group. These conceptions of the consumer implied specific policy models for regulating product markets. Similar to the policy-paradigm approach, each policy model entailed a distinctive world-view about the condition and role of consumers in society. Yet at the outset no single conception of the consumer appears to have been apparent either to policymakers or to the general public. Instead, the politics of consumption regulation took the form of a public debate about which conception of the consumer would emerge as dominant in society.

Ideas, while critical to the emergence of distinctive national consumption regimes, were therefore not decisive in determining which conception of the consumer would emerge as dominant. The ramifications of this finding are potentially important. It suggests that the consumer identities that we reflexively identify with particular national cultures—mass consumerism in the United States, quality orientation in Germany, aesthetic sophistication in France—may have emerged relatively recently from a political struggle between emerging consumer interests and the economic interests of producers. More locally, this finding suggests that an adequate explanation of consumption regulations in France and Germany must draw on a combination of causal factors rather than a simple mono-causal explanation.

The Contested Ideas Approach to Policy Formation

The results of this research project suggest that a combination of interests, and institutions, and ideas must be invoked to explain radically new areas of policy formation. In the initial stages of consumer policy formation, national conceptions of the consumer

identity and interests were politically contested. Moreover each distinctive conception of the consumer identity implied a specific analysis of the problems consumers faced and a coherent program of policy prescriptions. These conceptions of the consumer thereby set the terms on which the political struggle between producers and consumers was waged in both France and Germany. In this view, ideas can be understood to have played an instrumental rather than a determining role.

This instrumental approach to policy ideas is not new to comparative policy analysis. Other researchers have found that interests are often closely tied to ideas in the regulation of new policy areas. Deborah Stone has argued that causal beliefs commonly embody underlying conflicts of interest in debates about new policy. Thus interest groups emphasize different kinds of causal beliefs depending on their strategic interests.¹⁰⁷ Geoffrey Garrett and Barry Weingast have argued that ideas can help to encourage cooperation in certain kinds of coordination games. When different strategies of cooperation are possible, policy ideas can create "constructed focal points" that permit actors to cooperate in achieving their collective goals.¹⁰⁸ Finally, Pierre Muller has suggested that new areas of policy should be seen as "ideas in action," meaning that ideas about the social identity of a group set the terms on which group interests in society are contested.¹⁰⁹ Each of these theories sits mid-way in the continuum between the

¹⁰⁷ Deborah Stone, "Causal Stories and the Formation of Policy Agendas," *Political Science Quarterly* 104 (1989), pp 281-300.

¹⁰⁸ Geoffrey Garrett, and Barry Weingast, "Ideas, Interests and Institutions: Constructing the European Community's Internal Market," in *Ideas and Foreign Policy: Beliefs, Institutions and Political Change*, eds. Judith Goldstein and Robert Keohane (Ithaca: Cornell University Press, 1993).

¹⁰⁹ Pierre Muller, "Les politiques publiques comme construction d'un rapport au monde," in *La construction du sens dans les politiques publiques: débats autour de la notion de*

determinacy of ideas and of interests. Notice that the specific role of ideas differs in each of these approaches. For Stone, ideas simply reflect underlying interests. For Garrett and Weingast, ideas act as a catalyst that helps collective actors to realize their underlying interests. For Muller, ideas restructure underlying interests by reconceptualizing the economic role of important social actors.

In the case of consumer protection, ideas appear to have served each of these three functions. First, consumer and producer groups advocated conceptions of the consumer identity that best reflected underlying interests. Second, especially for consumer groups, these conceptions also became the basis of a broader consumer mobilization in support of their collective economic interests. Third, these conceptions also determined how consumers and producers came to understand their own collective economic interests. The multiple roles that ideas may play is central to the notion of ideas as policy models that are politically contested. By creating systematic, coherent accounts of the consumer identity, goals, and interests, ideas about the consumer have the effect of compelling interest groups to choose from bundled policy solutions.

Of course not all kinds of ideas necessarily offer viable policy solutions. Many researchers have stressed structural factors that determine which ideas are likely to succeed in influencing policy decisions. In these interpretations, certain ideas become privileged because of an institutional bias that works in their favor. In this connection, Theda Skocpol has argued that the ideas policymakers generate are commonly

référentiel, eds. Alain Faure, Gilles Pollet, and Philippe Warin (Paris: Éditions L'Harmattan, 1995).

constrained by the regulatory capacities of the state.¹¹⁰ Nicholas Ziegler has argued that the differing organizations of professional expertise in France and in Germany has led policymakers to emphasize different kinds of policy approaches.¹¹¹ And Chris Allen has argued that Germany's orientation towards macroeconomic policy in the post-World War II period were driven by deeply-embedded historical institutions.¹¹² These accounts are compelling because they trace the structural sources of continuity in national policy thought and agendas. Indeed, they might be seen as the analytic basis of national cultural traditions. The problem with such approaches, as with cultural explanations in general, is that they may neglect the dynamics of raw political interest. By focusing on the continuum of institutions and ideas, they risk overlooking the political melee from which new policy solutions commonly emerge. As Jonas Pontusson notes: "Ideas may be very important to the politics of change, but interests are also important and must be an object of serious analysis."¹¹³

My research into the origins of national product market regulations attempts to combine the benefits of the interest-based and the institutional approaches to policy ideas by treating ideas as politically contested. Three distinct conceptions of the consumer identity became the focus of political debate in both France and Germany: consumer as

¹¹⁰ Theda Skocpol, "Bringing the State Back In: Strategies of Analysis in Current Research," in *Bringing the State Back In*, eds. Peter B. Evans, Dietrich Reuschmeyer, and Theda Skocpol (Cambridge: Cambridge University Press, 1985).

¹¹¹ Nicholas Ziegler, *Governing Ideas: Strategies for Innovation in France and Germany* (Ithaca, New York: Cornell University Press, 1997), p 34.

¹¹² Christopher Allen, "The Underdevelopment of Keynesianism in the Federal Republic of Germany," in *The Political Power of Economic Ideas*, ed. Peter Hall (Princeton, New Jersey: Princeton University Press, 1989), pp 263-289.

¹¹³ Jonas Pontusson, "From Comparative Public Policy to Political Economy: Putting Political Institutions in Their Place and Taking Interests Seriously," *Comparative Political Studies* 28/1 (1995), p 143.

economic actor with the same status as producers, consumer as citizen, and consumer as interest group. Each of these conceptions of the consumer, understood as policy models, provided a coherent interpretation of the consumer's condition, interests, and the kind of solutions that were appropriate for consumer protection. Consumer and producer groups then pushed for that conception of the consumer that best met their perceived interests. In France, consumer policy came to reflect the conception of the consumer as citizen, which worked to advance a protection approach to product market regulation. In Germany, consumer policy came to reflect the conception of the consumer as economic actor, which advocated an information approach to product market regulation.

Policy Preference Orderings and the Role of Institutions

Rather than viewing consumer and producer preferences as grounded in a single policy idea, the contested-ideas approach assumes that each interest group worked from an ordinal preference ranking of all three policy models (consumer as economic actor, consumer as citizen, and consumer as interest group) for consumer protection. Each interest group preferred one strategy the most, another second, and the remaining strategy the least. Policy disagreements between consumer and producer groups arose from their conflicting preference orderings. How such preference conflicts were resolved depended in turn on the way in which consumer and producer interests were organized in France and in Germany.

This section describes the arena in which consumer and producer interests confronted each other in those two countries. It first presents the preference ordering of producer and consumer groups in relation to three different conceptions of the consumer interest. Of course no consumer or producer statements explicitly lay out their underlying

preference rankings in respect to these three policy models. Nonetheless, the preference rankings of the three policy models by the consumer and producer groups emerge clearly from their statements about different policy options. These statements show that French and German production interests ranked the available policy models in the same way. On the other hand, because French and German consumer groups represented newly emerging interests in society, they came to espouse different preference rankings that reflected their different organizational strategies. (These preference rankings are described in Figure 8 below.) The fact that consumer groups had differing policy preference rankings meant that the nature of the conflict between producers and consumers in the two countries would be different.

How these conflicting policy preferences were resolved depended on the way in which consumer and producer interests were organized in France and in Germany. Institutions mediated the conflict over policy models in three ways. First, as described above, the organization of consumer groups drove their ranking of policy preferences. Second, for both consumers and producers, their degree of coordination determined their ability to apply political pressure in favor of their preferred policy approach. Third, the degree of coordination of producers in particular determined their ability to implement certain strategies of consumer protection. The way in which consumer and producer interests were organized thus set their preference rankings, their political power, and their capacities to implement their preferred policies. It is this multifaceted interaction of interests and institutions in the political struggle for a new conception of the consumer that has generated distinctive strategies of product market regulation in France and Germany.

In Germany, where producers were well organized and consumer groups had few members, producers were able to secure their preferred option, the information model. The information model was the second-ranked preference of consumer groups. In France, where producers were loosely organized and consumer groups enjoyed a strong mobilization, consumption policies shifted over the course of the 1970s and early 1980s away from the policy preference of producers and towards the policy preference of consumers. By the mid-1980s, France had adopted the protection model. This approach was the least favored option for industry, and only the second option of most consumer groups. In this specific sense, the product market regulations that emerged in Germany can be called *producer-oriented*, as they favored the policy preferences of producers over consumers. By contrast, French product market regulations can be called *consumer-oriented*, since they favored the policy preferences of consumers over those of producers. In order to see the political dynamic that led to these results, however, we must first describe the interests and institutions that were in play.

Policy Preference Rankings of Consumers

Consumer interests are potentially, almost inherently, diverse. The policy-preference ranking characteristic of French and of German consumer groups has tended to emphasize those consumer interests that also reflect the organizational strategies of consumer movements in the two countries. In France, where the consumer movement is founded in grass-roots mobilization and political engagement, consumer groups have favored approaches that build on mobilization. Hence French consumer groups have favored negotiations with industry and lobbying for further legal protections of consumers, both activities that draw on their strengths in mobilizing consumers. They

have been less enthusiastic about the information strategy, since that tends to treat the consumer as an individual rather than as a political or group actor. In general, French consumer groups prefer first the negotiation approach, then the protection approach, and finally, in last place, the information approach.

This was true in product labeling, consumer contracts, advertising, and product quality standards, where French consumer groups gave their strongest endorsement to negotiated solutions. In 1975, the eleven major French consumer groups proposed a general framework law ("loi cadre") that would permit them to negotiate binding contracts with industry on a broad range of policy issues.¹¹⁴ They also proposed the formation of a "high council on innovation and safety," with an equal representation of consumers, professionals, and government officials, with the goal of giving safety and design input to manufacturers, and of identifying so-called "false innovations" that were expensive for society and burdensome to consumers.¹¹⁵ The consumer group OR-GE-CO, allied with the major French trade unions, strongly supported direct consumer group negotiations with industry as a productive approach to consumer protection.¹¹⁶

The second most-favored option of French consumer groups, less-favored than the information model but more favored than the negotiation model, was the strategy of protection by the creation of special consumer rights. From an organizational logic, the protection approach was less satisfying for consumer groups than the negotiation model, since it did not draw on a vast organization of consumers. Nonetheless consumer groups

¹¹⁴ *Un monde en mouvement: les organisations de consommation* (Paris: Ministère de l'économie -- comité national de la consommation, September 1980).

¹¹⁵ "Onze organisations d'usagers proposent une charte nationale," *Le Monde*, 30 April 1975.

lobbied hard for higher safety standards, better contractual terms, and greater industry responsibility, all hallmarks of this approach. While they did not object to higher quality information, especially when it resulted from negotiated agreements with industry, they were skeptical that information alone could adequately help consumers. Truth in advertising, for example, was not an important policy issue for French consumer groups. When the government proposed a set of negotiated quality labels in 1976, the Federal Consumption Union (UFC) objected on the grounds that it should not substitute for real product quality.¹¹⁷ As summarized in Figure 8 below, French consumer preference ranking for strategies of consumer protection was first negotiation, then protection, then information.

<i>preference rankings</i>	<i>consumer groups French</i>	<i>consumer groups German</i>	<i>Producer interests France and Germany</i>
First	negotiation	negotiation	information
Second	protection	information	negotiation
Third	information	protection	protection

Figure 8. Policy preference rankings of consumer and producer groups.

German consumer groups have pursued an organizational strategy different from that of their French counterparts, and this different strategy has generated a different policy-preference ranking. German consumer groups had few individual members and relied instead on privileged access to negotiations. They measured their success not in

¹¹⁶ Jacques Dubois, "Du Mepris à la Concertation," *Information Consommation OR-GE-CO* 20 (January-February 1977), p 2.

¹¹⁷ "Contrats qualité et Production Nationale," *Informations Indecosa-CGT* 49 (November 1984), p 3.

terms of consumer support or their own weight as a political force, but instead in terms of their expertise and their access to government and business decision-making. This organizational strategy has caused German consumer group to emphasize technical skills rather than mobilization. They have thus tended to favor both negotiation and information models , since both strategies emphasize their organizational strengths. The protection model was the least favored approach of the German consumer movement because by making consumer issues political, it risked undermining the consumer movement's own privileged access to policymaking. Consumer groups in Germany preferred first the negotiation approach, as in France, then the information approach, and they preferred least the protection approach.

While both German and French consumer groups preferred a negotiation approach to consumer protection. The conception of negotiation of German consumer groups was somewhat different from that of their French counterparts. French groups saw their role in negotiation as that of aggregating broad consumer interests. German consumer groups, by contrast, perceived at the outset that they simply did not have the political power or popular legitimacy to negotiate on an equal political footing with business. In the early 1960s, for example, Germany's leading consumer association, the Association of Consumer Groups (AgV), had been pushing for the creation of a Consumption Ministry within the government. This would have given the AgV authority to speak on an equal footing with industry. But by the early 1970s the AgV had changed its position, opposing a separate consumption ministry and pushing instead for access to consumer policy committees within the economics and agriculture ministries.

Because they had little membership and no independent basis of political power, German consumer groups were dependent for their policy access on the good will of the government. The Social-Democratic Party-dominated coalition of the 1970s proved enthusiastically in favor of integrating consumer groups into policy circles. As examples of this, in 1973, consumer groups were granted access to the multi-party Concerted Action negotiations of wage and money supply levels. In 1974 they were given access to technical committees within Germany's technical standards-setting body, Deutsche Industrie Normung (DIN). And in 1976 they were given an important role in monitoring standard consumer contracts.

In exchange for this access to government policy, German consumer groups tended to avoid any confrontation with industry. This aversion led to strong consumer-group opposition to the protection strategy. When the German trade-mark association criticized the AgV for conducting comparative product tests, for example, the AgV stopped. When the president of the Federal Cartel Office (Bundeskartellamt) called for the creation of a single office for consumer and competition policy, the president of the AgV opposed the idea out of concern that the new body would undermine the status of the AgV as an equal partner with industry.¹¹⁸ The AgV opposed any state-regulated consumer politics, and strongly opposed a state-run consumer protection bureau.¹¹⁹ Indeed, most of the major consumer legislative initiatives in Germany were initiated not

¹¹⁸ Eberhard Guenther, "Verbraucherpolitik, ziele, Mittel und Traeger," *Marktwirtschaft* 2 (1973), p 39.

¹¹⁹ "Staatsunabhängige Verbraucherpolitik," *Wirtschaft und Wettbewerb* (October 1973), pp 665-666.

by consumer groups, but instead by industry or by political parties.¹²⁰ The conceptual essence of the protection strategy is consumer confrontation with industry, to which German consumer groups were entirely opposed.

The information model of consumer protection was the second-favorite option for German consumer groups. Consumer information became the foundational activity of consumer protection, especially for regional consumer associations (Verbraucherverbände). But the AgV also participated. In 1973, for example, the AgV send two buses on a tour through Germany under the slogan "together for reasonable prices" ("Gemeinsam für vernünftige Preise"). Brochures were handed out, educational movies were shown, and computerized tests of consumer's knowledge of product prices were offered.¹²¹ The primary focus of French consumer groups was to collect consumer complaints and present them to industry, one of the main focuses of German consumer groups was to gather product information and present it to consumers. As summarized in Figure 8 above, German consumer preference ranking for strategies of consumer protection was first negotiation, then information, then protection.

Policy Preference Rankings of Producers

As opposed to French and German consumer groups, French and German industry had very similar ideas about consumer policy. In both countries, the primary concern of business was to avoid government interference in production decisions. Hence businesses evaluated the three policy models in terms of the level of regulatory intervention they

¹²⁰ Heribert Schatz, "Consumer Interests in the Process of Political Decision-Making: A Study of Some Consumer Policy Decisions in the Federal Republic of Germany," *Journal of Consumer Policy* 6 (1983), p 388.

were likely to generate. Among the three, the information model appeared the least restrictive to business. Indeed businesses in general recognized that better informed consumers could be more responsive consumers. For Germany's leading industry association, the Bund Deutscher Industrie (BDI), the greatest goal of the government is to help the consumer help herself to work through the enormous amount of information that might otherwise leave her the weaker market partner. Industry groups favored information strategies, such as product labeling and consumer education, that were objective and neutral. They especially favored school education about consumer issues and government support of product advisory centers. France's leading industry association, the National Council of French Employers (CNPF), also emphasized the usefulness of a program of consumer information: "consumer information is the condition of a true freedom of choice: a poorly or insufficiently informed consumer has no real freedom of decision."¹²²

In second-place preference, after the information model, business in both France and Germany preferred the negotiation model of consumer protection. While this put them face to face with consumers, it had the benefit of avoiding direct government intervention. Germany's standard-setting group, DIN, for example, accepted the creation of a consumer advisory board within its administration in exchange for a high degree of autonomy and freedom from government intervention. In France, the CNPF became an enthusiastic proponent of the negotiation approach when faced with the probability of

¹²¹ Wolfgang H. Glöckner, "Aktion 'Gelber Punkt' – Ins Rote verfälscht," *Vorwärts*, 18 October 1973.

¹²² "Cette information du consommateur conditionne d'ailleurs en realite la liberte de choix: un consommateur mal ou insuffisamment informe n'a plus d'autonomie de decision." "Libre de son choix...," *CNPF Patronat* 370 (June 1976), p 15.

direct government intervention. Indeed the CNPF created a special committee, the Commission on Industry, Trade, and Consumption (CICC) with the explicit goal of negotiating with consumers. In the case of consumer terms of sale, for instance, the CICC negotiated with consumer groups for two years before their efforts were brought to a halt by direct regulatory intervention by the government.¹²³

The least desirable consumer policy for producers was the protection model. This approach implied a high level of government intervention to enforce a new strong set of consumer rights. In France, industry was extremely critical of the Consumer Safety Commission (CSC) that was put in place in 1983 to regulate products in the interest of consumer safety. They criticized the fact that any of several ministries could bring cases, the fact that even trade unions could apply for product reviews, and the new Commission's strong powers to investigate producers.¹²⁴ Both French and German industry opposed product recall actions, for example, because of concern that they could be politically motivated and disruptive to industry.¹²⁵ For industry in both countries, the preference ranking for strategies of consumer protection was first negotiation, then information, then protection. See Figure 8 above.

¹²³ "Accord Patrons-Consommateurs," *Information Consommation OR-GE-CO* 16 (May-June 1976), p 6.

¹²⁴ Marcel Garrigou, *L'Assaut des Consommateurs pour changer les rapports producteurs - vendeurs - consommateurs* (Paris: Aubier-Montaigne, 1981), p 11.

¹²⁵ Hans-Wolfgang Micklitz, "Comparative Analysis of the National Country Reports on Post Market Control and Perspectives for a European Setting of Post Market Control," in *Post Market Control of Consumer Goods*, ed. Hans-Wolfgang Micklitz, Schriftenreihe des Zentrums für Europäische Rechtspolitik an der Universität Bremen (ZERP), Band 11 (Baden-Baden: Nomos, 1990), p 418.

Three Roles of Interest Organization in the Formation of Product Market Regulation

The organization of producer and consumer interests in France and Germany worked in three ways to influence their goals for policy formation. First, as described above, the differing organizational strategies of consumer groups in France and in Germany resulted in their having different preference rankings among the three policy models. In France, where consumers organized around a grass-roots movement, consumer groups pushed for strong political actions. In Germany, where consumer organization was based on devolved powers, the most prominent associations discouraged explicitly political actions as subversive to their own authority. Hence institutional differences affected the underlying policy-preference ranking of consumer groups.

Second, differing organizational strategies of consumer and producer associations determined the political weight of those groups. Whether consumer or producer group preferences came to be emphasized in national policy depended in part on the political weight these groups wielded. Because they were well organized, German producers and French consumers were able to exert political pressure in favor of their preferred policies. In France, the relative political strength of industry declined over time as the consumer movement grew. This shift caused a change in policy emphasis away from the regulatory strategy preferred by industry and toward the strategy preferred by consumer groups. In Germany, by contrast, the lack of a grass-roots membership in the consumer movement put severe limits on the political weight of Germany's leading consumer associations in pursuing their goals.

Third, the organization of consumer and of producer interests placed limits on the kinds of policies that could be successfully implemented in the two countries. While producers in both countries preferred minimal interference in their production decisions, the ability of producers to pursue their interests was constrained by significant collective-action problems within the production sphere. The high level of coordination among German producers permitted them to pursue their interest in an information model of consumer protection with a high degree of credibility. By contrast, the low level of coordination among producers in France gave them less capability to pursue their preferred strategy. For example, both producer groups and consumer groups in France preferred the negotiation model to the protection model. Yet attempts to implement the negotiation model failed because industry was insufficiently organized to negotiate with consumers in a coordinated way. The core problem was that France's leading industry associations did not have the authority to negotiate agreements that would be binding on their members. Hence, while the CNPF pushed for negotiated agreements, individual companies were hesitant to participate in them without the certainty that other companies would participate as well.

These organizational capacities of producers were particularly important in the case of labor unions. Because workers were in a sense both producers and consumers, labor unions could potentially identify themselves either with consumer groups or with producer groups. In some countries, such as Sweden and Austria, trade unions were even granted the official status of consumer groups. In other countries, such as the United Kingdom and Germany, trade unions identified themselves far more with production than with consumption. The allegiances that trade unions formed, whether with the consumer

movement or with the interests of production, depended to an important degree on the way in which production was organized.

In Germany, for instance, where patterned wage bargaining and works councils give workers a strong input into production decisions, unions shied away from the consumer movement. When women in the German workforce, for example, called for union support of longer store hours, the unions rebuffed their proposal. Indeed, German trade-union preferences in relation to product market regulations have closely mirrored those of producers on a broad range of policies.

In France, by contrast, where trade unions have little institutionalized access to wage formation or company management, workers have typically pursued their interests through strikes and protests. Because of this confrontational approach to labor relations, French trade unions came to see consumers as brothers in arms. Workers and consumers saw themselves as sharing a common status as victims of big industry. French labor unions thus began in the mid-1970s to create their own affiliated consumer movements. These union-consumer groups encouraged grass-roots membership, conducted product boycotts and price surveys, and collaborated with workers to negotiate quality contracts with producers. Hence the way in which production was organized in France led producer groups to lose the support of unions for their consumer policy preferences.

In sum, the institutional form of interest groups may have an effect on the underlying preference rankings of those groups, on their political strength to pursue a particular set of preferences, and on the organizational capacity of those interest groups successfully to implement a preferred policy strategy. These three institutional factors have contributed both to the preference ranking of consumer groups, and to the ability of

consumer and producer groups to pursue their preferred policy options. The following section describes the way in which the organized interests of consumers and producers confronted each other in France and in Germany.

The Policy Conflict over National Models of Consumer Protection

We have seen that the way in which producer and consumer interests were organized in France and Germany played three different roles in policymaking, determining preference ranking, political weight, and capacities to implement policies. These three different roles interact in a complex way to generate policy outcomes. Because of this complex interaction, policy formation in new areas of policy often has an internal dynamic. In France, for example, , the process of consumer policy formation lasted for nearly ten years before a stable policy model emerged. In Germany, a different set of institutional constraints allowed policymakers to arrive at a stable policy solution after only a short period of deliberation. By paying close attention to the different roles of interest organization we can gain an understanding of the internal dynamics by which even radically new areas of policy are formed.

One way of mapping the political dynamic of new policy formation is to employ an asymmetric preference game based on the preference rankings of consumer and producer groups. From the policy preference rankings of those groups we can adduce an ordinal payoff schedule (see Figure 8 above). The lowest policy preference of each actor receives 0 points, the second policy preference receives 1 point, and the highest policy preference receives 2 points. Since French and German consumer groups had different preference rankings, emerging from their different strategies of organization, their payoffs are accordingly different. Producer preference rankings, and policy payoffs, are

the same in both France and Germany. Consumer and producer policy payoffs are summarized in Figure 9.

<i>preference rankings</i>	<i>consumer groups French</i>	<i>consumer groups German</i>	<i>Producer interests France and Germany</i>
information	0	1	2
negotiation	2	2	1
protection	1	0	0

Figure 9. Policy payoff schedule for consumer and producer groups in France and Germany.

In Germany, both consumers and producers had a common lowest preference, the protection model. Conflict therefore emerged only over which interest group would achieve its higher-ranked option.¹²⁶ In this conflict the weak organization of the consumer movement placed limits on its ability to achieve its preferred policy, the negotiation approach. Moreover, the strong organizational capacities of industry in Germany permitted them industry to make the information strategy an effective policy tool for consumer protection. German policy therefore came to favor producer over consumer policy preferences.

In France, by contrast, where the first preference of producers – the information model – corresponded to the third preference of consumers, the process of policy formation was more dynamic. Early consumer protection initiatives favored industry by adopting the information model. As consumer mobilization increased the political influence of consumers, however, this information model became contested. The policy model therefore shifted to negotiation. This negotiation model, representing the first

preference of consumers and the second preference of producers, was the socially optimal policy in that it offered the greatest combined payoff. Yet this strategy also failed, primarily because of the inability of French industry associations to impose negotiated solutions on individual companies. As a consequence, France shifted to its final position, the protection model. Because it was the second preference of consumers and the third preference of producers, this policy can be seen as a victory for the consumer movement. Interestingly, however, the protection model also represented the worst social outcome (that is, the worst combined score) for producers and consumers.

The Evolution of Consumer Policy in France

French consumer policy proceeded in three stages. In the first stage, from roughly 1970 to 1978, consumer policies focused on the information strategy. This was the particular emphasis of policies under the first Secretary of Consumption, Christiane Scrivener, from 1976-1978. This policy approach represented the best payoff for producers and the worst payoff for consumers. As consumers mobilized over the course of the 1970s, they became unsatisfied with this information model. The third Barre government of 1978 began the second stage of French consumer policy, in which consumers and producers espoused the negotiation model of consumer protection. Consumer and professional groups met to work out standards for all aspects of consumer protection policy. By 1983, however, both sides had become disenchanted with the negotiation approach. The core problem was that French businesses were unable to negotiate agreements in a collective way. So long as all companies were not bound by

¹²⁶ This kind of struggle, in which the group payoff is the same but individual payoffs differ, is referred to generically as a "battle of the sexes" game.

agreements, individual companies were hesitant to participate for fear of suffering a competitive disadvantage. Hence in 1983 French policy moved to the third stage, in which policy reflected the protection strategy. New government policies attempted to push full responsibility for product-related risk onto producers. They also began to encourage private legal enforcement of these new consumer protections. Figure 10 below describes the payoff levels of these different stages for consumers and producers.

		<i>consumers</i>	
		<i>mobilized</i>	<i>not mobilized</i>
<i>producers</i>	<i>organized</i>	negotiation model (1, 2) <i>stage 2 (1978-83)</i>	information model (2, 0) <i>stage 1 (1970-78)</i>
	<i>not organized</i>	protection model (0, 1) <i>stage 3 (1983-)</i>	

Figure 10. Consumer Policy Payoff Matrix for producers and consumers in France.

France's early initiatives in consumer protection, in the first policy stage, focused on providing consumers with accurate information. This policy approach was pushed most strongly by France's first Secretary of Consumption, Christiane Scrivener, appointed to the position in 1976 under the second government of Raymond Barre. Scrivener, who had just returned from the Harvard Business School with a mid-career MBA degree, was

focused on the economic role that consumers should play in the economy.¹²⁷ "Their information," she wrote, "determines the very orientation of our economy."¹²⁸ Her program for consumer protection included four "axes of action" that embodied the information model: (1) incorporate durability into the design of products, (2) give consumers more information regarding durability, which manufacturers collect, (3) require improved documentation and construction that allows consumers to keep their product longer, and (4) create regulations to help the second-hand market function properly.¹²⁹

Some of Scrivener's specific policy initiatives for improving consumer information relied on market mechanisms. She pushed to legalize comparative advertising in France, for example, on the grounds that this could provide consumers with valuable information. She also called for French companies to create their own consumer relations offices that could communicate individually with consumers.¹³⁰ But Scrivener also felt that in many cases the strategy of consumer protection through accurate information required direct state intervention.¹³¹ She pushed policies that targeted both information and education. Information policies included a new standard for quality certificates, with the Ministry of industry imposing a minimum standard of quality for all

¹²⁷ Margaret de Miraval, "France's consumer minister," *The Christian Science Monitor*, 14 Feb 1977.

¹²⁸ Christiane Scrivener, "Le droit des consommateurs à l'information," *Allocutions ministérielles* (Secrétariat d'Etat à la consommation, 11 October 1976), p 2.

¹²⁹ Christine Scrivener, "La durabilité des produits, une exigence dont les industriels doivent davantage tenir compte," *Les Échos*, 6 Mar 1978.

¹³⁰ Christiane Scrivener, "Pour un 'service consommateurs' dans les entreprises," *Les Notes Bleues du Service de l'information du Ministère de l'économie et des finances* (6 April 1977).

products.¹³² In 1977, Scrivener introduced consumer education into the elementary school curriculum.¹³³ A law with similar effect, the *reformé Haby*, called for consumer education in technical schools. The curriculum of this education had a strong commercial content, including such topics as the way to distinguish a real Camembert.¹³⁴

Yet this information strategy that Scrivener had come to represent was being challenged by a very different conception of the consumer interest group. Writing in 1977, Michel Wieworka noted that French consumerism at the time seemed to have two modes: "On the one hand, [product] scandals that by their high social visibility give a sudden importance to general consumer themes and to groups dedicated to consumers; on the other hand, a sustained effort, much less popular, tending towards informing middle-class consumers."¹³⁵ This emerging conception of the consumer as having a collective interest was already latent in society. As early as 1973, the *loi Royer* had proposed granting consumer groups the right to file class action suits, although this law was later diluted through court interpretation.¹³⁶ Indeed business had proved quite open to negotiating directly with consumer groups on issues that related to consumer

¹³¹ Christiane Scrivener, "Pour un 'service consommateurs' dans les entreprises," *Les Notes Bleues du Service de l'information du Ministère de l'économie et des finances* (6 April 1977).

¹³² Gisèle Prevost, "Qualification de produits industriels," *Les Echos*, 27 Sep 1979.

¹³³ Garrigou, Marcel. *L'Assaut des Consommateurs pour changer les rapports producteurs - vendeurs - consommateurs*. Paris: Aubier-Montaigne, 1981), p 93.

¹³⁴ Claudie Bert, "La consommation et les enfants," *J'Informe*, 18, Nov, 1977.

¹³⁵ "...d'une part, des scandales qui par leur forte visibilité sociale donnent une importance soudaine aux thèmes généraux du consumerism et aux organisations qui s'y consacrent; d'autre part, un effort soutenu, nettement moins poluaire, axe sur un effort d'information sur la consommation de couches petites-bourgeoises." Michel Wieworka, *L'Etat, le Patronat, et les Consommateurs: Etude des mouvements de consommateurs*, (Paris: Presses Universitaires de France, 1977), p 245.

¹³⁶ "Les organismes de consommateurs peuvent se porter partie civile," *La Croix*, 29 June 1974.

information.¹³⁷ Already in 1970 the CNPF had collaborated with the state-run consumer group INC to negotiate standard product labels. In 1976 the Consumption Committee of the French Seventh Plan proposed the creation of an ongoing dialogue between consumers and producers, including representation of consumer groups in the associations that manage product information (France's standard setting body AFNOR, the labeling body AFEI, etc). The Consumption Committee also suggested that this negotiation approach might be employed to eliminate abusive contract clauses and to simplify consumer litigation.¹³⁸

This negotiation approach to consumer protection became the orthodoxy of the Third Barre Government, which was inaugurated in 1978, and was especially championed by the new Economics Minister, René Monory. Monory's tenure marked the beginning of the second stage of French consumer protection. He was an economist by training, and believed that the best approach to consumer protection was not through greater government regulation but instead was through empowering consumers to represent their interests directly to business. To symbolize this view, he eliminated the position of Secretary of Consumption. Instead, he publicly referred to himself as the "Minister of Consumption," and advocated that government financial support to consumer groups be quadrupled in his first two years in office.¹³⁹ "We need to make producers and distributors realize," Monory wrote, "that the consumer should become a partner in all things, and who participates at all levels: from product manufacturing to

¹³⁷ "Opinions sur la fonction consommation et la libre entreprise," *Humanisme et Entreprise* 102 (April 1977), pp 13-19.

¹³⁸ Jacques Dubois, "Les consommateurs dans le 7ème plan." *Information Consommation OR-GE-CO* 15 (March-April 1976), pp 1-2.

price setting."¹⁴⁰ He felt that even inflation might be held down if the two million current members of consumer groups in France were to join in a single organization.¹⁴¹

The negotiation approach, which had been proposed by consumer groups in 1975,¹⁴² was also increasingly accepted by business as a useful alternative to direct government intervention. Ambroise Roux, the head of the CNPF, felt that consumer groups "should be encouraged and developed."¹⁴³ From November 1979 to 1981 the CNPF met monthly with consumer groups to discuss consumer issues as diverse as advertising, automobile sales, after-sale service, and others.¹⁴⁴ Between 1980 and 1983, the newly created Conseil National de la Publicité (CNP) negotiated with consumer associations to set standards for advertising. The Conseil contained representatives of 11 consumer organizations and 11 representatives of the media.¹⁴⁵ Similar efforts to have consumer and professional interests negotiate agreements were being undertaken at the regional and local level throughout France.

By the beginning of 1980, however, French consumer associations had become frustrated that industry was not actually abiding by negotiated standards. In a letter of January 1980, the 11 major national consumer associations renounced participation in all

¹³⁹ "René Monory: davantage de moyens pour informer les consommateurs," *Démocratie Moderne*, 22 November 1979.

¹⁴⁰ "Il faut faire comprendre aux producteurs et distributeurs, explique M. Monory, que le consommateur doit devenir un partenaire à part entière, qui participe à tous les niveaux: la fabrication des produits comme la formation des prix." Jean Marchand, "M. Monory veut des consommateurs puissants," *La Croix*, 28 September 1979.

¹⁴¹ "Un hypersyndicat?" *Le Nouveau Journal*, 28 Sep 1979.

¹⁴² Jacques Dubois, "Du Mepris à la Concertation," *Information Consommation OR-GE-CO* 20 (Jan-Feb 1977), p 2.

¹⁴³ "...devraient être encouragées et développées." Ambroise Roux, (President of the CNPF), "La réforme de l'entreprise," *CNPF Patronat* (Feb 1976), p 29.

¹⁴⁴ Gérard Lavergne, "Eux, les clients," *CNPF Patronat* 429 (November 1981), p 22..

¹⁴⁵ "La guerre est finie," *CNPF Patronat* 447 (July 1983), p 71..

collective agreements with the state and with business until an enforcement mechanism was established.¹⁴⁶ Their answer came with the 1981 Socialist victory of Francois Mitterrand. Mitterrand proposed in his campaign platform, the *110 Propositions for France*, that “consumer associations must be supported.”¹⁴⁷ Emphasizing the importance of the consumer, Mitterrand created a Ministerial-level position dedicated to the consumer interest, and with the explicit goal of promoting negotiations between consumer groups and professional interests.¹⁴⁸ In September of 1981, the newly appointed Minister of Consumption, Catherine Lalumière, said in an interview: “I believe that we can do nothing with individual consumers in the state of nature, nor if all effort is concentrated at the state level.”¹⁴⁹

The solution that the government proposed was that consumer groups be treated as were labor union. By this analogy, industry should be given the responsibility of making binding agreements with consumer groups. Consumer advocates felt that the interests of consumers deserved a legal status similar to that of labor interests.¹⁵⁰ To this end, Lalumière appointed the consumer activist Jean Calais-Auloy head of a committee to rewrite the consumer law so as to incorporate existing regulation into a negotiated

¹⁴⁶ Didier Ferrier, *La Protection des Consommateurs*, (Paris: Dalloz, 1996), p 80.

¹⁴⁷ “Il faut renforcer les associations de consommateurs. C'est une des priorités de mon action car je crois que l'on ne peut rien faire avec des consommateurs atomisés dans la nature et qu'on ne peut rien faire si tout est concentré au niveau de l'Etat.” Alain Poirée, *Les Discours consuméristes et leur perception par les Français* (Paris: I.C.C.-C.N.P.F., 1984), p 36.

¹⁴⁸ Decree N0 81-704 of 16 July 1981 “Relatif aux attributions du ministre de la consommation.” (cited in “le ministère de la consommation,” *Consommateurs Actualités* 297 (4 sept 1981), pp 5-6.

¹⁴⁹ “Je crois qu'on ne peut rien faire avec des consommateurs atomisés dans la nature et qu'on ne peut rien faire si tout est concentré au niveau de l'Etat.” Josée Doyère, “Un entretien avec le ministre de la consommation,” *Le Monde*, 17 September 1981.

framework.¹⁵¹ This corporatist solution was applauded by consumers but strongly opposed by industry. The Paris Chamber of Trade and Industry (CCIP) criticized the Calais-Auloy committee for its lack of industry representatives.¹⁵² The CNPF strongly opposed treating consumer relations in the same way as labor relations.¹⁵³ They argued that professional associations could not sign binding agreements with consumers because consumer groups were not truly representative, and because consumer groups did not have the technical training properly to consider the issues that would be involved.¹⁵⁴ The Ministry of Justice sided with industry, arguing that the analogy between consumers and labor unions was not legally valid.¹⁵⁵ Finally, the financial crisis of 1983 put an end to Lalumière's corporatist aspirations. French business was simply not sufficiently organized to negotiate on an equal footing with consumer groups. Business foresaw correctly that the diversity of their interests would put them at a disadvantage to consumers.¹⁵⁶

This policy collapse signaled the move to the third Stage of French consumer policy, in which consumers would be protected through state regulations and interventions designed to shift the burden of product-related risk fully onto producers.

¹⁵⁰ "Négociation collective: le point de vue des juristes," *Que Savoir* 43-44 (June-July 1982), p 53.

¹⁵¹ Josée Doyère, "Des 'conventions collectives' de la consommation rendront obligatoires les engagements des professionnels," *Le Monde*, 5 December 1981.

¹⁵² Chambre de commerce et d'industrie de Paris. *La Politique de la Consommation*. Rapport présenté au nom de la Commission du Commerce Intérieur par Messieurs Lefeuvre et Blat (Adopted 14 January and 11 March 1982), p 16.

¹⁵³ Elisabeth Rochard, "Le CNPF ne veut pas de conventions collectives de la consommation," *Le Matin*, 19 February 1982.

¹⁵⁴ Maria Aubertin, and Edmond Robin, *Les Nouveaux Rapports entre producteurs et consommateurs*, (Paris: La Mission à l'innovation, Report No 6, November 1981).

¹⁵⁵ Ministère de la Justice, "Observations sur l'éventualité de conventions collectives entre les organisations de consommateurs et les professionnels," Paris, 14 march 1980.

This policy was embodied in the 1983 law for consumer protection that created the Consumer Safety Commission (Commission pour la Sécurité des Consommateurs, or CSC), modeled on the US Food and Drug Administration.¹⁵⁷ Government Ministries were granted extraordinary rights to survey the consumer market and to call for products to be withdrawn. In 1985 France endorsed a state-sponsored consumer defense by joining the functions of consumer protection, competition, and repression of fraud in the new General Direction of Competition, Consumption and the Elimination of Fraud (Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes, or DGCCRF).¹⁵⁸ It is this protection model that remains the dominant strategy of consumer protection in France today.

Stasis in Consumer Policy in Germany

Because German consumer groups ranked their preferences for the different consumer protection models differently, the payoff matrix for the German policy game looks different from that in France. See Figure 11 below. Two general observations can be made. First, because the protection model was the lowest preference both of consumer groups and of producer groups, it never came into play as a viable policy alternative in Germany.¹⁵⁹ This means that most policy debates in Germany took the form of conflict

¹⁵⁶ Chambre de commerce et d'industrie de Paris, *La Creation du Conseil National de la Consommation*, Rapport présenté au nom de la Commission du Commerce Intérieur par M. Gaucher (Adopted 19 may 1983), p 10.

¹⁵⁷ Françoise Vaysse, "Les anges gardiens de la sécurité," *Le Monde*, 14 April 1992.

¹⁵⁸ Anne Fily, and Philippe Guillermin, "Les politiques de la consommation dans les États membres de la CEE," *Revue de la concurrence et de la consommation* 70 (November-December 1992), pp 43-50.

¹⁵⁹ Indeed, when the protection strategy was proposed in European[be more specific here by naming the European organization related to negotiations, Lotsa « European » things in this world. You are too non-specific.] negotiations, for example in the negotiations for

between the negotiation strategy and the protection strategy. Second, while the information model favors producer preferences and the negotiation model favors consumer preferences, the combined payoff of the two models are the same. Given the weak mobilization and political force of the German consumer movement, and the strong organization and political weight of German industrial associations, Germany's adoption of the information strategy followed nearly as a matter of course. Critical to this outcome was both the weakness of Germany's consumer movement, and the strength of Germany's industrial associations.

		<i>consumers</i>	
		mobilized	not mobilized
<i>producers</i>	organized	negotiation model (1, 2)	information model (2, 1)
	not organized	protection model (0, 0)	<i>dominant model</i>

Figure 11. Consumer Policy Payoff Matrix for producers and consumers in Germany.

a product liability directive, German consumers and producer concurred in their opposition. Cannot find where this footnote is hanging from.

In part because of these different consumer group preferences, and in part because of the different organizational strategies of consumers and producers, the German product- market regulation process is nearly static over time. German consumer protection policy began with and has maintained an emphasis on the information model of consumer protection. Consumer input into policy making, in this approach, has taken the form of technical advice rather than strong interest representation. In 1973, for example, the German Ministry of Justice convened a discussion group to decide a course of action for regulating consumer contracts. Nearly 150 of the most prominent production and labor associations attended. Consumer groups were invited, and half a dozen also attended. However the strong attendance by industry and labor representatives simply overwhelmed the consumer advocates, so that consumer interests did not have a strong input into the final proposed legislation. The resulting law on standard contract terms (Gesetz zur Allgemeingeschäftsbedingungen, or AGB-Gesetz) thus closely reflected these industry interests.¹⁶⁰ Without greater mobilization, Germany's consumer groups were unable apply political pressure for policies they favored.

The negotiation approach was not entirely abandoned, however.. In regulations that treated product information, for example, it was often possible to accommodate the interests both of industry in the information model and of consumer groups in the negotiation model. Yet regulators stopped short of giving consumer groups a truly equal position in relation to producers. In advertising, for example, consumer groups were

¹⁶⁰ Heribert Schatz, *Verbraucherinteressen im politischen Entscheidungsproze* (Frankfurt: Campus Verlag, 1984), p 68.

given a policing role in ensuring that Germany's high standard of advertising was met.¹⁶¹ But legislation blocked consumer groups from seeking remuneration for consumers who had been deceived by illegal advertising.¹⁶² As the Free Democratic Party (FDP) explicitly warned, that kind of class action suit focused on consumer claims would be unacceptably profitable for consumer groups.¹⁶³ A similar dynamic emerged in product labeling in Germany. In 1974, Germany's labeling organization (Deutsches Institut für Gütesicherung und Kennzeichnung) proposed that minimum acceptable safety standards for products be negotiated outside of the industry standard-setting organization, DIN, by a committee composed of equal members from consumer and producer groups. While industry favored labeling, they objected to the influence that this arrangement would give consumers in setting product standards.¹⁶⁴ Under pressure from industry, the Economics Ministry refused to support the project, and a new Produktinformation (PI) system was created by the Association of German Industry (BDI) that effectively removed government and consumer influence from labeling decisions.¹⁶⁵ In sum, industry accepted collaboration with consumer groups in the interest of pursuing an information strategy of product market regulation, but in each case stopped short of acceding to equitable negotiations with consumers.

¹⁶¹ Schricker, Gerhard. "Soll der einzelne Verbraucher ein Recht zur Klage wegen unlauteren Wettbewerbs erhalten?" *Zeitschrift für Rechtspolitik* 8 (1975), pp 189-190.

¹⁶² Alex Stein, "Die Verbraucheransprüche und ihre Geltenmachung durch Verbraucherverbände nach der UWG-Novelle," *Journal of Consumer Policy* 3 (1979), pp 29-40.

¹⁶³ "Mehr Schutz vor unlauterem Wettbewerb," *Frankfurter Rundschau*, 28 Jan 1982.

¹⁶⁴ "Grundsätze für Gütezeichen," *Bundesanzeiger*, 23 March 1974.

¹⁶⁵ Annemarie Bopp-Schmehl, Uwe Heibült, and Ulrich Kypke, *Technische Normung und Verbraucherinteressen im gesellschaftlichen Wandel* (Frankfurt am Main: Haag & Herchen Verlag, 1984), p 86.

German product market regulation favored the interests of industry not only because of the political weight of producer groups but also because they were committed to a strategy of producing high-quality goods that made the information model an attractive approach to product safety. As David Soskice and Wolfgang Streeck have argued, the structure of relations between producers and their suppliers, workers, and capital in Germany have pushed German producers towards a production strategy that emphasizes high-quality products and incremental innovation.¹⁶⁶ Not only has this strategic bias towards quality given German industry a genuine interest in an information solution to consumer protection, it has also made the information model a highly attractive solution for German regulators. After all, the information solution to product risk depends not only on providing consumers with accurate product information, but also on the availability of high quality goods capable of lowering consumer risk.

Consistent with the information approach, Germany has given industry a high degree of autonomy. Germany's Equipment Safety Law (*Gerätsicherheitsgesetz*, or GSG), for example, does not itself specify minimum safety standards, but instead makes standards established by industry, in the context of DIN, mandatory for all producers.¹⁶⁷ The Economics Ministry did force DIN in 1974 to accept consumer representatives on technical standards committees relating to consumer products. But these representatives act in a technical rather than in a representative fashion. They are outnumbered on these

¹⁶⁶ David Soskice, *German Technology Policy, Innovation, and National Institutional Frameworks*, Discussion Paper FS I 96-319 (Berlin: Wissenschaftszentrum Berlin, 1996); Wolfgang Streeck, "On the Institutional Preconditions of Diversified Quality Production," in *Social Institutions and Economic Performance*, ed. Wolfgang Streeck (London: Park Sage Productions, 1992).

committees by representatives from industry, and have no formal veto power over decisions on standards.¹⁶⁸ Similarly, the negligence standard that Germany applies to cases of product liability provides for producer exculpation if the company can show that accepted manufacturing practices were followed.¹⁶⁹ The goal of German risk regulation, in other words, is to enforce industry standards of product design and manufacturing on all producers, in the understanding that industry itself held the greatest knowledge and capability to ensure that high quality goods came to market. Product standards in this approach could not be subjected to negotiations between producer and consumer groups, as the negotiation model advocated.

Lessons from French and German Product Market Regulation

In radically new areas of public policy, alternative ideas about how the new policy should be addressed become the focus of political contestation. Such alternative ideas have the status of policy models, in that they imply comprehensive but exclusive conceptual frameworks for regulation. Which policy model came to dominate policy-making in each country depended on the interests and institutional form of the important economic actors in each society. Especially in new policy areas, group interests are linked to their institutional form in at least three ways. First, the way in which group interests are organized can affect their policy preferences. We observe this in the different

¹⁶⁷ Annemarie Bopp-Schmehl, Uwe Heibült, and Ulrich Kypke, *Technische Normung und Verbraucherinteressen im gesellschaftlichen Wandel* (Frankfurt am Main: Haag & Herchen Verlag, 1984), p 101.

¹⁶⁸ Christian Joerges, Josef Falke, Hans-Wolfgang Micklitz, and Gert Brüggemeier, *Die Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft* (Baden-Baden: Nomos, 1989), p 186.

preference ranking of French and German consumer groups. Second, a greater capacity to organize group membership confers a greater political weight. We observe, for example, the growing political weight of French consumer groups as they increase their grass-roots membership. Third, the institutional capacity of interest groups places constraints on the kinds of policies they can successfully pursue. German industry, for example, was well coordinated to pursue an information strategy to consumer protection, whereas French industry lacked sufficient coordination among individual companies. Thus economic interest groups confronting radically new areas of policy resolve their conflicting preferences among policy models through a political contest, the outcome of which is strongly influenced by the way in which their group interests are organized.

In the area of product market regulations in particular, the contested-ideas approach helps to explain why different countries have adopted different regulatory strategies. In general, when consumers are mobilized and industry is disorganized, as in France, we should expect a protection approach to consumer policy to emerge. This model also appears to represent the approaches adopted in the United States and in Canada. When consumers are not mobilized and industry is organized, as in Germany, we should expect an information approach to consumer policy to emerge. This model appears to represent the approaches adopted in Spain and in Austria. Finally, when consumers are mobilized and businesses are organized, the situation emerges in which a negotiation strategy prevails. This model appears to describe the consumer policy setting in Sweden and indeed in all of Scandinavia. Those countries enjoyed strong cooperative

¹⁶⁹ Henricus Duintjer Tebbens, *International Product Liability: A Study of Comparative and International Aspects of Product Liability* (The Hague: Asser Institute, 1979), pp 74-75.

movements early in the century that formed the basis of a strong consumer mobilization. Producers too are highly organized, and enjoy amicable relations with trade unions. Finally, in the case where consumers are not mobilized and business is disorganized, consumer policy is likely to be haphazard and weak. This model appears to prevail in Britain today.

This strategy of explanation does have two significant limitations. First, it does not conceptualize the institutional context of policy making, but instead treats the policy process as a black box. This approach therefore ignores policy theories that focus attention on the structure of the state such as bureaucratic phenomena, agenda-setting, or veto points.¹⁷⁰ But this blindness to the functioning of the state also has advantages. In the case of product market regulation, for example, my research finds that the parliament, the ministry of economics, and the court system all contributed substantially to the shape of product market regulations in both France and Germany. Any theory based on close institutional analysis of the state would have to explain how such different institutions consistently pushed for a similar regulatory strategy. The contested-ideas approach assumes that government policies reflect the preferences of societal interests in proportion to the political power and organizational capacity of their advocates. This simple model also helps to explain how countries with such different government structures, such as France and the United States, have adopted very similar strategies of product market regulation.

¹⁷⁰ Michel Crozier, *The Bureaucratic Phenomenon* (Chicago: University of Chicago Press, 1964); Ellen Immergut, *Health Politics: Interests and Institutions in Western Europe* (Cambridge: Cambridge University Press, 1992).

The second limitation of the contested-ideas approach is that it does not address the origins of consumer and producer organizational strategies. French and German industrial organizations have roots in their nineteenth-century experience of industrialization. As such, they precede the debate on consumer protection by nearly a century. But the different organizational strategies of French and German consumer groups had a far more recent origin, emerging only in the late 1960s and early 1970s. In this context, the contested-ideas approach artificially separates the question of consumer group organization from the broader question of product market regulation. Chapter 5 below addresses the origins of German and French consumer group strategies. The research described there shows that consumer groups in fact adopted their organizational strategies in large part in response to existing government and industry institutions.

Despite these limitations, the contested-ideas model of policy formation offers important advantages for comparative policy analysis. First, it suggests that institutional analysis need not limit its explanatory scope to instances of policy continuity, but that it can also offer powerful insights into periods of radical policy change. If policy evolution is understood as a process of punctuated equilibrium, this research suggests that the field of comparative politics can apply the tools of institutional analysis to explain not just the equilibrium but also the punctuation. Second, it suggests that the core role of ideas in new policy formation is to elaborate coherent regulatory strategies, not to blind policymakers to possible alternatives. Ideas in this model work to clarify rather than to obscure. Third, this research suggests that any analysis of nascent policy areas must be able to integrate the insights of rational-choice institutionalist and historical institutionalist approaches in order to capture the political dynamic of new policy formation in which both interests and

institutions are not yet fixed. This study of product market regulations has suggested at least one way in which the rational-choice and the historical approaches can be integrated.

Chapter 3. How National Varieties of Consumerism Drive Product Choice

The different regulatory strategies employed in France and Germany have important implications for the kinds of products that are produced and consumed. Germany pursues what might be called a means-based approach to consumer protection, in which existing industry capabilities set the terms of consumer protection. France, by contrast, pursues an ends-based approach in which consumer priorities dictate industry regulation. This chapter describes the impact that this policy difference has on the product choices of consumers and producers.

Before proceeding, it is important to emphasize that the arguments of this chapter remain hypothetical. The focus of my research has primarily been on the causes of divergent national product market regulation rather than on the economic consequences of this divergence. As will become clear, the impact of product market regulations is potentially great, but also complex. Many of the theoretical issues lie beyond the primarily political emphasis of this thesis. The secondary literature on this subject offers little recourse. Indeed, few of the policy areas that I study have been the subject of useful empirical economic analysis. These limitations have constrained the scope of my own treatment. First, this chapter focuses only on the regulation of product risk and product information. While direct product regulations (see Chapter 8) have arguably had a greater impact on producers than have risk and information regulation, their impact depends to an important degree on the details of implementation and is therefore difficult to present in summary. Second, I offer supporting evidence of the impact of market regulations from only two policy areas. For product information I present findings from studies of

comparative product testing. For product risk I present findings from studies of product liability. Again, because of the dearth of empirical data, these case studies are suggestive but not definitive. Nonetheless, these cases do suggest that market regulations, those that set the risk and information context of consumer transactions, have a powerful impact on the product strategies of consumers and producers.

Information, Risk and Market Failure

One of the first economists to point out the independent impact of market setting on consumer and producer decisions was George Akerlof. In his 1970 article “The Market for Lemons” he explained why price information alone frequently does not provide adequate information for a market to function efficiently.¹⁷¹ He describes the situation of a used car lot, in which the consumer cannot know the actual condition of the car on sale, and the salesman has no incentive to provide the consumer with accurate information. In this setting buyers must assume that they are being cheated. Used cars that actually are in good condition nonetheless sell below their real value because consumers cannot know their condition is in fact good. This means that car owners wishing to resell are likely to do so only if their cars are already damaged in some way. Otherwise they would not receive the true value of the car. This results in a smaller used-car market than would exist in the presence of better information, and a preponderance of hidden defects in the cars that are traded.

This kind of information asymmetry in the market for used cars helps to explain why new cars fall drastically in value as they leave the dealership. It is the reputation of

¹⁷¹ George Akerlof, “The Market for Lemons,” *Quarterly Journal of Economics* 84 (1970), pp 488-500.

the manufacturer and their liability for the car, reinforced by warranties and lemon laws, that ensure that the price of a new car reflects its true value. Once the car has left the lot, the information and legal protection that accompany a new car are lost. The combined value of this information and legal protection is exactly equal to the immediate drop in value of a newly purchased automobile.

The information asymmetries that Akerlof describes are not limited to markets for used goods. A manufacturer that invests highly in technical aspects of a product that are not immediately visible to the consumer, for example, will be able to recover the cost of this additional investment only if the consumer is adequately informed about the value of these hidden improvements. This kind of investment may therefore only make sense for a marketplace in which consumers are extremely knowledgeable about the products they purchase. In the absence of such an informed consumer base, producers can only compete effectively on product characteristics that consumers can understand and evaluate. In this way the market setting can generate a competitive dynamic in which Akerlof's market for lemons emerges even among new products. In general, when strong information asymmetries prevail between producers and consumers, higher quality goods sell below their actual value (that is, the value they would have given complete information). Companies producing higher quality goods must therefore either leave the market, or shift production to lower quality goods. By analogy to Gresham's Law, information asymmetries in national product markets can cause bad products to drive out good.

The consumer is not always the party facing an information deficit. Information asymmetries may also work to the detriment of producers. Joseph Stiglitz and Andrew

Weiss describe this kind of market failure in their study of credit rationing by banks.¹⁷²

Like the car dealer, the money borrower has better information than the bank about whether or not she is likely to default.¹⁷³ Yet it is the bank that takes on the risk of a possible default. The problem is that the bank in this situation is unable to distinguish between those borrowers who accept to pay higher premiums because they genuinely face higher risks, and other borrowers who accept to pay higher premiums because they already know that they plan to default. This uncertainty leads banks to ration their credit. Without more information about the intentions of borrowers, banks offer fewer loans than would be economically optimal. In the absence of better information, the market for loans, like the market for used cars, remains smaller than it might be.

As the case of credit rationing makes clear, information asymmetries can also be conceived as risk asymmetries. Market failures arise not just when one party knows more than the other, but when the ignorant party also bears the burden of risk. In the case of the used car lot, the problem is not just that the consumer is ignorant of possible mechanical failures, but also that the consumer bears the full burden of risk for these failures. Markets function efficiently when the knowledgeable party also bears the risk. This means that market failures of the sort described by Akerlof are always open to two kinds of solution: either information redistributing, or risk reallocating. These two approaches correspond the information and protection models described in Chapter 2 above.

¹⁷² Joseph Stiglitz, and Andrew Weiss, "Credit Rationing in Markets with Imperfect Information" *American Economic Review* 71, 3 (June 1981), pp 393-410.

¹⁷³ To see the similarity to Akerlof's analysis, think of the borrower as selling the right to future earnings, with the bank as buyer.

		<i>Burden of Risk</i>	
		consumer	producer
<i>Consumer Information</i>	accurate	Germany (information)	classical market setting
	inaccurate	Market for Lemons (Akerlof)	France (protection)

Figure 12. National approaches to consumer protection.

Conceptually, four distributions of product risk and information are possible. See Figure 12. The situation we observe in France is represented in the lower right square, where product market regulations are characterized by inaccurate product information and where consumers bear a low burden of risk. The situation we observe in Germany is represented in the upper left square, where product market regulations are characterized by accurate product information and where consumers bare a relatively high burden of risk. The scenario foreseen by Akerlof, in which information is poor and liability resides with the consumer, is described by the lower-left square. This combination of low product information and high consumer risk describes nearly all national product markets during industrialization and continues to characterize many developing economies today. The final square, in which consumer risk is low and consumer information is high,

describes a perfect consumer market, in which buyers have full knowledge of products and product-related risks are negligible. This perfect consumer market rarely exists in practice, since consumer grievances can generally be met either through information or through protection alone. The countries that come closest to achieving the perfect consumer market are in Scandinavia, where a negotiated approach to consumer protection combines information and protection strategies.

Market Rules Drive Product Choice

Both the German strategy of increased consumer information and the French strategy of increased producer responsibility for product-related risk succeed in addressing the problems of market failure arising from information and risk asymmetries. Yet these different strategies are not neutral in respect to product choice, either for the consuming public or for producing companies. Each strategy works to eliminate market failure, but each also generates a different competitive dynamic in the consumer marketplace. In general, solutions of the kind adopted in Germany that focus on consumer information favor a competition for high-quality production and gradualist innovation. Conversely, solutions of the kind adopted in France, as well as in the United States, focus on allocating product-related risk to producers, and favor a competition for lower-quality production and radical forms of innovation.

All products combine a set of hidden qualities with other visible qualities. Hidden qualities include aspects such as internal engineering, safety features, and extensive laboratory testing. These are qualities of the product that the consumer cannot assess by simple inspection without specialized knowledge. By contrast, visible qualities are those that all consumers naturally evaluate as they purchase, including product traits such as

aesthetics, taste, and feel. Different kinds of products naturally incorporate different proportions of visible and hidden qualities. Traditional products such as clothing and leather goods all have a high level of visible qualities and a relatively low level of hidden qualities. Other products such as pharmaceuticals and sophisticated "black-box" equipment have a high level of hidden qualities and a relatively low level of visible qualities. All products lie at some point in the space that defines their degree of hidden and visible qualities. See Figure 13 below.

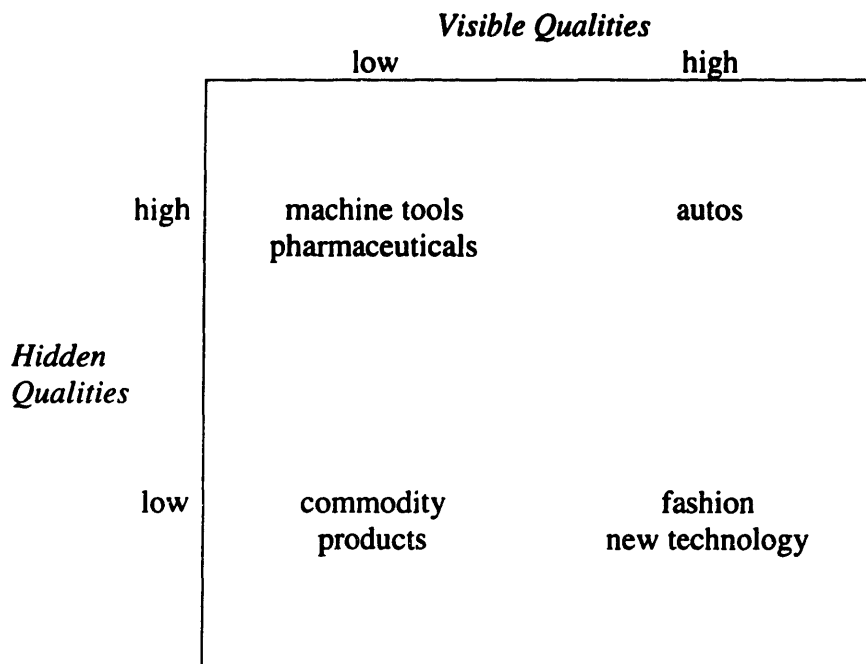


Figure 13. Examples of Hidden and Visible Qualities of Products.

The information strategy of consumer protection works by revealing to consumers some of the hidden qualities of products. Among those hidden qualities lie aspects of the product that are relevant to consumer safety. Also among these hidden qualities lie features such as durability, design, engineering, company experience, and workmanship.

Thus along with information about consumer safety comes information about other qualities of the products such as durability, design, and engineering. In this way the information strategy provides consumers with a broad insight into the hidden qualities of products. Moreover, because consumers in the information model face a relatively high burden of risk from product-related failure, they have an incentive to take this information into account as they make their purchasing decisions. Consumers in this information model thus protect themselves against product risk by purchasing higher quality goods. The higher price they pay can be seen as a form of insurance against unsafe products. Producers accordingly come to compete for a high level of the hidden product qualities that consumers prefer.

The protection model, by contrast, protects consumers by assigning product-related risk to producers. This model also leads to a high level of consumer safety because it groups product risk and product information in the same actor, namely the producer. Producers in this model absorb the full cost of product-related risk, which they pool and pass on to consumers in the form of a price premium on their products. To take an extreme example, 95 percent of the cost of children's vaccines is estimated to pay for liability insurance and legal fees.¹⁷⁴ This risk premium that producers bear must be divided between a combination of product safety design and liability insurance measures. Unlike the information strategy, this protection approach creates incentives for both consumers and producers to favor lower quality goods.

For consumers, the protection strategy means that more expensive products are not necessarily safer. That is because consumers cannot know whether each additional

unit of product price reflects better safety and design, or simply the additional cost premium from insurance against product failures. Similar to the case of loan rationing described above, the consumer in the protection model is unable to distinguish between higher prices that reflect the cost of better hidden qualities and higher prices that reflect higher product risk. Without information that would allow them to distinguish between a quality premium and a risk premium, the consumer will ration demand for higher-priced goods.

For the producer, the protection strategy means that consumers have no incentive to inform themselves about their products, because, in principle, consumers face a low legal burden of risk. Consumers therefore have a low recognition of hidden qualities. Moreover, producers face a high burden of product risk and have strong incentives to ensure that the products they sell are safe. Thus the protection model leads the producer to invest in consumer safety. But companies do not have any incentive to improve other hidden qualities of products, such as design or durability, since their consumers are not informed to recognize these improvements. Producers in the protection model therefore invest heavily in safety measures but minimize investment in other hidden qualities such as engineering and durability.

The market rules governing the context in which consumers shop have an effect not only on product quality, but also on strategies of product innovation. In markets governed by the information model, consumers and producers are likely to emphasize gradual kinds of innovation to existing products. Producers have strong market incentives to invest in innovations that improve the hidden qualities of existing products, since they

¹⁷⁴ Richard J. Mahoney and Stephen E. Littlejohn, "Innovation on Trial: Punitive

know that consumers recognize and favor this kind of quality emphasis. What has made the German automobile industry so successful, for example, is not just the skill of German engineers, but also the knowledge and quality emphasis of Germany's consuming public. The down-side of this quality emphasis is that German consumers face new kinds of products with a strong skepticism. This skepticism is not just cultural; it is built into Germany's market rules. German consumers protect themselves in the marketplace through accurate information that allows them to purchase high-quality goods. For radically new kinds of products, though, accurate information is generally unavailable. Faced with this uncertainty, consumers avoid radical innovation. For German industry, this conservative kind of demand makes radical innovation a bad business strategy.

If the information strategy favors gradual product innovation, the protection strategy favors radical product innovation. One of the problems with radically new kinds of products is that they carry greater uncertainty and correspondingly higher risks than conventional products. Radically innovative products may not work as well as expected, or they may be turn out to be harmful. In the protection model, however, the consumer enjoys, at least in principle, the same high level of protection against risk from all kinds of products. Thus the consumer in the protection model is not strongly deterred by the potential higher risk of radically new kinds of products. Furthermore, radically new kinds of products differ from existing products in ways that are immediately visible to any consumer. Recognizing radically new products does not require detailed knowledge of their hidden qualities. Because consumers in the protection model do not have a high level of information about the hidden qualities of products (nor a strong risk-driven

Damages Versus New Products," *Science* 246 (15 December 1989), p 1397.

incentive to secure this kind of information), they have a comparative advantage in products with visible qualities. This creates a competitive dynamic that favors not only traditional kinds of products, whose qualities are apparent to all, but also radically new kinds of products, for which the innovation is immediately apparent to the consumer.

Risk Allocation Through Product Liability Law

Product liability laws in France and Germany have contributed to these patterns of producer and consumer product choice. The legal standards of both countries embrace a broader goal of consumer protection, but they function in different ways. German product liability law encourages product safety by reinforcing the institutions of quality production.¹⁷⁵ It does so in part by exculpating companies that adopt accepted industry product standards, worker training programs, and management strategies. This so-called negligence standard of product liability ensures that all companies operate in conformity with the perceived best practice of the industry at any given time. French product liability law, by contrast, places the full burden of product-related damage on the producer and distributor. Instead of providing incentives for uniform industry standards of practice, this strict approach to product liability encourages companies to seek out innovative design solutions to problems of product safety. If Germany can be said to pursue safety through quality, France might be said to pursue safety through innovation.

¹⁷⁵ At the time of writing, the impact of the 1985 Product Liability Directive on national standards of product liability remains ambiguous. The Directive closely reflects the existing German strategy of product liability, and was adopted in France only in 1998 under threat of fines from the European Court of Justice. Moreover, because product liability law relies heavily on case law history, the implications of the new Directive may not be understood for many years. This research focuses on national standards of liability prior to the Directive.

The way in which product risk is allocated between producer and consumer conditions market competition for product quality and for product innovation. Faced with high product risk, and assuming adequate product information, consumers are likely to pay more for higher quality products that are less likely to be dangerous. This premium for higher quality is a sort of insurance against product failure. Hence, when risk lies with consumers, competition for their patronage requires competing at the high end of the product range. Moreover, because these consumers rely on their knowledge of products to assure their safety, radically new kinds of products fare poorly in Germany.

Conversely, when product liability lies heavily on the producer, consumers face diminished incentive to seek high-end products. Indeed, they have little incentive even to collect the kind of information that would allow them to distinguish the advantages of high-end products. Faced with this prospect, producers experience a tension between the need for safety and the need to compete in a low price range, even if this comes at the cost of overall product quality. Companies in this competitive setting tend to focus design efforts on specific safety features instead of pursuing a general strategy of high quality production. Furthermore, because French consumers in this setting have to worry less about product risk, they are more likely to experiment with new kinds of products. Responding to this acceptance of experimentation, companies too have directed research toward radically new product areas.

Strict Liability Standard Favors Lower Price and Radical Innovation

Strict product liability does not allow for exculpatory evidence for product-related damage. It thereby places an absolute responsibility on industry, and this has an impact on both consumers and producers. For consumers, strict liability reduces the duty of care.

Because product risk is incorporated into the price of the good, all products at all price levels are assumed to represent the same (economically optimal) level of safety. High-end goods, in other words, may offer additional quality, features, or durability, but the higher price does not signal a higher level of safety. Hence under the system of strict liability, the consumer has no safety-related incentive for preferring higher quality over lower quality goods. "With the customer facing a lower probability of being liable [under strict liability], relatively hazardous designs would be less unattractive to him, and the demand curve for such products would rise relative to the demand curve for comparatively safe products."¹⁷⁶ Consumers in this regulatory environment face no safety-related incentives to avoid low-end purchases.

For producers, this strict standard of liability has an impact both on product price and on product innovation strategies. The most striking evidence of the impact of strict liability comes from the United States, where industry faces a strict liability standard similar to that applied in France. While similar evidence has not been collected in France, the effect of US product liability may be expected to have a similar if less intensive impact there.¹⁷⁷

Because under a strict standard of liability the price of each product reflects the full cost of its associated risk, liability tends to make up a large portion of product cost. In a 1986 US survey, 38 percent of large firms and 61 percent of small firms reported a

¹⁷⁶ McKean, Roland N., "Product Liability: Implications of Some Changing Property Rights," *The Economics of Legal Relationships*, ed. Henry G. Manne (St. Paul: West Publishing Company, 1975), p 267.

¹⁷⁷ The extremely high value of punitive damages awarded in the United States has been attributed to court procedures that are not used in France, including jury trials for product liability cases and contingency fees for lawyers.

major impact of product liability on direct costs.¹⁷⁸ The price of US automobiles, for example, includes about \$500 for the cost of product liability insurance, compared to roughly \$50 for automobiles in other countries. The OECD has estimated that US product liability costs are twenty to fifty times higher than the world average.¹⁷⁹ In principle such differences should not matter to competitiveness, since foreign companies exporting to the United States face the same standard of liability as do domestic companies. In practice it appears that foreign companies may enjoy a short-term advantage in the United States because many domestic firms face the burden of lawsuits from older products still being used by consumers.¹⁸⁰

This higher level of responsibility for product-related loss in the United States does appear to have encouraged companies to engage in more research and innovation. One study finds that this higher liability burden has translated into additional product-related research.¹⁸¹ It has also driven company decisions about what kinds of products to develop and distribute. In 1985-6, 47 percent of all manufacturers in the United States reported removing product lines from the marketplace, 25 percent reported discontinuing product research, and 39 percent reported deciding not to introduce new products, all because of the threat of increased product liability exposure.¹⁸²

¹⁷⁸ E. Patrick McGuire, *The Impact of Product Liability*, Research Report No. 908 (New York: The Conference Board, 1988), pp 13, 32.

¹⁷⁹ *Product Liability Rules in OECD Countries* (Paris: OECD, 1995), pp 40-41.

¹⁸⁰ Victor E. Schwartz, "Making Product Liability Work for You: A Path Out of the Product Liability Jungle," in *Product Liability and Innovation: Managing Risk in an Uncertain Environment* (Washington, D.C.: National Academy Press, 1994), p 35.

¹⁸¹ W. Kip Viscusi, and Michael J. Moore, "An Industrial Profile of the Links between Product Liability and Innovation," in *The Liability Maze: The Impact of Liability Law on Safety and Innovation*. (Washington, D.C.: The Brookings Institute, 1991), p 84.

¹⁸² Jules L. Coleman, *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992), pp 407-408.

In some cases, extremely high levels of liability have driven US firms out of entire product markets. US private aircraft production, for example, fell from 17,000 planes in 1979 to 1,085 in 1987 because of the cost of liability coverage. Claims rose from \$24 million in 1977 to \$210 million in 1985.¹⁸³ One result was to push private plane manufacturers to innovations in kit airplanes, which face a lower liability exposure because they are assembled by the user. While this trend has made the United States the world's largest kit-plane producer, it has come at the cost of progress in traditional aviation. "Kit planes have pushed general aviation back into becoming a cottage industry again, essentially reversing the last 150 years of progress made in production techniques for this industry."¹⁸⁴ Other high-risk equipment has faced similar pressures. The United States no longer produces anesthesia gas machines, for example, because the risk associated with their use has become unacceptably high for US firms.¹⁸⁵

Negligence Liability Standard Favors Higher Price and Gradual Innovation

Under the negligence standard of product liability—the standard that has been applied in Germany—the consumer shares some of the burden of product risk with the producer. In this system, therefore, the consumer plays a role in product safety. Consumers can select higher priced products in the expectation that their higher level of quality also reflects a greater degree of safety. To purchase low-end products is to accept a greater degree of product-related risk, since that risk has not been fully incorporated

¹⁸³ Jules L. Coleman, *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992), pp 408-409.

¹⁸⁴ Frederic B. Sontag, "Indirect Effects of Product Liability on a Corporation," in *Product Liability and Innovation: Managing Risk in an Uncertain Environment* (Washington, D.C.: National Academy Press, 1994), pp 69-70.

into the price of the product. Hence a negligence standard allows consumers to allay concerns about product safety by purchasing more expensive, higher quality goods. A strict standard of liability, by contrast, ensures that the cost of product risk is always fully incorporated into the price of the product, thus offering no safety advantage to higher-quality goods.

Beyond this indirect impact on product design through consumer product choice, the negligence standard of product liability as applied in Germany has worked to reinforce industry-wide standards of quality production. It has done so in two ways. First, producers are generally exempted from liability claims based on product design if they have followed industry standards. Typically this means standards set by the industry standards body DIN. Second, industries are exempted from liability for accidents caused by their employees if these employees are hired and managed in appropriate ways. Specifically, companies hiring union labor with recognized technical training are not liable for accidental damage caused by the fault of these employees, so long as they can show that these workers have been managed responsibly (for more details on these requirements see Chapter 7 below).

By using product liability law to enforce industry-wide standards of design and production, Germany has in effect equated product safety with product quality. So long as companies comply with industry-wide design and production norms, they face a diminished threat from product liability suits. The shelter provided by conformity with industry standards thereby places a strong pressure for a uniform and high level of design and production quality in industry. "Fault based liability...gives an additional quality

¹⁸⁵ Richard J. Mahoney and Stephen E. Littlejohn, "Innovation on Trial: Punitive

incentive because it opens the exculpation door to avoid liability, provided the product was blameless."¹⁸⁶

This high quality comes with a cost in terms of innovation. Companies are encouraged to pursue common, or collective, approaches to product safety, but this can stifle innovative efforts by smaller companies. Industry technical standards, for example, are set by DIN technical committees with the participation of industry representatives. Product liability standards enforce compliance with DIN technical standards on all producers. Yet because participation in DIN technical committees demands company resources and technical expertise, only large, established companies tend to participate. This means that both small and new producers enjoy limited access to technical standard setting in Germany.¹⁸⁷ Because new designs frequently emerge within new companies, this system of liability grounded in collective quality standards tends to favor traditional products and inhibit innovative products.

Product Information Through Comparative Testing

Regulations governing the provision of product information also have an impact on consumer and producer strategies. Accurate product information helps consumers to ensure they get what they pay for. It also encourages companies to offer high quality products in the knowledge that consumers will recognize the additional quality and take it into account when purchasing. Yet highly accurate product information reporting may

Damages Versus New Products," *Science* 246 (15 December 1989), p 1397.

¹⁸⁶ Bernd Hohlbein, "Product Safety and Product Liability: The Relevance of Insurance," in *National and European Law on the Threshold to the Single Market*, ed. Günter Weick (Frankfurt am Main: Peter Lang, 1993), p 262.

also run counter to radical product innovation. Manufacturers that know the criteria by which consumers will be judging their products tend to invest so as to improve their products along these dimensions. Consumers, similarly, are more likely to purchase products that fit existing criteria because they can be confident about getting what they pay for. This can mean that new kinds of products that cannot be evaluated according to existing standards will be avoided. When product information about existing kinds of products is good, the relative risk of new kinds of products is high. Thus as consumers and producers become more reliant on institutional sources of technical product information, new products that do not coincide with existing information sources are unlikely to flourish. This describes the consumer information setting in Germany.

In France, product information is more impressionistic and conveyed primarily through packaging and advertising. This emphasis makes it easier for companies to vaunt totally new kinds of products than to describe complicated technical advances to existing one. Similarly, consumers are less likely to perceive detailed technical improvements than they are to appreciate totally new products. New products must be radical simply to catch the consumer's eye. Hence both consumers and producers will tend toward more radical kinds of products rather than toward refinement of traditional products.

What impact do comparative product testing organizations such as Germany's *Stiftung Warentest*, France's *INC* and *UFC*, or the American *Consumers Union* have on consumers and producers? One characteristic of comparative product tests is that they reach a relatively small segment of the population. See Figure 14. Subscriptions and news

¹⁸⁷ Günter Weick, "Product Safety and Product Liability: German Law in the European Context," in *National and European Law on the Threshold to the Single Market*, ed. Günter Weick (Frankfurt am Main: Peter Lang, 1993), p 246.

stand sales of comparative testing magazines in 1990 reached 4 percent of the population in the Netherlands and Belgium, and about 2 percent in the Scandinavian countries, England and the United States. Circulation in Germany was lower, at 1.2 percent, but this was half again as much as sales in France, Portugal, and Italy. In Spain, Greece, and Ireland, less than one half of one percent of the population reads such consumer magazines. These figures do not take into account the cost of subscription, which varies somewhat from country to country. Also, the narrow segment of the population that subscribes to or buys product test magazines is overwhelmingly middle class, with a relatively high level of education.

	1970 ¹⁸⁸	1980 ¹⁸⁹	1990 ¹⁹⁰
Norway	4.4	6.1	n/a
Belgium	1.9	4.2	n/a
Netherlands	2.0	3.4	4.0
Denmark	1.3	n/a	1.9
Sweden	1.3	n/a	1.9
USA	0.8	n/a	1.9
UK	1.1	1.2	1.7
Germany	0.4	1.2	1.2
Italy	0.2	0.2	0.9
France	0.3	1.1	0.8
Portugal	0.0	0.0	0.8
Spain	0.0	0.1	0.4
Austria	0.3	0.7	n/a

Figure 14. National Sales of Consumer Reports as a Percentage of the Total Population, 1970-1990.

¹⁸⁸ Hans B. Thorelli, and Sarah V. Thorelli, *Consumer Information Handbook: Europe and North America* (New York: Praeger Publishers, 1974).

¹⁸⁹ Business International, *Europe's Consumer Movement: Key Issues and Corporate Responses* (Business International: 1980), pp IV-5-27.

Such raw circulation figures tend to under-represent the true readership of comparative product test results. Consumer reports are often passed from one consumer to another, and many countries have encouraged alternative channels for the distribution of test results. Germany, for example, has long allowed product test results to be incorporated into product packaging and advertising. In a 1984 survey German consumers reported that they were more likely to encounter the results of *Warentest* product evaluations in any of six alternative ways than from reading the magazine *Test* itself. These more common channels were, beginning with the most pervasive, product packaging, advertisements, newspapers, personal contacts, television, and radio.¹⁹¹ Hence, in countries that do not permit product test results to be diffused via alternative channels such as product packaging and advertising, the economic impact of product tests is likely to be reduced, even when levels of circulation are the same.

A survey conducted in Europe in 1978 helps to approximate the actual impact of product tests on consumer choices. Figure 15 shows that Germans at the time reported using product test results twice as often as their French or British counterparts when deciding what to buy – 26 percent of the population in Germany compared to 13 percent in France and 12 percent in Britain, respectively. This high level of German dependence on product test results is partly confirmed by another survey of consumers of household equipment, photographic equipment, audio equipment, and men's watches that found that

¹⁹⁰ "La Politique d'information des consommateurs dans les états membres," *INC Hebdo* 729 (7 June 1991), pp 23-6.

¹⁹¹ Günter Silberer, Friedrich Förster, Hans Raffée, Wolfgang Fritz, and Harald Hilger, "Kontakte mit Testergebnissen der Stiftung Warentest und deren verwendung im Konsumentenbereich - Ergebnisse Verschiedener Umfragen," in *Warentest und Konsument: Nutzung, Wirkungen und Beurteilung des vergleichenden Warentests im*

27 percent used *Warentest* results in making their purchases.¹⁹² The difference between Germany and France and Britain is particularly striking given that 1980 circulation figures for product test magazines in the three countries are nearly equivalent in proportion to the size of the population (Figure 14). In Germany and England, 1.2 percent of the population purchased *Which* and *Test* in 1980, and 1.1 percent of consumers in France purchased either *50 Millions de Consommateurs* or *Que Choisir?* This suggests that not just the volume of comparative product tests, but also the context in which they are made and distributed, can work to determine their impact on the economy.

	Aus	Bel	Den	Ger	Fra	Ire	Italy	Lux	Hol	UK
Awareness of tests	52	47	63	65	51	25	39	48	64	49
Considerable or some trust of results	45	41	56	59	47	22	30	45	57	43
Changed buying habits	15	10	17	26	13	3	8	12	19	12

Figure 15. Consumer awareness, trust, and reliance on comparative product tests in Europe, 1978.¹⁹³

Konsumentenbereich, ed. Günter Silberer and Hans Raffée (Frankfurt: Campus Verlag, 1984), pp 25-106.

¹⁹² Günter Silberer, Friedrich Förster, Hans Raffée, Wolfgang Fritz, and Harald Hilger, "Kontakte mit Testergebnissen der Stiftung Warentest und deren verwendung im Konsumentenbereich - Ergebnisse Verschiedener Umfragen," in *Warentest und Konsument: Nutzung, Wirkungen und Beurteilung des vergleichenden Warentests im Konsumentenbereich*, ed. Günter Silberer and Hans Raffée (Frankfurt: Campus Verlag, 1984), p 69.

¹⁹³ George H. Gallop, *The International Gallop Polls: Public Opinion 1978* (Wilmington, Delaware: Scholarly Resources, 1980), p 366. The actual question read: "Have you ever heard of laboratory tests carried out to compare the price and quality of various brands of goods on sale to the public? To what extent do you think the organizations that carry out these product comparison tests and publish their results can be trusted? Speaking for yourself and your family, would you say that because of your knowledge of the results of such tests on any products, you have changed your buying habits?"

In principle, the goal of product tests is fully compatible with industry interests, because better informed consumers tend to be more loyal. Companies can have greater confidence that new technical developments they introduce into their products will be acknowledged by the public and reflected in their purchasing decisions. But these advantages also occasionally bring perils for the producer. Companies that have invested heavily in a product may lose part of their investment due to a critical product test that undermines their sales. What producers dislike is not the fact of evaluation, but the uncertainty of its impact on sales. In order to retain the benefit of an informed consumer, but avoid the problem of surprise test results, companies in both France and Germany have called for greater industry participation in the evaluation process. If companies know in advance the criteria by which their products will be evaluated, and if they are able to monitor the process of evaluation, then the results that the audience reads will not come as a surprise to industry.

The results of business participation in product testing in Germany are striking. According to a survey of producers in 1984, over two-thirds of manufacturers of products that have been tested by Warentest incorporated Warentest's own test criteria into their design of new products. Sixty-seven percent of washing machine and compact stereo manufacturers in Germany, for example, report using Warentest criteria when developing their machines.¹⁹⁴ Over half of all companies used test results to improve their products.

¹⁹⁴ Wolfgang Fritz, Harald Hilger, Hans Raffée, Günter Silberer, and Friedrich Förster, "Testnutzung und Testwirkungen im Bereich der Konsumgüterindustrie," in *Warentest und Unternehmen: Nutzung, Wirkungen und Beurteilung des vergleichenden Warentests in Industrie und Handel*, ed. Hans Raffée and Günter Silberer (Frankfurt: Campus Verlag, 1984), p 46.

One third use the test criteria of Warentest for their own quality control.¹⁹⁵ A different survey in 1994 found that 80 percent of manufacturers rely in some way or another on *Warentest* information.¹⁹⁶ Seen in this light, industry participation in comparative product testing appears to encourage a kind of post-hoc standardization that pushes producers towards technically sophisticated products that emphasize consumer usefulness.

The downside to industry participation in product testing is that it can place breaks on the speed of product innovation. This occurs in two ways. First, producers prefer to extend the duration of any product evaluation so that they can meet criticisms before the evaluations reach consumers. This helps companies to control the economic impact of negative reviews. In Germany, product tests require an average of two years from product selection to publication. While this sluggishness gives companies time to respond to poor reviews, it also means that older products with good reviews are likely to overshadow new products that have not yet been reviewed. Retailers confirm this slowing effect. In a survey of 13 department stores and 146 specialty retailers in Germany in 1984, 32 percent reported ordering outdated products that had received the 'good' *Test* score in the past, even though new versions were available. Twenty-five percent reported keeping high-scoring products in their inventory longer than usual.¹⁹⁷ One effect may be to slow the cycle time of innovation in industry.

¹⁹⁵ Hans Raffée and Wolfgang Fritz, "The Effects of Comparative Product Testing on Industry and Trade: Findings of a Research Project," *Journal of Consumer Policy* 7 (1984), p 427.

¹⁹⁶ *Die Welt*, 2 December 1994.

¹⁹⁷ "Die diffusion von Innovationen wird dadurch von Seiten des Handels verlangsamt." Harald Hilger, Wolfgang Fritz, Günter Silberer, Hans Raffée, and Friedrich Förster, "Testnutzung und Testwirkungen im Bereich des Konsumgüterhandel," in *Warentest und Unternehmen: Nutzung, Wirkungen und Beurteilung des vergleichenden Warentests in*

The second impediment derives from industry's participation in product selection and evaluation. Germany's *Warentest* does not evaluate products such as perfume and champagne, for example, because their qualities are not easily susceptible to technical measure. Yet the French UFC and INC regularly evaluate such products through consumer surveys. More significantly, producers in Germany help to set the criteria by which products are to be judged. The problem is that particularly innovative qualities of new products are unlikely to be appreciated by conventional evaluation schemes. Indeed, because many companies report incorporating *Warentest* evaluation criteria into their product design, the likelihood of radically new products even leaving the drawing board may be reduced. In other words, industry participation in the evaluation process may create a bias against new kinds of products as well as radical innovations in existing products.

Comparative product tests appear not to have the same impact on all companies. First, comparative product tests appear to create a systematic bias in favor of domestic producers. A comparison of 6 years of *Warentest* results with survey responses from product manufacturers reveals that equally positive *Test* results tend to increase demand for domestic products more than they do for foreign products (81% versus 59%). Conversely, negative *Test* scores tend to decrease demand for domestic products only half as much as they decrease the demand for foreign products (19 % versus 41%).¹⁹⁸ In sum,

Industrie und Handel, ed. Hans Raffée and Günter Silberer (Frankfurt: Campus Verlag, 1984), p 191.

¹⁹⁸ Wolfgang Fritz, Harald Hilger, Hans Raffée, Günter Silberer, and Friedrich Förster, "Testnutzung und Testwirkungen im Bereich der Konsumgüterindustrie," in *Warentest und Unternehmen: Nutzung, Wirkungen und Beurteilung des vergleichenden Warentests*

positive evaluations tend to confer greater advantage to domestic producers, while negative evaluations tend to confer greater disadvantage to foreign producers.

Second, it is commonly pointed out that comparative product tests, because they reach only a small segment of the consuming public, tend on average to advantage smaller producers.¹⁹⁹ To see why, consider the case in which product evaluations reach 5 percent of the population (*Stiftung Warentest* claims that *Test* is actually read by 5 percent of the population). Imagine now two companies: one large company that controls 30 percent of a particular product market, and one smaller company that controls only 10 percent of the same market. Taking the extreme case, in which product reviews are absolutely convincing to their readers, both companies stand to lose 5 percent of their customers from negative reviews. Hence the impact of negative reviews does not depend on company size. The impact of positive reviews, by contrast, depends on the size of the consumer population that does not already purchase a company's product. For the large company, which already controls a third of the product market, an extremely positive review could only draw in 5 percent of the remaining consumers. It would, in other words, increase their current sales by 12 percent (i.e., an additional 5% of the remaining 70% of the market equals a growth of 3.5% of the total market, which would increase their actual sales by 12%). For the small company, by contrast, a positive review could increase their sales by as much as 45 percent, assuming that it won over 5 percent of the remaining 90 percent of the market (i.e., 5% of the remaining 90% of the market equals a growth of 4.5% of the total market, which would increase their actual sales by 45%).

in Industrie und Handel, edited by Hans Raffée and Günter Silberer (Frankfurt: Campus Verlag, 1984), p 94.

Structured Markets for Consumer Goods

The cases of product liability and product testing offer a window onto the specific impact of product market regulations on producer strategies. They suggest that the contractual terms of product exchange can have a significant impact on the strategies of consumers and producers alike. Consumer decisions are guided not only by price and underlying preferences, but also by the context of information and risk that they confront in the marketplace. Where consumer risk and information are both high, consumers are likely to use the better information to purchase higher quality goods as a way of off-setting the risk they face. Conversely, where consumer risk and information are both low, consumers can safely purchase low-end goods, both because the risk they face is low, and because they lack the necessary information to confidently purchase higher quality goods.

One conclusion, therefore, is that higher quality consumer information generates a demand for higher quality goods. The emphasis in German advertising on the provision of highly accurate information, for example, works to emphasize the technical qualities of products. French advertising, by contrast, offers a broad leeway for creativity in advertisements that address the imagination but does not help the consumer to select products on objective qualities. Different national approaches to product labeling also have strong effects on producer strategies. The Produktinformation (PI) labeling system in Germany, which is run by the industrial standard setting body DIN, offers consumers information about those technical characteristics of products that producers feel are most relevant to product choice. France's AFEI system, by contrast, which is negotiated between consumers and producers, reflects consumer concerns rather than technical

¹⁹⁹ See for example, Claude Duchamp, "Les essais comparatifs," *Revue des études*

standards that industry wishes to emphasize, thereby reducing incentives for a strategy of highly technical innovation in industry.

A second lesson is that formal legal or administrative protection from product-related risk encourages customers to be more experimental in their product selection. This trend can be observed not only in product liability standards, but also in government product safety standards. In France, where the government intervenes aggressively to set and enforce minimum safety levels for all kinds of products, the greater uncertainty that normally accompanies new kinds of products is less dissuasive for consumers. French consumers thus face weaker incentives to stress technically refined, high quality products. In Germany, by contrast, where industry itself sets minimum safety standards for consumer products, risk tends to be shared more evenly between producer and consumer. In this German market setting consumers therefore face a genuine risk in purchasing entirely new kinds of products. German consumers instead prefer to purchase high quality, existing products as a way of counteracting the market risk to which they are exposed.

The impact of product market regulation on production strategies extends beyond regulations governing product risk and product information in the consumer marketplace to include many areas of direct product regulations. One example of the impact of direct product regulations is the case of terms of sale. German regulation of standard terms of sale for consumer purchases enforces a high standard of retail support to consumers purchasing goods. These rigorous contractual standards were favored by German industrial producers, who worried that downward competition among retailers interested

coopératives 186 (1977), p 81.

in limiting their responsibilities to consumers would create a market dynamic focused on price rather than on quality competition.²⁰⁰ Regulation governing terms of sale thus helped to restrict retail competition in a way that emphasized quality over price. In France by contrast, the regulation of consumer terms of sale was politically popular but met strong industry opposition. The resulting weak limitations on terms of sale appear to have generated a competition for weaker contractual standards.

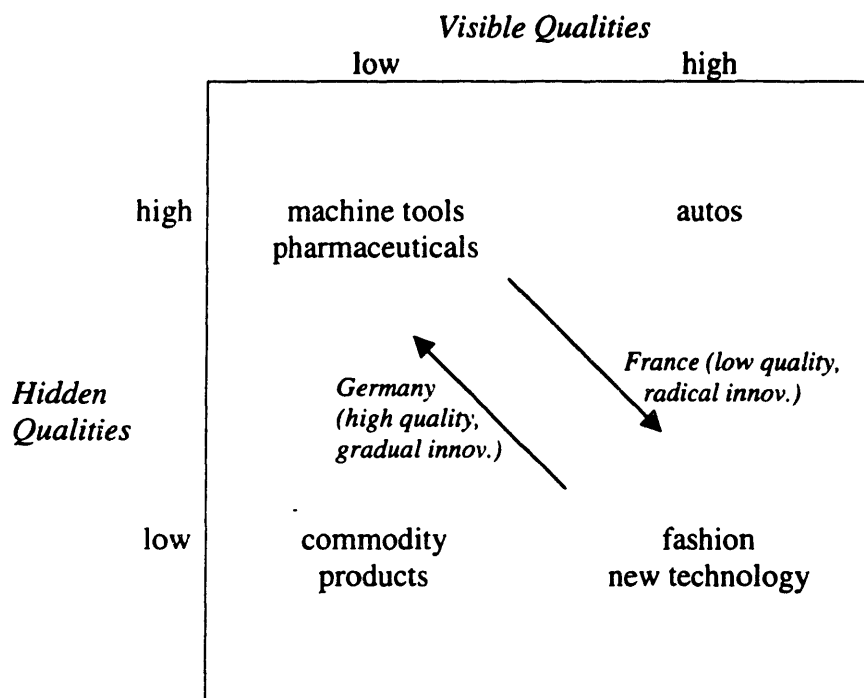


Figure 16. National Trends Toward Hidden and Visible Qualities of Products.

The findings presented in this chapter permit us to make predictions both about the sorts of products that French and German consumer regulations are likely to favor, as

²⁰⁰ Joachim Beimowski, *Zur ökonomischen Analyse Allgemeiner Geschäftsbedingungen*

well as the kind of product innovation they are likely to sponsor. See Figure 16 above. In Germany we should observe trends toward products that emphasize hidden qualities and de-emphasize visible qualities. This view suggests that German industrial success in producing highly engineered products has stemmed in part from market pressures that have pushed them in that direction. In France, by contrast, we should observe trends toward products that emphasize visible qualities and de-emphasize hidden qualities. This suggests that French production emphasis both on traditional artisanal product markets, such as perfumes and fashion, as well as on radically new kinds of product markets, such as Minitel, have their roots in part in a common emphasis on products with a high degree of visible qualities. In this light, differences in product market regulation might be viewed as an ongoing source of comparative advantage for domestic producers.

Section II. Organized Interests and Consumer Identity

During the 1970s both France and Germany came to reconceptualize the role of the consumer in their societies. Consumer interests were potentially diverse, including issues like product quality, safety, price, and selection, as well as access to political and legal recourse, and special shelter for vulnerable groups of consumers. Chapter 2 above argued that contested ideas about the consumer identity in France and Germany drove policymakers to emphasize different sets of consumer interests. But the consumer revolution in France and Germany was not simply imposed from above. New conceptions of the consumer identity also emerged through different strategies of consumer interest organization that set the context for consumer interaction with producers. This section focuses on two groups in society that helped to organize and mediate this interaction: consumer associations and retailers.

Pierre Muller has argued that the formation of any radically new social policy entails a reconceptualization of the identity of the target group.²⁰¹ While this new identity is created in part by elites within the government policy apparatus, it is also constituted through the evolving understanding of critical groups within society as a whole. In the case of consumer policies, the organizational strategies of consumer associations and of retailers in France and Germany have proved an important creative force in the elaboration of a new national consumer identity. Like consumers themselves, each of

²⁰¹ Pierre Muller, "Les politiques publiques comme construction d'un rapport au monde," in *La construction du sens dans les politiques publiques: débats autour de la notion de référentiel*, ed. Alain Faure, Gilles Pollet, and Philippe Warin (Paris: Éditions L'Harmattan, 1995), p 162.

these groups was undergoing dramatic change in the early 1970s. Consumer groups were rapidly expanding their membership and competencies. They were also shifting away from broad family themes and toward a focus on the individual consumer. Traditional retailers during this period were in decline and coming under growing economic and political pressure either to rationalize their businesses or to close shop. The number of retail stores had been falling in both France and Germany since the 1950s as new chain and discount stores expanded their customer base. At stake for the success both of expanding consumer groups and of declining retailers was a newly emerging conception of the national consumer interest.

Consumer associations pursued different organizational strategies in France and Germany. In France, consumer groups adopted a strategy of mass mobilization and radical opposition to industry. Individual consumers participated in extensive price surveys, political rallies, and product boycotts. In Germany, by contrast, the consumer movement eschewed grass-roots mobilization and instead cultivated a strong technical competency that permitted it to sit as an informed participant in detailed policy and technical committees. To understand the origins of these different policies, Chapter 4 below explores the way in which consumer groups came to interact with the government and with industry. It finds that groups in both countries adopted organizational strategies that offered them the greatest policy leverage given the existing national setting into which they were attempting to integrate.

Retailers also played an important role in defining the nature of new consumer interests in society. Faced with growing competition from large-scale retailers, smaller shop-keepers repositioned themselves in relation to consumers. In France, shopkeepers

portrayed themselves as a critical ally to consumers against the growing market control of large producers. New large stores argued that only their large purchasing power would allow consumers to negotiate on an equal footing with producers for lower priced goods. In each case retailers portrayed themselves as consumer advocates and opponents of industry. In Germany, by contrast, retailers saw themselves as an extension of the national production system. Retail workers invoked solidarity with industrial workers to successfully lobby for short store hours. Retail management has continued to set product prices based on price lists distributed by manufacturers. Thus unlike in France, where retailers allied themselves with consumers, retailers in Germany allied themselves more closely with industry and in opposition to the interests of consumers.

Chapter 4. Two Strategies of Consumer Group Organization

Consumer groups underwent a period of rapid expansion from 1970 to the early 1980s in both France and Germany. New consumer groups in both countries attempted to match their own evolving organizational strategies to newly emerging consumer concerns. Because consumer groups in the two countries emphasized different strategies of organization, they also emphasized different sets of goals, actions, and priorities for consumers. In this way, national priorities for consumer protection that were favored by consumer groups in each country did not necessarily reflect pre-existing differences in the priorities of individual consumers. Rather, their policy positions favored the organizational imperatives of the consumer groups themselves.²⁰² This chapter describes the origins of the different organizational strategies of French and German consumer groups.

Consumer groups represented an emerging set of societal interests, but the institutional setting in which they pursued their goals was by no means new. The nature of their relation to individual consumers was driven in large part by the context of their interaction with industry and with the government. In France, consumer groups took on the status of a watch-dog to industry, looking out for transgressions, mobilizing against high prices and dangerous products, and filing frequent law suits. In Germany, relations between consumer groups and producers were more amicable. German consumer groups consulted with industry, participated on technical committees, helped to enforce

competition and cartel regulations, and disseminated technical product information to consumers.

Consumer group interactions with their governments were also nationally distinctive. The French consumer movement took on a political valence. Each of the major labor unions created its own consumer group, as did some political parties. These groups were given policy access at the ministerial level, so that consumerism quickly became a new arena for political struggle. In Germany consumer groups avoided politically polarized issues and party affiliations. Their contribution to debates occurred within individual ministries rather than at the ministerial level, and was normally technical rather than political in substance. French consumer groups took on the manners of a political and social movement; German consumer groups comported themselves as a group of technical professionals with a strictly advisory role in government.

The Organizational Imperatives of Consumer Groups

The distinctive strategies of French and German consumer associations emerge from their organizational forms. Superficially the organization of consumer groups in the two countries looks similar. Both have a single peak-level consumer association, a collection of nation-wide consumer associations, and myriad regional and local affiliates. But important differences appear at each level. Germany's peak-level consumer association, the Council of Consumer Groups (Arbeitsgemeinschaft der Verbraucherverbände, or AgV) represents all other consumer groups in national debates. France's peak-level consumer association, the National Consumption Institute (Institut

²⁰² Sapolsky, Harvey M., "The Politics of Product Controversies," in *Consuming Fears: The Politics of Product Risk*, ed. Harvey Sapolsky (New York: Basic Books, 1987), p

national de la consommation, or INC), acts independently of other groups as a technical resource on consumer questions, serving the government, business, and consumers.

Whereas Germany's AgV embodies the principle of corporatism applied to consumer interests, France's INC functions primarily as a technical resource and provides no coordination or representation of other consumer groups.

The role of national-level consumer groups also differs importantly in France and Germany. In Germany, these groups are functionally distinct. Specific consumer protection goals such as consumer education, product testing, and legal defense are each taken up by a dedicated national organization that specializes solely in that area. In France, by contrast, national consumer groups tend to offer a combination of services to consumers, competing directly with one another for consumer recognition, membership, and public influence. Because they often provide competing or overlapping services, France's national-level consumer groups have commonly been criticized for their conflicts and lack of coordination.

The most striking difference between France and Germany, however, appears in consumer groups organized at the regional and local levels. In France, these groups work to mobilize consumers in order to pursue specific consumer goals. Regional and local consumer groups, which are generally affiliated with national consumer associations, participate regularly in price surveys (*relevés de prix*), consumer boycotts, and protests against specific retailers and producers. In Germany, by contrast, regional and local consumer groups (*Verbraucherverbände*) have focused their activity almost exclusively

on providing consumers with accurate technical information about individual products through a network of consumer advisory centers (Verbraucherstellen).

The different orientations of consumer groups at all levels in France and Germany emerges most strikingly from their record of individual consumer membership. The level of national consumer participation in such groups has been a source of long-standing misunderstanding in comparative studies of consumer mobilization. In 1978, Jacqueline Poelmans estimated that 45 percent of German families and 25 percent of French families were affiliated with consumer groups.²⁰³ Estimates by consumer groups themselves found that French consumer groups had a total of 2 million members in the late 1970s, and that German consumer groups had as many as 8 million members in the mid-1980s.²⁰⁴ Yet these estimates by consumer organizations contrast strikingly with what individual consumers in France and Germany have reported. In a survey conducted in 1978, consumers were asked whether they were members of organizations "...that have no links with manufacturers or traders and whose specific aim is to inform and defend the consumer." It found that a statistically insignificant number of Germans identified themselves as current members of consumer groups, thus defined, compared with 3 percent of the French population. Furthermore, only 8 percent of Germans reported that they would even be willing to become members, compared to 27 percent in France. Yet in apparent contradiction to these membership numbers, 55 percent of Germans reported having heard of this kind of consumer organization, while only 44 percent of French

²⁰³ Jacqueline Poelmans, *L'Europe et les consommateurs* (Bruxelles: Editions Labor, 1978), p 140.

²⁰⁴ "Un hypersyndicat?" *Le Nouveau Journal*, 28 Sep 1979; Hartwig Piepenbrock, "Die Legitimation der Verbraucherverbände zur Wahrnehmung von Verbraucherinteressen," in

respondents reported having heard of them.²⁰⁵ The difference in participation thus appears to stem not from different levels of consumer awareness but instead from an entirely different strategy of consumer organization in the two countries.

The range of variation in these estimates is in itself fascinating. It reveals, at the least, a high degree of uncertainty about what kinds of organizations should count as consumer organizations. Germany has a large collection of powerful family and women's groups that are members of the peak consumer association (AgV) even though their own members do not identify them as consumer groups.²⁰⁶ Moreover, the fact that so few Germans self-identify as members of consumer groups reflects a fundamental difference between the strategies of the French and German consumer movements. Whereas France's consumer associations genuinely constitute a movement, Germany's consumer associations have cultivated little grass-roots support.

Technical Specialization in the German Consumer Movement

Germany's consumer groups have discouraged individual membership at both the national and regional levels. At the national level, the peak consumer association AgV has less than 100 individual members. These are people who, as described in § 4 paragraph 1 of the by-laws of the AgV, are particularly suited to furthering the goals of the organization. These members also help to meet a legal requirement of accreditation necessary for the AgV to bring legal suits in cases of misleading advertising or unfair

Verbraucherpolitik kontrovers, ed. Hartwig Piepenbrock and Conrad Schroeder (Köln: Deutscher Instituts-Verlag, 1987), p 102.

²⁰⁵ George H. Gallup, *The International Gallup Polls: Public Opinion 1978* (Wilmington, Delaware: Scholarly Resources Inc., 1979), p 365.

sales contracts. Accredited consumer organizations must have at least 60 individual members. (France, by comparison, requires that consumer groups have at least 10,000 members in order to receive a similar legal accreditation!) Following the popular mobilizations of the late 1960s, the AgV came under public criticism for this lack of individual members. In response, the AgV in 1971 changed its name from the Working Group of Consumer Associations (*Arbeitsgemeinschaft der Verbraucherverbände*) to the Working Group of Consumers (*Arbeitsgemeinschaft der Verbraucher*). Yet no new membership was encouraged, few consumers mobilized themselves to join, and the old name was re-adopted in 1986.

One possible explanation for this lack of popular participation might be the corporatist status of the AgV. As a peak-level organization with corporatist deliberative rights, the AgV has a dual goal of coordinating the interests of its member consumer organizations, and of representing the general consumer interest to the government. Admitting individual members might therefore be seen to undermine the corporatist formula of group representation. Yet even consumer groups at the regional level do not have an extensive tradition of individual membership, and these groups are not bound by corporatist goals. Of the 11 state-level consumer centers (*Verbraucherzentralen*) in West Germany, only 5 have permitted individual membership in their by-laws, and even these have done so only in limited numbers. In Hessen, for example, the *Verbraucherzentrale* permits 6 individual members. States like Berlin and Hamburg, which do allow unlimited

²⁰⁶ Hartwig Piepenbrock, "Die Legitimation der Verbraucherverbände zur Wahrnehmung von Verbraucherinteressen," in *Verbraucherpolitik Kontrovers*, ed. Hartwig Piepenbrock and Conrad Schroeder (Köln: Deutscher Instituts-Verlag, 1987), pp 101-107.

individual membership in their consumer centers, have generally experienced only low levels of participation.²⁰⁷

Another possible explanation is the fact that German consumer groups receive their funding almost exclusively from state and federal sources and therefore have little organizational need to cultivate individual membership. National and regional consumer groups in Germany have consistently received nearly four times as much government support as have French consumer groups. See Figure 17 below. The role of this kind of government support is perceived differently in the two countries. Government funding to consumer organizations in France is viewed by many as a compensated weakness (“faiblesse compensée”) that keeps consumer groups from achieving their full organizational capacity. German government funding, by contrast, is seen as legitimate remuneration for consumer groups that have taken on duties that would otherwise have to be performed by the state.²⁰⁸ Moreover, while German government funding to consumer groups is indeed higher, there is also a strong variation in funding levels across Germany’s federal states. Much of government spending on consumer associations comes from state-level governments, with different states placing more or less emphasis on consumer protection. See Appendix 3. Bavaria in 1980 spent only 0.19 DM per person on consumer groups, compared to 1.28 DM per person in Bremen.²⁰⁹ Hence while some federal states far outspent France on consumer groups, others also spent far less per

²⁰⁷ Hartwig Piepenbrock, “Die Legitimation der Verbraucherverbände zur Wahrnehmung von Verbraucherinteressen,” in *Verbraucherpolitik kontrovers*, ed. Hartwig Piepenbrock and Conrad Schroeder (Köln: Deutscher Institut-Verlag, 1987), pp 101-107.

²⁰⁸ Alexandre Carnelutti, “Consommation et société,” *Revue française d’administration publique* 56 (October-December 1990), p 584.

²⁰⁹ Handbuch der Verbraucherinstitutionen.

capita. Yet there is no sign that consumer groups in the less generous states attempted to pursue more extensive grass-roots organizational strategies.

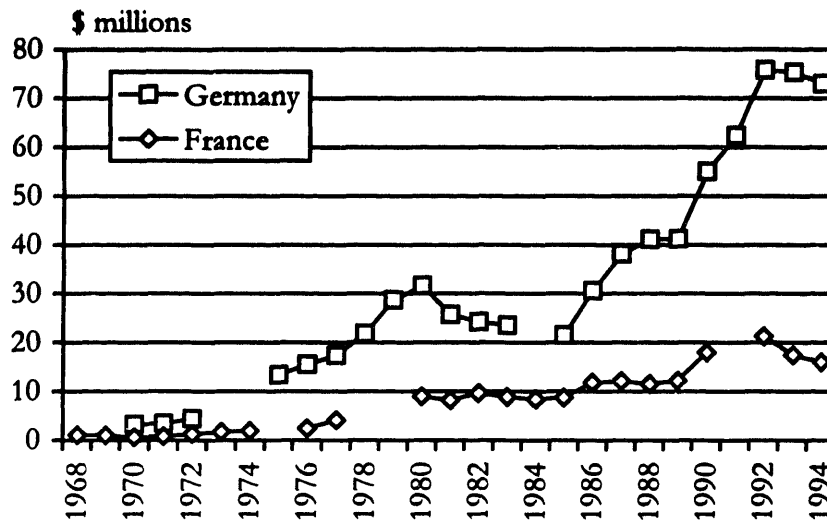


Figure 17. Government support to consumer organizations in France and Germany, 1970-1990 (millions of US dollars).²¹⁰

The dearth of individual consumer group membership in Germany has less to do with the corporatist structure of the consumer movement, or with the level of government funding it receives, than with the way in which consumer groups interact with the government and with industry. The nature of this interaction is evoked in two common criticisms of Germany's low-membership strategy. The first criticism is that consumer groups without individual members do not have the popular legitimacy to negotiate directly with industry on behalf of consumers. In the absence of mobilization it is difficult to focus consumer interests on particular issues, so that many consumer interests, which

are necessarily diffuse interests, are likely to go unheeded.²¹¹ Yet there are signs that this was also precisely the goal of both the government and of business. The CDU and SPD both opposed the use of individual consumer members out of concern for the ramifications of a politicized consumerist agenda. Industry was also strongly opposed to a politically-powerful consumer movement, primarily out of concern that aspects of production would become politicized and then regulated. Indeed the centrist FDP was the lone political voice advocating individual members in consumer groups.²¹²

A second criticism of Germany's low-membership strategy was the concern that the interests represented by groups without members were unlikely to reflect the real concerns of working-class consumers. These critics have lambasted German consumer groups, for example, for a lack of creativity in the strategies they have employed for defending the interests of consumers.²¹³ Consumer groups, they have argued, follow a conformist agenda that risks to diverge from actual consumer interests. Yet within the German institutional context, this lack of representation was also commonly understood to be a desirable outcome. Because individual members in consumer groups were likely to be of a higher socio-economic level, it was feared that their participation would skew the representation of consumer interests in that direction. Consumer groups themselves argued that admitting individual members into German consumer organizations could

²¹⁰ Compiled by author, data incomplete.

²¹¹ Roberta Sassetilli, *Power Balance in the Consumption Sphere: Reconsidering Consumer Protection Organisations* (Florence: European University Institute Working Paper, 1995).

²¹² Christine Czerwonka, and Günter Shöppe, "Verbraucherpolitische Konzeptionen und Programme in der Bundesrepublik Deutschland," *Zeitschrift für Verbraucherpolitik* 1/3 (1977), pp 286-287.

bias their representation towards the interests of the middle class.²¹⁴ The consumer center of Northrhein Westfallen wrote in 1985: "In the context of socially oriented consumer work we must consider the problems and information needs of specific minorities that are possibly not represented, or even opposed, by the majority or average citizen."²¹⁵

German consumer groups instead cultivated a technically sophisticated staff and leadership that have enabled them to advise consumers on technical dimensions of product choice and to consult on committees within industry. These staff members, usually hired with technical training, generally have neither interest nor facility in grass-roots mobilization. Consumer groups at the national level are functionally specialized and tend to hire and train employees in their particular area of specialization. The Stiftung Warentest, for example, hires employees with technical training suited to organizing and analyzing the results of product testing. Consumer groups at the local and regional level (Verbraucherzentralen) also focus their activities primarily on providing accurate product information to consumers. The core of this activity is a system of consumer information offices (Verbraucherstellen) that provide product advice free of charge to the general public. Consumers interested in buying a camera, for example, can call or visit a consumer center to discuss possible options, specifications of particular brands and models, and considerations that they should take into account when purchasing. The

²¹³ Reinhard Rock, Bernd Biervert, and Wolf F. Fischer-Winkelmann, "A Critique of Some Fundamental Theoretical and Practical Tenets of Present Consumer Policy," *Zeitschrift für Verbraucherpolitik* 4/2 (1980), p 98.

²¹⁴ Christine Czerwonka, Günter Schoppe, and Stefan Weckbach, *Der aktive Konsument: Kommunikation und Kooperation* (Göttingen: Verlag Otto Schwarz, 1976), p 193.

²¹⁵ "Im Bereich sozialorientierter Verbraucherarbeit müssen Probleme und Informationsbefürfnisse spezifischer Minderheiten berücksichtigt werden, die möglicherweise von der Mehrheit, also auch vom Bevölkerungsdurchschnitt, nicht

results of comparative product tests are distributed for free to visiting consumers. These advisory centers have proved very popular. Between 1973 and 1974 alone, the number of consumer visits to these centers grew by 30 percent from 540,000 to 700,000.²¹⁶ By 1995 total instances of consumer advice by the Verbraucherstellen across Germany—including visits, phone conversations and correspondence—exceeded 4 million per year.²¹⁷

Information centers in Nord-Rhein Westfalen alone were contacted by consumers 860,000 times.²¹⁸

The advice offered by these centers has been viewed favorably both by consumers and by producers. In a 1984 evaluation of consumer centers conducted for the Verbraucherzentrale in Hamburg, 200 visitors to their centers were surveyed and a further 300 were given surveys to complete 6 weeks later.²¹⁹ Of these visitors, 35 percent reported that they were fully satisfied (“voll und ganz zufrieden”) with the advice they had received; 66 percent reported that they were at least partly satisfied (“teilweise zufrieden”). For 29 percent of respondents, this was their first visit to a Verbraucherzentrale. The largest portion sought information about small and large household equipment (45.6 %), with another sizeable group interested in phonographs and televisions (23 %). Only 3.7 percent were interested in information about services. Over 90 percent said they would go back to the consumer center for future purchases. Only 3.7 percent said they would not return. Those surveys that were returned six weeks

empfunden oder sogar konträr beurteilt werden,” in *Die Verbraucherberatung in Nordrhein-Westfalen aus Sicht der Bevölkerung 1984/5* (Bielefeld, 1985), p 1.

²¹⁶ Kommission für wirtschaftlichen und sozialen Wandel, *Wirtschaftlicher und sozialer Wandel in der Bundesrepublik Deutschland: Gutachten der Kommission* (Göttingen: Verlag Otto Schwartz & Co., 1977), p 417.

²¹⁷ Calculated by author from annual reports of consumer centers.

²¹⁸ Verbraucherzentrale NRW, *Das Jahr '95* (1996), p 5.

later showed that 44 percent of consumers bought the product they had sought advice about.²²⁰

Producers also favored consumer advice centers, precisely because they helped to educate consumers about new products. Albrecht Schultz, former member of the board of directors at Braun, explains that brand name manufacturers had a strong interest in consumer advising because accurate information helped keep consumers from being disappointed, thereby encouraging repeat purchases.²²¹ Moreover, content analysis of advice given at consumer advisory centers shows that price is rarely if ever discussed, and that advisors working at the centers also rarely mention where products can be bought cheaply.²²² Hence advice from the centers informs about quality without emphasizing the need to shop for lower prices.

Popular Mobilization in the French Consumer Movement

Unlike in Germany, consumer groups in France have been the focus of a high level of popular interest and membership. Surveys confirm that French consumers have shown enthusiasm for consumer associations as a whole. A 1971 survey conducted by the National Consumption Institute (INC) found that 20 percent of French over 15 years old

²¹⁹ 160 responded, for a response rate of 53%.

²²⁰ Lothar Maier, "Zur Wirksamkeit der Produktberatung in Verbraucherzentralen: Ergebnisse einer Umfrage," in *Die Qualität von Beratungen für Verbraucher*, ed. Volkmar Lübke and Ingo Schoenheit (Frankfurt: Campus Verlag, 1985), p 189.

²²¹ Albrecht Schultz, "Das Interesse der Industrie an adäquater Beratung des Verbrauchers durch Handel und Verbraucherberatungsstellen," in *Die Qualität von Beratungen für Verbraucher*, ed. Volkmar Lübke and Ingo Schoenheit (Frankfurt: Campus Verlag, 1985).

²²² Udo Beier, "Schwachstellen einer mit vergleichenden Warentestberichten arbeitenden Produktberatung: Eine Übersicht über empirische Untersuchungsergebnisse," in *Die Qualität von Beratungen für Verbraucher*, ed. Volkmar Lübke and Ingo Schoenheit (Frankfurt: Campus Verlag, 1985), p 189.

said they were “ready to belong” to a consumer organization.²²³ Another poll three years later found that 75 percent of the population felt that the government should support consumer organizations and give them input into government policy making.²²⁴ This high level of popular support has been maintained through today. A 1996 survey found that 74% of all French pay attention to the recommendations of consumer organizations.²²⁵

French consumer groups experienced an enormous growth beginning in the early 1970s. With this growth came a fragmentation of organizations and interests that has become an enduring feature of the French consumer movement. There are about 13 major national consumer associations in France today. In general, these groups emerged from four different sources. Family groups that arose during the Vichy occupation under the Pétainist mantra of “travail, famille, patrie” evolved in the 1970s towards consumer concerns. Trade unions in the 1970s began to form their own consumer associations as they realized that consumerist politics were in effect class politics by other means. The French cooperative movement also took on the consumer interest as their own, publishing for a short time the results of comparative product tests in their publication *Labo-coop*. Finally, a small group of organizations, including the Federal Union of Consumers (UFC) emerged in the late 1960s with a broad constituency and an exclusive focus on the consumer interest. Many of these groups published their own consumer protection magazines. The total circulation of these publications grew to over 2 million by 1980. See Appendix 2.

²²³ “Prets a adherer.” Dominique Pons, *Consomme et tais-toi* (Paris: Epi, 1972), p 97.

²²⁴ Gérard Cas, *La Défense du Consommateur* (Paris: Presses Universitaires de France, 1975), p 82.

²²⁵ Bénédicte Epinay, “Le lobby consommateurs veut monter au filet: ses moyens le contraignent en fond de court,” *Les Echos*, 3 October 1996.

<i>family groups</i>	<i>trade unions</i>	<i>cooperative movement</i>	<i>dedicated consumer groups</i>
CNAPF CNFR CSF FFF UFCS FNAFR APF CSCV UNAF	AFOC ASSECO-CFDT INDECOSA-CGT ORGECO	FNCC Labo-Coop	ANC ²²⁶ UFC

Figure 18. Major National Consumer Associations in France, 1970-1980.

Beginning in 1968, France also experienced a rapid growth in local consumer unions affiliated with the national associations and oriented towards grass-roots mobilization. The UFC, for example, which had acted primarily as an information center during the 1960s, began to take on affiliated local unions beginning in 1971.²²⁷ Over the next ten years the number of these local unions grew to 170, and the number of union militants grew to 50,000.²²⁸ See Figure 19 below. This level of mobilization allowed the UFC and other consumer groups with similar grass-roots support to undertake public efforts unimaginable in the German context. In 1979, for example, 110 of the local UFC affiliates were able to survey 27,735 stores in order to assess compliance with price labeling laws.²²⁹ This sort of mobilization has been a central component of French

²²⁶ created by the Union Nationale des Jeunes Consommateurs, headed by Henry Estingoy.

²²⁷ Michel Wieviorka, *L'Etat, le Patronat, et les Consommateurs: Etude des mouvements de consommateurs* (Paris: Presses Universitaires de France, 1977), pp 71-73.

²²⁸ Josée Doyère, "Les associations de consommateurs," *Le Monde Dimanche*, 16 November 1980.

²²⁹ "Une enquête de l'Union fédérale des consommateurs," *Le Monde*, 12 Dec 1979.

consumer group activities. But such activism has often come at the cost of technical expertise. Jean-Claude Jacquet, a consumer representative to France's National Council on Consumption, acknowledged the need for greater technical competency among France's consumer representatives, but warned that this competency must "be grounded in a dense associational life, at the risk of failing to translate the real hopes and needs of consumers."²³⁰

	1974 ²³¹	1976 ²³²	1978 ²³³	1980 ²³⁴
local unions	28	80	117	170
members	5,000	20,000	32,000	50,000

Figure 19. Growth in local consumer unions affiliated with the UFC.

The organization of French consumer groups, grounded in a competition over the provision of consumer services and with a strong emphasis on consumer mobilization, has worked to cultivate a distinctive identity for the French consumer as politically active and economically threatened. As in Germany, the organizational priorities of consumer groups in France derived from the institutional context in which they evolved.

Competition among consumer groups for broader legitimacy pushed them towards efforts

²³⁰ "s'appuyer sur une vie associative intense, sous peine de ne plus pouvoir traduire les aspirations et besoins réels des consommateurs." "Le financement des organisations de consommateurs," *Inc Hebdo* 583 (26 February 1988), p 5.

²³¹ Jean-Marc Biais, "L'Etat s dépense pour les consommateurs," *La Vie Française*, 30 January 1978.

²³² "C'est Schweppes!" *Rouge*, 1 Dec 1976.

²³³ Claude Boris, "Les consommateurs entrent en politique," *Politique Hebdo*, 5 Feb 1978.

²³⁴ Josée Doyère, "Les associations de consommateurs," *Le Monde Dimanche*, 16 November 1980.

at consumer mobilization. This kind of mobilization focused on protest actions, and the consumer identity in France came to be identified with these activities.

Consumer Groups in Institutional Context

Consumer groups emerging in France and Germany had different organizational priorities, and these differences led them to emphasize different kinds of consumer interests. This contributed, in turn, to different popular conceptions of the consumer identity in the two countries. Why, it should be asked, did French and German consumer groups pursue such different organizational goals? The answer lies in the pre-existing institutional setting in which these groups grew and matured. In particular, the political, legal, and industrial context in which consumer groups functioned worked to wean them in ways that guided their organizational interests.

The Political Context of Consumer Activism

French consumer groups saw politics as a route to organizational expansion. Political parties mobilized around consumer issues. The government worked to incorporate consumer interests into policy formation. Soon the political spectrum came to be represented in miniature within the consumer movement itself. By contrast, Germany's consumer groups shied away from politicizing the consumer interest. Because both the peak consumer group, the AgV, and the regional consumer associations (Verbraucherzentralen) had an effective organizational monopoly on engaging the consumer interest, they appear to have feared that a move towards a more radical politics of consumption would undermine their status. One consequence was that French consumer groups were willing to engage heavily in politics, while German consumer

groups have avoided an explicitly political consumerist agenda. The details of government interaction with consumers will be elaborated in the case studies below, but some generalizations can be made about the political context in which consumer groups have matured in France and Germany.

The French government has undergone a number of institutional changes designed to integrate consumer interests into government policymaking. The first such move was the creation of the National Consumption Council (Conseil national de la consommation, or CNC) on 19 December 1960, at the instigation of Jean Fontanet.²³⁵ It was created to pursue three goals: to create a meeting place for consumers and a forum for them to interact directly with the government, to contribute to the growing cohesion of consumer groups, and to bring together ministries whose work bore on consumption. Composed of fourteen ministerial members and fourteen consumer representatives, the CNC met every six weeks.²³⁶ The fact that the newly created CNC incorporated family groups (UNAF, UFCS, CNAPF) is generally thought to have made it more difficult for consumer groups to consolidate and become professional, contributing to the later fragmentation of the French consumer movement.²³⁷

Beginning in 1976 with the creation of the Secretariat of State for Consumption within the Economics Ministry, consumer interests have generally been represented within the French government. The first Secretariat, led by Christiane Scrivener, focused on employing government regulatory powers to provide better information to consumers.

²³⁵ Jacques Dubois, *Les structures administratives de la consommation* (Doctoral Thesis. Paris: Université Paris II, 1984), p 216.

²³⁶ Marcel Garrigou, *L'Assaut des consommateurs pour changer les rapports producteurs - vendeurs - consommateurs* (Paris: Aubier-Montaigne, 1981), pp 32-33.

“On the general economic plan, consumers cannot play a decisive role in assuring that production is better adapted to their real needs unless they are better informed and are better able to express themselves. Their information will eventually condition the orientation of our economy.”²³⁸ Scrivener’s proposals reflected traditional *étatist* solutions to new consumer problems. Consumers with grievances against businesses could submit these to the government sponsored “postal box 5000,” which helped to resolve conflicts. A newly created Committee on Abusive Clauses studied consumer contracts in order to eliminate contract clauses that worked to the disadvantage of consumers. And on 28 February 1977 the government created an interministerial group to coordinate consumer politics.²³⁹

In 1978 the Secretariat of Consumption was abolished, but the new Minister of Economics and Finance, René Monory, favored a strong consumerist agenda and even referred to himself informally as the “Minister of Consumption.” Monory argued that inflation might be held down if the 2 million members of consumer organizations joined under one umbrella organization.²⁴⁰ In 1979 he encouraged the formerly neutral National Consumption Institute (INC) to develop “a consumer counterforce to counterbalance the

²³⁷ Jacques Dubois, *Les structures administratives de la consommation* (Doctoral Thesis. Paris: Université Paris II, 1984), p 274.

²³⁸ “Sur le plan de l’économie générale, les consommateurs ne pourront jouer un rôle décisif pour que l’outil de production soit mieux adapté à leurs besoins réels que s’ils sont mieux informés et s’ils peuvent mieux s’exprimer. Leur information conditionne à terme l’orientation même de notre économie.” Christiane Scrivener, “Le droit des consommateurs à l’information,” *Allocutions ministérielles*, Secrétariat d’Etat à la Consommation (11 October 1976), p 2.

²³⁹ Marie-Elisabeth Bordes, and Sylvie George, *Politique de la Consommation dans la Communauté Européenne*, (Mémoire, Université de Droit, d’Économie et de Sciences Sociales de Paris, 1982), p 45.

²⁴⁰ “Un hypersyndicat?” *Le Nouveau Journal*, 28 Sep 1979.

technical skills and advertising of producers.”²⁴¹ In line with this goal, he expanded government funding to consumer organizations. This move was adamantly opposed by the largest employers’ association, the CNPF, on the grounds that the INC should not combine the rolls of information provision and market control.

Despite their fragmentation, French consumer groups did manage to act together in order to intervene in government policy making. As early as the late 1960s consumer groups participated in the Consumption Committee of the Sixth French Plan.²⁴² On 8 May 1972, eleven of France’s national consumer associations created the Coordination Committee for Consumer Organizations (Comité de coordination des organisations de consommateurs, or CCOC). The group was not long-lived, but they did push for consumer protection legislation – permitting a 7 day grace period for door-to-door sales, and allowing advertisements to include company names – that was eventually enacted.²⁴³ On 29 April 1975 the same eleven consumer groups published a comprehensive proposal for a new package of consumer legislation.²⁴⁴ In a 30-page charter they called for the abolition of the National Consumption Institute (INC) and the creation in its place of a technical organization dominated by consumer representatives and oriented towards serving consumer associations. They also proposed the creation of a High Council on Innovation and Safety (Conseil supérieur de l’innovation et de la sécurité) where consumers, professionals and government officials could meet on an equal footing in

²⁴¹ "un contre-pouvoir consommateur [pour] contrebalancer la technicité des producteurs et l'action de la publicité." Gisèle Prevost, "Consommation: 'l'agressivité' de l'INC préoccupe de plus en plus le CNPF," *Les Echos*, 28 May 1979.

²⁴² Claude Romec, "Organisations de consommateurs," *Reforme*, 15 Dec 1975.

²⁴³ "Onze associations nationales créent un conseil de coordination des organisations de consommateurs," *Le Monde*, 16 May 1972.

order to give consumer input into product materials and production, to detect so-called “false innovations,” and to avoid the waste that resulted from them. A special tax on industry would finance commissions to promote consumer education and competition policy.²⁴⁵ These initiatives were not in the end successful, but the effort did introduce consumer groups to high politics and they would continue to speak out in the political arena.

A common denominator of German consumerism was the reticence of consumer groups to advocate new consumer protections.²⁴⁶ Moves for reform came instead from a combination of business interests, political parties, government bodies, and experts in the field. Political parties created specialized consumer working groups. First the SPD, then the CDU, created working groups on consumer politics within their parties. The SPD group was led by Anke Riedel-Martiny, the CDU group was led by Walter Picard.²⁴⁷ New initiatives sometimes created unusual alliances. The centrist Free Democratic Party, for example, allied with the German Confederation of Labor (DGB) to call for the creation of a consumer academy.²⁴⁸ The peak industry association, the Bund Deutscher Industrie (BDI), called for the government to support better consumer information

²⁴⁴ Marcel Garrigou, *L'Assaut des Consommateurs pour changer les rapports producteurs - vendeurs - consommateurs* (Paris: Aubier-Montaigne, 1981), p 238.

²⁴⁵ "Onze organisations d'usagers proposent une charte nationale," *Le Monde*, 30 April 1975.

²⁴⁶ Heribert Schatz, "Consumer Interests in the Process of Political Decision-Making: A Study of Some Consumer Policy Decisions in the Federal Republic of Germany" *Journal of Consumer Policy* 6 (1983), p 388.

²⁴⁷ Wolfgang H. Glöckner, "Aktion 'Gelber Punkt' – Ins Rote verfälscht," *Vorwärts*, 18 October 1973.

²⁴⁸ Christine Czerwonka, and Günter Shöppe, "Verbraucherpolitische Konzeptionen und Programme in der Bundesrepublik Deutschland," *Zeitschrift für Verbraucherpolitik* 1/3 (1977), p 286.

through improved consumer education and more consumer advisory centers.²⁴⁹ Indeed the peak consumer group, AgV, had been so passive in its support of new consumer policies that the CDU, pushing for office in 1981, criticized it as an organization “whose services are so little demanded in the free market that it must be supported almost exclusively through state support.”

The AgV appears to have feared that any move into politics would undermine its own authority. Whereas the AgV prior to 1969 had called for consumers to be represented by their own consumer ministry, they changed their position in the 1970s to favor a consumer advisory role within existing ministries.²⁵⁰ In 1973, for example, the Federal Cartel Office (Bundeskartellamt, or BKA) called for competition and consumer policy to be merged into a single national office modeled on the US Federal Trade Commission. While this would have increased political scrutiny of consumer issues, the AgV opposed the project, both for fear that they would lose control of the consumer agenda, and because they genuinely doubted the utility of one central office in furthering consumer interests.²⁵¹ Instead, individual ministries began creating committees to consider consumer issues. The Economics Ministry created a Consumer Advisory Council (Verbraucherbeirat) in 1972. This Consumer council included 6 members of consumer associations, 3 government representatives, 3 academics, 3 union

²⁴⁹ BDI, *Jahresbericht* 1973/4 (Köln 1974), p 45.

²⁵⁰ Klaus Wieken, *Die Organisation der Verbraucherinteressen im internationalen Vergleich* (Göttingen: Verlag Otto Schwartz & Co., 1976), p 27.

²⁵¹ Eberhard Guenther, “Verbraucherpolitik, ziele, Mittel und Traeger,” *Marktwirtschaft* 2 (1973), p 4.

representatives, and 1 member of the press.²⁵² The Ministry of Food, Land, and Forest created its own Consumer Committee (Verbraucherausschuss) in 1975.²⁵³

The Legal Context of Consumer Activism

The legal framework in France and Germany has formed an important context for the manner in which consumer groups came to interact with industry. In both countries the law shaped the way in which consumer groups could represent collective consumer interests. In neither country was the law particularly friendly to the consumer interest. But whereas German law worked to contain and structure the kinds of opposition that consumer groups could raise against industry, French law became the arena in which consumer groups proved their autonomy and mettle.

France and Germany have both encouraged legal action by consumer groups against transgressions by industry, but the nature of the legal action differs in the two countries. Neither country yet allows class action suits as employed in the United States. Each has instead granted limited rights to consumer groups to protect consumers. In Germany, collective suits (Verbraucherverbandklagen) are limited to two areas of law in which consumer group legal actions have been explicitly permitted. The 1965 amendment to the Law on Unfair Competition (Gesetz über unlauteren Wettbewerb, UWG) established a high threshold for misleading advertising and empowered consumer groups to help enforce that standard. Approximately 1,000 UWG cases were brought by

²⁵² "Zwei DGB-Vertreter im Verbraucherbeirat," *Informations Dienst* (Düsseldorf: Bundespressestelle des Deutschen Gewerkschaftsbundes, 11 August 1982), pp 1-2.

²⁵³ Katherina Focke (Bundesminister für Jugend, Familie und Gesundheit), "Verbraucherpolitik in der Marktwirtschaft," *Bulletin des Presse- und Informationsamtes der Bundesregierung* 65 (30 May 1973), p 645.

consumer groups between 1965 and 1977, and 516 were brought in 1979 alone.²⁵⁴ The 1976 law on standard terms of sale (Gesetz über Allgemeine Geschäftsbedingungen, AGB) also granted consumer groups the right to file suits against companies employing unfair terms of sale. A smaller but important number of AGB cases are brought by consumer groups.

These laws, while drawing on the institutional capacities of consumer groups to enforce certain consumer policies, did little to extend the legal action of consumer groups in general. First, the collective legal suit was not extended to other kinds of legal action. Hence consumer groups could not weigh in on liability suits, warranty disputes, or other kinds of consumer grievances. This restriction was unusual from a legal perspective in the German context since Germany, unlike France, has a long tradition of recognizing group legal suits (Verbandklage), at least as that has applied to labor and producer associations. Moreover, consumer group legal actions were restricted to blocking illegal activity, but did not, except under extraordinary circumstances, extend to compensating consumers for losses.²⁵⁵ Neither of these provisions worked to generate legal dynamism within the consumer movement.

Moreover, it is interesting to note that until 1980, consumer advisory centers faced a statutory limitation on the kinds of legal advice that they could offer consumers. While they were allowed to broach matters bearing on contract law, Germany's Law on Legal Consultation (Rechtsberatungsgesetz) did not permit them to give free advice on

²⁵⁴ European Consumer Law Group, *Reports and Opinions -- September 1977-March 1984* (Louvain-la-Neuve, Belgium: Cabay, 1984), 278-279.

²⁵⁵ Individuals received compensation only if it could be shown that they would not have purchased the product if the company had acted lawfully – a burden of proof that was in practice rarely met.

tort law. Because product liability in Germany falls primarily under tort law, advisory centers could often not discuss legal recourse for product damage. Even those consumer associations charged explicitly with pursuing legal action against companies that contravened consumer laws, such as the Consumer Protection Union (Verbraucherschutzverein, VSV), were not allowed to give legal advice to consumers, since such free legal advice was prohibited.²⁵⁶ A 1980 change in the statutory lawyer fee scale (Rechtsanwaltsgebührenordnung, BGB I, 1507) made possible a more liberal treatment of consumer advisory centers under the Rechtsberatungsgesetz.²⁵⁷

In France, the 1973 loi Royer granted consumer groups the right to represent consumer interests in the courts, but this right was quickly curtailed by a restriction on the kinds of damages that they could claim. Unlike class action suits pursued on behalf of consumers in the United States, French consumer groups were not permitted to act on behalf of specific consumer interests. Instead, they were permitted to recover only for damages to the general interests of consumer organizations. In practice, consumer groups have often pursued their own cases alongside individual consumer cases in order to offer legal and technical support. One consequence of this limitation is that French consumer groups were unable to rely on high legal damages and fees to defray the costs of their legal actions, as US consumer groups commonly do. Of the 1,300 lawsuits brought by consumer associations from 1973 to 1982, 87 percent resulted in rewards of less than

²⁵⁶ Armin Schoreit, "Zur Rechtsberatung des Verbrauchers in der Bundesrepublik Deutschland," *Journal of Consumer Policy* 1/2 (1977), p 118.

²⁵⁷ Norbert Reich, "Rechtsberatung im Verbraucherschutz" *Zeitschrift für Rechtspolitik* 3 (1981), pp 53-54.

5,000 francs.²⁵⁸ Moreover consumer groups wishing to pursue legal suits had to be accredited by the French government. Accreditation required proof that a consumer group had at least ten thousand members and that consumer protection was its primary function. This high threshold gave consumer groups strong incentives to attract individual members. By 1979, 12 national and 62 regional consumer groups had been accredited to pursue civil actions. Yet even given this high level of accreditation, the 450 consumer groups cases filed in 1979 generated combined damages of only 440,000 francs.²⁵⁹

Consumer group litigation remains a staple of French consumer association activity. In a 1989 survey of French consumers, 76 percent reported that consumer associations were either very or fairly accessible for help with consumer litigation, whereas only 29 percent felt that the government administration was equally capable. And whereas only 2 percent of respondents reported that they personally would rely on the government for support with a consumer grievance, 17 percent reported that they would use consumer associations.²⁶⁰

In December 1985 the National Consumption Council (CNC) considered the creation of a true class action suit ("action de groupe"). The move was proposed by the new State Secretariat for Consumption, Henri Emmanuelli. Industry representatives on the CNC opposed the move, citing the experience of other countries, notably the United States, that employ class actions suits. "Can we support a project that will be only a lure

²⁵⁸ Anne Morin, "L'Action d'intérêt collectif exercée par les organisations de consommateurs avant et après la loi du 5 janvier 1988," *Group Actions and Consumer Protection*, ed. Thierry Bourgoignie (Brussels: Story Scientia, 1992), p 65.

²⁵⁹ European Consumer Law Group, *Reports and Opinions -- September 1977-March 1984* (Louvain-la-Neuve, Belgium: Cabay, 1984), pp 272-273.

²⁶⁰ "Les Français et les organisations de consommateurs," *Inc Hebdo* 633 (7 April 1989), pp 9-13.

and source of disillusion for the consumer and that will entail grave economic consequences for French enterprises?"²⁶¹ After the elections of 1986, the new Minister of Consumer Affairs, Jean Arthuis, expressed support for class action suits, but on the condition that it be imposed at the European level.²⁶² Given the probable preferences of other European countries, especially Germany, this eventuality appears unlikely.

Outside of the courtroom, consumer groups in both countries have resorted to boycotts to protest dangerous or highly-priced goods. French boycotts have been greeted with strong popular acclaim, and often with support from French trade unions. But if France's experience with product boycotts has been extensive, it has not always been successful. In 1978, for example, the UFC called for a boycott of the Shell company in response to the wreck of the Amoco-Cadiz oil tanker. The courts found in Shell's favor, but fines were eventually suppressed by the appeals courts.²⁶³ Consumer groups were also commonly more focused on confrontation than on technical analysis. On 16 June 1975, for example, the Villejuif Association populaire de familles (APF) distributed brochures to a hospital warning, based on a report from the Ministry of Health, that Schweppes added the chemical E330 to their beverages. Schweppes sued the group on the grounds that E330 was simply the designator for citric acid.²⁶⁴

²⁶¹ "Peut-on en effet soutenir un projet qui ne sera pour le consommateur qu'un leurre et une source de désillusion et qui va entraîner de graves conséquences économiques pour les entreprises françaises?" "Action de groupe," *Consommateurs Actualités* 494 (31 January 1986), p 18.

²⁶² Agnès Chambraud, Patricia Foucher, and Anne Morin, "The Importance of Community Law for French Consumer Protection Legislation," *Journal of Consumer Policy* 17 (1994), p 29.

²⁶³ La cour d'appel confirme l'interdiction du boycottage des produits Shell," *Le Monde*, 15 June 1978.

²⁶⁴ "C'est Schweppes!" *Rouge*, 1 Dec 1976.

German product boycotts were less common than their French counterpart, but they also typically achieved a greater level of success, especially in cases of dangerous products or excessive prices. In 1971 a boycott against real estate agents for the excessive fees they charged (Vorab-Maklergebühren), in which consumers stood before real estate offices and handed out leaflets to potential customers, resulted in a law one year later making such fees illegal. The first large-scale consumer boycott, which occurred in September 1973 in protest against the high price of meat, was supported by trade unions and was relatively successful.²⁶⁵ A 1980 boycott against estrogen in veal, in which France also participated, was the first in which environmental and consumer protection groups worked together. Nestlé and Lacroix took their veal products off the market.²⁶⁶ In 1982, the Consumer Center of Stuttgart launched a boycott of Aral and BP because of their high oil prices, and managed to have the prices reduced.²⁶⁷

Unlike French courts, the German legal system has been more permissive with boycotts that do not have explicitly competitive goals. This difference in the courts' stances toward consumer boycott drew in part from the perceived technical competency of these groups. In Germany, where consumer centers had cultivated a high level of familiarity with product markets, boycotts they launched were typically well-informed and targeted at flagrant transgressions. In France, where consumer groups had little technical expertise, courts sided systematically with business in boycott cases, although

²⁶⁵ Wolfgang H. Glöckner, "Verbraucherpolitik im Aufwind," *Die Neue Gesellschaft* 5 (May 1974), p 424.

²⁶⁶ "Autofahrer gegen ölkonzerne -- Boykott letzte Waffe der Konsumenten," *Frankfurter Rundschau*, 24 July 1982.

²⁶⁷ Wolf Renschke, "Der Boykott -- sein Möglichkeiten und sein Grenzen," *Verbraucher & Markt '82* (Bonn: 4 November 1982).

higher courts typically reduced fines to a token 1 franc on appeal.²⁶⁸ These court conflicts, which became increasingly common between French consumer groups and industry, grew into a symbol of autonomy for these groups, advertising that they had not been co-opted and were at the leading edge of the consumer struggle.

The Industrial Context of Consumer Activism

Not all interaction between consumer groups and producers was conflictual. In tandem with the mobilization of consumer groups, the 1970s also saw the rise of extensive collaborations between producers and consumers. French and German consumer groups worked together with industry to elaborate standards for product sales and design that would be mutually acceptable. Yet, again, the nature of this collaboration was different in the two countries. In France, consumer groups negotiated directly with industrial sectors, and later with individual producers. In Germany, by contrast, consumer groups supported technical representatives to sit on product design committees in which consumer goods were discussed. The legitimacy of Germany's consumer representatives derived from their technical knowledge and ability to interact with industry experts. The legitimacy of French consumer groups derived precisely from their wide popular support and broad membership.

In 1975, France's largest employer association, the CNPF, created a new Committee on Industry, Commerce, and Consumption (CICC) to coordinate business interaction with consumers groups. Paul Simonet, the head of the new committee, declared that they were "...very open to all forms of concertation, especially in the

²⁶⁸ Roger-Xavier Lanteri, "Prix: que peuvent faire les consommateurs?" *L'Express*, 20 September 1976.

domain of information."²⁶⁹ They felt that consumer groups should be encouraged and developed, although they argued against funding them through a tax on advertising, as some consumer advocates had proposed.²⁷⁰ Simonet felt that consumerism was "...a profound and lasting movement that corresponds to the evolution of life in society, and with which we [business] should establish an open and constructive concertation."²⁷¹ This opinion appears to have been shared by many of France's companies as well. A 1977 survey of producers found that 24 percent had already held at least one dialogue with a consumer association. Consumer groups, for their part, were more than willing to join in such discussions. The same survey found that 81 percent of consumer associations wished for a consultative role with industry.²⁷²

Early efforts at concertation were aimed primarily at standardizing sales practice in particular sectors. In 1974, for example, the president of the National Council on Consumption (CNC), Francis Péresse, called for the formation of a trial forum for negotiations between consumers and retailers. This led to the creation in 1975 in Toulouse of a trial Committee for Recourse and Information on Sales and Consumption (Comité de recours et d'information commerce consommation, or CRICC). Consumers were represented by the consumer groups FFF and the UFCS. The more radical UFC refused to sit down in any context with professionals. On 24 March 1976, the first meeting took place with the new Secretariat for Consumption, Christiane Scrivener,

²⁶⁹ "...nous sommes tres ouverts a toute forme de concertation, plus particulierement dans le domaine de l'information..."; "Opinions sur la fonction consommation et la libre entreprise," *Humanisme et Entreprise* 102 (April 1977), p 16.

²⁷⁰ Ambroise Roux, (President CNPF), "La réforme de l'entreprise," *CNPF Patronat* (February 1976), p 29.

²⁷¹ Gérard Lavergne, "Eux, les clients," *CNPF Patronat* 429 (November 1981), p 22.

²⁷² "Le Consumerisme," *Libre Service Actualités* 632 (30 June 1977), pp 134-6.

attending. This was the first strictly equal meeting of consumers and producers, and resulted in agreements about the sales of furniture and dry cleaning.²⁷³ In another instance, in 1975, consumers groups and the food industry created the Communal Organization of Consumers, Workers and Farmers (Organisation commune des consommateurs, travailleurs, agriculteurs, or OCCTA) to set labeling standards for food products.²⁷⁴ And in 1976, the French standard setting body AFNOR created experimental standard X 50.002 based on negotiations between consumers and producers concerning after-sales service for kitchen products.²⁷⁵ All of these agreements, and there was a very large number of them, were strictly voluntary for producers.

Consumer negotiations with industry were not always amicable. In 1975, for example, at a meeting convened by AFNOR on the subject of “The Quality Challenge” (“Le Defi de la qualité”), the union consumer group ORGECO suggested applying the notion of consumer-producer concertation in order to improve product quality. The CNPF greeted the idea with hostility.²⁷⁶ While they welcomed consumer input in selling products to consumers, they opposed any direct consumer participation in product design. They also opposed any government intervention in their negotiations with consumers for fear that the negotiations might spread to questions of design and production.²⁷⁷

Consumer groups, for their part, soon became frustrated that the negotiated agreements

²⁷³ Marcel Garrigou, *L'Assaut des Consommateurs pour changer les rapports producteurs - vendeurs - consommateurs* (Paris: Aubier-Montaigne, 1981), p 162.

²⁷⁴ Maurice Lecroel, "Force Ouvrière et les Consommateurs," *Force Ouvrière, Les Consommateurs et l'écologie*, edited by René Mauriaux (Paris: FNSP-CEVIPOF, 1994), pp 17-18. OCCTA was dissolved in 1990.

²⁷⁵ Sophie Caroit, *Les relations entre les associations de consommateurs et les centrales syndicales* (Paris: Sorbonne dissertation, 1994), p 30.

²⁷⁶ Michel Dumez, "Le Defi de la Qualite," *Information Consommation OR-GE-CO 7* (April 1975), pp 1-2.

were not being adopted by industry. As early as 1976, during the negotiations of the Consumption Group of the 7th French Plan, the business contingent complained of a “certain climate of hostility and tartness that...impregnated the meetings of the Commission and of the working groups.”²⁷⁸ Finally, in an open letter published on 11 January 1980, the 11 major national consumer associations renounced participation in all collective agreements with business until some form of enforcement mechanism could be established.

The new Socialist Government saw consumer organizations as an indirect means of regulating business practice, and considered making the outcome of negotiations between business associations and consumer groups binding on all businesses affected by the decision. The CNPF strongly opposed this corporatist solution, and the government was eventually forced to back down. In its place they pursued two new strategies. The first strategy was to transform the National Consumption Committee (CNC), formerly a forum for consumer groups to express their interests to the government, into a tripartite negotiating table at which not only consumer groups and the government but also professional groups would be present. It was called, somewhat confusingly, the National Consumption Council (Conseil national de la consommation, or CNC). Decisions arrived at in this new forum would not be binding, but the presence of the government went a long way to alleviate the frustrations expressed by consumer groups.²⁷⁹

²⁷⁷ Gérard Lavergne, "Eux, les clients," *CNPF Patronat* 429 (November 1981), p 23.

²⁷⁸ "sensibles à un certain climat d'hostilité et d'aigreur qui a, dans l'ensemble...imprégné les réunions de la Commission et de ses groupes de travaux"; *Commissariat General du Plan, Rapport du comité Consommation: Préparation du 7e plan* (Paris: Documentation Française, 1976), p 69.

²⁷⁹ Didier Ferrier, *La Protection des Consommateurs*, (Paris: Dalloz, 1996), pp 80-81

The second strategy was to permit consumer groups to negotiate binding contracts, so-called "quality contracts," with individual companies for a limited time frame. Unlike earlier agreements between consumer and professional groups, these quality contracts were company-specific and legally enforceable. Company participation was strictly voluntary, but those companies that did sign agreements could advertise this as an advantage of their products. Not all consumer groups participated in the program. The UFC, for example, felt that quality contracts did little to improve product quality, and because they were only negotiated with French firms, the UFC felt that they would hurt French consumers in the long run by excluding foreign products.²⁸⁰ Labor-oriented consumer groups such as INDECOSA-CGT, by contrast, favored quality contracts as an additional forum for negotiating with employers. Indeed quality contracts were often initiated through discussions with local labor unions, which called on the government to push nationalized industries into quality contracting.²⁸¹

Unlike French consumer groups, which negotiated with industry outside of any formal setting and without their agreements being generally binding, German consumer groups contributed to producer decisions from within industry associations that set product standards. The most prominent case of this was the introduction in 1975 of a consumer council to German industry's main standard setting body, Deutscher Industrie Normung (DIN). Consumer representatives, with political backing from the Economics Ministry, were admitted to those technical standard setting committees that dealt directly with consumer product safety. Over 200 consumer representatives thus gained access to

²⁸⁰ "Contrats de qualité: 3 questions - 3 réponses," *Informations Indecosa-CGT* 29 (January 1983), p 4.

over 10 percent of all DIN technical standard writing bodies. These safety standards were in turn made mandatory on all producers by a 1980 amendment to the Equipment Safety Law (Gerätsicherheitsgesetz, or GSG). The details of this process are discussed in Chapters 5 and 6 below. For consumer groups, the effect was to channel their efforts into the training of technically sophisticated representatives who could contribute directly to industry standard setting.

Summary

Claus Offe and Philippe Schmitter have both observed that corporatist institutions of interest representation such as those found in Germany may fail to grant adequate access to new kinds of interests that arise in society because these new interests go unrepresented at important bargaining tables.²⁸² The case of consumer interest representation in Germany suggest that this criticism, at least for emerging consumer interests, is not accurate. In fact, consumer groups *were* able to gain access to important bargaining tables in Germany. The institutions of corporatist interest representation actually legitimated the integration of consumer interests into industry decision-making on a par with other economic interests. The legitimacy of consumer input was not contested by industry, and a variety of forums were established in which consumer interests could be expressed. German consumer representatives were even admitted,

²⁸¹ "Contrats qualité -- Des questions sérieuses," *Informations Indecosa-CGT* 14 (March 1986), p 2.

²⁸² Philippe C. Schmitter, "Interest Mediation and Regime Governability in Contemporary Western Europe and North America," in *Organizing Interests in Western Europe: Pluralism, Corporatism, and the Transformation of Politics*, ed. Suzanne Berger (New York: Cambridge University Press, 1981), pp 285-327.

beginning in 1973, to the “Concerted Action” negotiations at which wage and money supply levels were set in Germany.²⁸³

It is not the lack of policy access, but instead the fact of *automatic* access to policy forums, that has had a decisive impact on the kinds of consumer interests that have been emphasized in Germany. Consumer groups have tailored their organizational strategies towards issues and competencies that suited the bargaining-tables to which they were granted access. These groups felt no strong need to organize individual consumers because the principle of corporatism already legitimated their access to important policy forums.

In France, by contrast, where consumer groups focused their efforts on political action and member mobilization, consumer interaction with industry became radicalized. French producers complained that the “strong and imperative language” employed by consumer groups reflected a tendency to exaggerate problems in a way that undermined the integrity of the consumer movement as a whole.²⁸⁴ But this exaggeration was precisely the goal of French groups, which were forced to cultivate interest among consumers in order to pursue the consumer interest.

²⁸³ Hanna Gieskes, “Gesucht wird der mündige, nicht der vevormundete Verbraucher,” *Die Welt*, 25 October 1978.

²⁸⁴ Alain Poirée, *Les Discours consuméristes et leur perception par les Français* (Paris: I.C.C.-C.N.P.F., 1984), pp 45-46.

Chapter 5. Retailer Regulation and the Identity of the Consumer

During the period in which consumer groups were mobilizing in France and Germany, the retail sector was waging a struggle that would determine the fate of small-scale retailing. Since the 1950s small and family stores had progressively been driven out of business by larger stores and chain stores that were able to undercut smaller competition through lower operating costs and a greater purchasing power with producers. Small store owners in both countries mobilized in the 1970s to resist this threat to their livelihood and managed to curb what had been a long-term trend of decline for small retailers and of growth for large retailers and chain stores. The strategy of small-retailer mobilization took different forms in the two countries, however, and this difference was to have implications for emerging national conceptions of consumer interests and identity. After all, retailers were one of the only large economic interests in society that had as one of their explicit goals the shielding of the interests of consumers. Small retailers in particular, because they typically enjoyed long-term economic and social contact with their customers, were in a strong position to mold the societal conception of what consumers needed and wanted. In this way the fate of consumers in France and Germany was closely tied to the aspirations and survival strategies of small retailers.

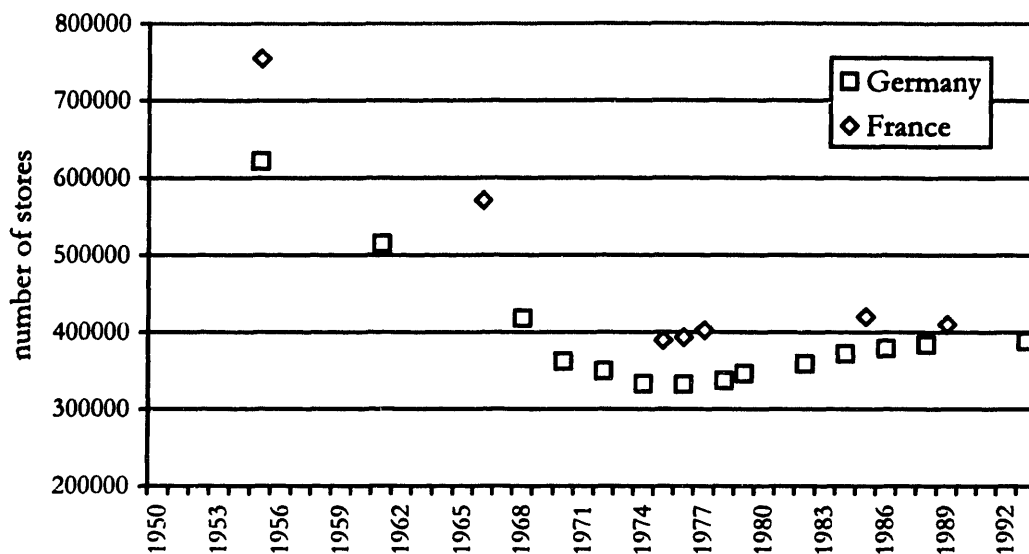


Figure 20. Retail density in France and Germany, 1955-1995.²⁸⁵

At the core of this struggle was an effort to reframe the consumer interest in both countries in a way that highlighted the specific contribution of small retailers to consumer welfare. Protection for small store owners in Germany took the form of maintaining restrictive conditions in retailing that placed practical limits on the growth of larger distributors. The most important restriction of this kind has been the Store Closing Law (Ladenschlußgesetz) which created an important barrier to large stores relying on volume sales. Store hour restrictions were championed by a left-alliance among retailers and trade unions grounded in a common concern to limit working hours. The German trade union movement backed this approach on the grounds that no workers, including retail workers, should be forced to work late into the evening or night. Producers acceded to these

restrictions because they recognized both that small retailers with weaker market share had less power to negotiate for lower product prices, and that small retailers tended to emphasize quality in their sales. Quality products and knowledgeable service were seen to be one of the important advantages of small over large retailers.

In France, small retailers drew on a different set of political affiliations, mobilizing alongside artisans to win political and public support for a limitation on licenses to new large retailers. Such store surface-area restrictions have been championed most forcefully by an alliance between the political Right and an independent middle class constituency embodied in traditionally conservative shopkeepers. Shopkeepers portrayed themselves as a critical counterforce to the danger of the marketplace, and a tonic against the negative impact of monopoly capital in the retail sector. Consumer groups argued that small retailers helped to maintain a healthy competition in retailing, and that a mixture of large and small retailers was indispensable in order to protect consumer choice. “What matters,” in the words of Henri Estingoy, president of the National Consumption Institute, “is the maintenance of competition among the diverse kinds of distribution.”²⁸⁵ The French response thus reflected a deep skepticism that a laissez-faire approach to retailing could result in fruitful competition, or that consumer interests would necessarily be protected in an unfettered business environment.

These national strategies of shopkeeper protection cannot be understood merely as the perpetuation of traditional, pre-industrial commercial patterns. In fact France and Germany both had endorsed mass distribution throughout the 1960s. Echoing the earlier

²⁸⁵ Compiled by author from national statistical yearbooks.

Poujadist shopkeeper movement of the 1950s, the Royer Law limiting new store licenses appeared in the early 1970s in response to tax and lending policies that had been intended explicitly to favor modern over traditional forms of retailing. In Germany, similarly, the goal of the Store Closing Law (*Ladenschlußgesetz*) as originally conceived in 1956 was to extend modern production techniques to the retail sector by promoting rational employment practices among shopkeepers. It did this by ensuring that larger stores with trained employees would not be at a competitive disadvantage to traditional family retailers that could keep long hours with low labor costs. Only in the 1970s was the goal of early store closing reconceived as a protection of traditional neighborhood retailers against mass-distributors.

This protection of traditional retailing in France and Germany was also by no means a foregone conclusion. Traditional retailers in the United States, for example, fared poorly against large distributors competing on lower prices, greater accessibility, and wider selections. The average US store in 1990 employed 12 sales and support staff—the average German store employed only 5.4 staff and the average French store only 4.5 staff. German and French retailing have compensated for this smaller store size by their greater density. France has over eight stores per thousand inhabitants, compared to seven per thousand in Germany and six per thousand in the United States. Hence the survival of small retailers in both France and Germany did not reflect a broader international trend. Success in both cases depended on political initiative and policy innovation.

²⁸⁶ “Ce qui importe est le maintien d’une concurrence entre les divers types de distribution.” “Les associations de consommateurs restent prudentes face aux actions du grand commerce,” *Les Echos*, 14 April 1972.

Yet even in these cases of policy innovation, shopkeepers operated in ways that responded to the institutional context in which they found themselves. Just as consumer groups pursued different organizational strategies, so too did small retailers with similar kinds of goals pursue different means of protection in the two countries. In both cases the institutional framework in which new policies emerged shaped the strategies that actors pursued. And in both cases this generated distinctive interpretations of the consumer identity and interest.

The *loi Royer* and Store Size in France

In the late 1960s and early 1970s, French consumer groups tended to support large scale retailers against the interests of small shopkeepers. Consumer groups commonly came to the aid of large distributors such as the Centres Leclerc and Centres Lemaire in their attempts to secure business licenses to open new stores, often rallying before the licensing offices to encourage the local governments to approve new hypermarket sites.²⁸⁷ Price surveys, conducted frequently by consumer groups, emphasized the lower prices that these larger stores offered.²⁸⁸ Larger retailers also provided strong backing for the consumer movement. The FNAC music and book retailer, for example, twice brought Ralph Nader to come speak in France. They also offered the building for their new Montparnasse store as the site of a formative “Consumer Salon” in 1972, which an estimated 200,000 people attended.²⁸⁹ The new

²⁸⁷ Dominique Pons, *Consomme et tais-toi* (Paris: Epi, 1972), p 98.

²⁸⁸ Pierre Combris, J. Hossenlopp, and Elise Zitt, "Evolution des associations de consommateurs et leurs impact sur les industriels," *Problèmes Économiques* (11 January 1978), p 10.

²⁸⁹ Michel Wieviorka, *L'Etat, le Patronat, et les Consommateurs: Etude des mouvements de consommateurs* (Paris: Presses Universitaires de France, 1977), p 131.

Printemps 2000 store that opened in Rennes in 1973 made room for a Morris column at the center of the store on which consumer groups were encouraged to post product information and warnings.²⁹⁰

Consumer support for large retailing was initially accompanied by antagonism towards small retailers. When food and vegetable retailers went on strike in 1973, for example, protesting government tax increases, consumer groups opted for a punitive consumer strike against these stores for having closed. In November 1973 the regional consumer group APF led the so-called "Three-Six-Nine" boycott against the high prices of small retailers in which consumers were asked to boycott meat for three days, fruit for six days, and mineral water for nine days.²⁹¹ This antagonism was reflected in the formulation of the 1973 loi Royer, which granted control over new store licensing to Departmental Commissions of Commercial Town-Planning (Commissions départementales d'urbanisme commercial, or CDUC). As originally conceived, these CDUCs were intended to have equal numbers of local businessmen and consumers. Small shopkeepers, however, fearing the antagonism of consumer groups, successfully lobbied to reduce consumer representation to a token 2 members per commission.²⁹²

In 1969 French small shopkeepers mobilized around Gérard Nicoud, the charismatic 23 year old café owner and founder of the Committee for the Information and Defense of Retailers, Artisans, and the Liberal Professions (CIDCAPL).²⁹³ Their grievances were focused not explicitly against large distributors, however, but against

²⁹⁰ Michel Wieviorka, *L'Etat, le Patronat, et les Consommateurs: Etude des mouvements de consommateurs* (Paris: Presses Universitaires de France, 1977), pp 53-54.

²⁹¹ Roger-Xavier Lanteri, "Prix: que peuvent faire les consommateurs?" *L'Express*, 20 September 1976.

²⁹² Claude Romec, "Organisations de consommateurs," *Reforme*, 15 Dec 1975.

what they perceived to be discriminatory tax and lending policies of the government. In their first protest rally, for example, CIDCAPL took over the tax office of Tour-du-Pin and threatened to dump all of their tax documents into the river.

Three government policies were of particular concern to small retailers. First, the French government had increased sales taxes in 1968 as part of an austerity plan to depress domestic consumption. However, in order to encourage investment and stimulate exports, large companies were given tax concessions. In retailing, this meant that large-surface-area and chain stores enjoyed a lower tax rate than small shopkeepers. Second, the government had requested that banks not make loans to small store owners, in order to discourage further growth in what was considered to be a declining sector.²⁹⁴ Finally, traditional retailers complained that a local business tax, the *patente*, was being used by the communities in which they worked to modernize distribution by financing the construction of new suburban shopping centers.²⁹⁵ Shopkeeper grievances thus focused not specifically on the economic threat from large stores, but instead on the political threat from government support for modern distribution.

Nicoud took shopkeeper protest into the streets. He traveled France to meet with groups of retailers and widen the membership of CIDCAPL. He called on retailers to remove all of their savings from nationalized banks, post office accounts, and 'caisse

²⁹³ "Entretien avec Gérard Nicoud," *L'Express*, 1 June 1970.

²⁹⁴ Robert Lagre, "Giscard contre Nicoud, ou la dernière galéjade de Valéry," *Rivarol*, 2 April 1970.

²⁹⁵ Roger Eatwell, "Poujadism and Neo-Poujadism: From Revolt to Recognition," in *Social Movements and Protest in France*, ed. Philip G. Cerny (London: Frances Pinter, 1982), pp 81-2.

d'epargne' because of the government restriction on granting loans to small retailers.²⁹⁶ In March of 1970, he organized Paris retailers to close their shops and drive around the peripheral motorway during morning rush hour at 3 miles per hour.²⁹⁷ When Pompidou refused to meet with Nicoud to discuss the government's policies, Nicoud widened his attack. In what became known as the April Fools protest, Nicoud's CIDCAPL blocked roads all over France during spring vacation, a peak travel time. Shop owners blockaded toll islands, scattering nails on highways, and in one case used chain saws to fell trees across a road.²⁹⁸ In Paris, 500 retailers struggled with police from behind a flaming wall of tires.²⁹⁹ Finally, in 1971, Nicoud launched a hunger strike in an effort to have released from prison two members of his organization who had been arrested during these protests.³⁰⁰

Nicoud's creative mobilizations increased the membership and popularity of his group. CIDCAPL joined with another loosely formed organization of retailers to form CID-UNATI, and by 1971 CID-UNATI controlled 43 percent of the seats in local Artisanal Associations (Chambres de métiers).³⁰¹ Despite the disruptiveness of their tactics, Nicoud's group also gained significant public support. A 1970 Gallop poll found that 49 percent of the population sympathized with the shopkeepers' protest, while only

²⁹⁶ Robert Lagre, "Giscard contre Nicoud ou la dernière galéjade de Valéry," *Rivarol*, 2 April 1970.

²⁹⁷ "Militant Shopkeepers," *The Times*, 11 March 1970.

²⁹⁸ "Barrages de routes et manifestations de commerçants hier dans tout le pays," *Humanité*, 24 March 1970.

²⁹⁹ François Mirallès, "Revendications légitimes et actions injustifiées," *Le Figaro*, 24 March 1970.

³⁰⁰ "Le carême de M. Nicoud," *L'Express*, 22 March 1971.

³⁰¹ Suzanne Berger, "Regime and Interest Representation: the French Traditional Middle Class," in *Organizing Interests in Western Europe: Pluralism, Corporatism, and the*

39 percent disapproved.³⁰² Consumer groups, too, began gradually to endorse the goals of CID-UNATI.

The tide of government opinion turned in favor of retailer interests in 1972 when Prime Minister Chaban-Delmas resigned under disclosures of personal tax fraud. Shopkeeper discontent over government tax policies appeared to have been vindicated. The National Assembly rallied to the support of shopkeepers, presenting a range of possible solutions to shopkeeper resentment. Proposed legislation included federally supported pension funds for small retailers, a new lending bank modeled on the 'Credit agricole' that would be dedicated to retail development, and government compensation to shopkeepers whose property lost value due to the growth of new large-scale retailing. All were strategies for cushioning the fall of a declining sector, similar to agricultural subsidies intended to ease the decline of France's small farmers. The future of retailing was assumed to lie with large-scale distribution. A 1971 poll, for example, found that 83 percent of the French felt that the growth of large surface area stores was a necessity of modern life—only 15 thought their growth should be stopped.³⁰³

It therefore came as something of a political novelty when the newly appointed Minister of Commerce, Jean Royer, proposed actively to promote traditional retailing. His 1973 Law for the Orientation of Trade and Artisans (*loi d'orientation pour le commerce et l'artisanat* or *loi Royer*) delegated licensing decisions for new stores with a sales area greater than 1000 m² to corporatist decision-making bodies at the departmental

Transformation of Politics, ed. Suzanne Berger (New York: Cambridge University Press, 1981), p 94.

³⁰² Eatwell, p 83.

³⁰³ Eric Langeard, and Robert Malsagne, *Les Magasins de grande surface* (Paris: Dunod, 1971), pp 12-13.

level. Because local business interests would be strongly represented on these bodies, called Departmental Commissions of Commercial Town-Planning (CDUC), the *loi Royer* amounted to a moratorium on large store construction. Rather than easing traditional shopkeepers out of business, the *loi Royer* proposed to protect them.

This strategy of shopkeeper protection had two advantages for the political Right. First, by identifying modern mass distribution as the source of shop-keeper grievances, it was able to deflect criticism that would otherwise have fallen on the government. Second, by designating large retailers as a common enemy of all small retailers, the Right was able to create a set of common political interests for artisans and retailers who otherwise shared no common skills, workplace, consciousness, or culture.³⁰⁴ Ironically, it had been the very antagonism of the previous government that, by mobilizing shopkeeper opposition to their tax policies, had revealed the potential for organizing retailers in support of the political Right.

The new protections that the government created for small shop-keepers suggested that consumers and retailers shared an affinity as victims of big business. Both were revealed as pawns in a larger struggle between producers and large-scale distributors.³⁰⁵ Indeed the *loi Royer*, by combining a protection for small retailers with provisions for consumer protection, helped consumer groups to identify with the plight of small retailers. Josée Doyère, a long-time reporter on the consumer beat, recalls that “...curiously, consumers have benefited from the wave of electoral demagoguery that brought the members of parliament to the aid of small commerce....They have made so

³⁰⁴ Berger, p 95.

³⁰⁵ "tout en laissant dans l'ombre la plus complete des producteurs, vertables beneficiaires de ce texte!" Luc Bihl, *Consommateur, Défends-toi!* (Paris: Denoël, 1976), pp 23-24.

many speeches in their defense—on the left and the right as well as the center—that it was difficult not to support a text in favor of consumers.”³⁰⁶ Following the *loi Royer*, consumer groups became reluctant to make direct price comparisons between traditional and large distributors, preferring instead to compare prices only among the large distributors. Consumer groups also opposed the distribution of drugs by large chains, and opted to grant small pharmacies a monopoly on the sales of drugs.³⁰⁷

The alliance forged by the *loi Royer* between shopkeepers and the political Right has persisted in French politics. Indeed, one of the first moves by Jacques Chirac on coming to power in 1995 was to place a moratorium on new retail construction. In 1996 Jean-Pierre Raffarin, the minister charged with artisans and retailers, called for the threshold for approval of new retail sites to be lowered to 300 m² in an effort to target the so-called ‘hard discounters’ that have flourished even in small retail spaces. Similarly, Raffarin sought to protect traditional French bakers by reserving the name “boulangerie” exclusively for their use.³⁰⁸ Employing a political rhetoric that has linked consumer and retail interests since the early 1970s, this new designation was justified as a form of consumer protection against the threat posed by industrial bread.

³⁰⁶ “Curieusement, les consommateurs bénéficièrent de la vague de démagogie électorale qui porta les députés au secours du petit commerce.... On avait fait tant de discours dans l’hémicycle pour leur défense—de la gauche à la droite en passant par le centre—qu’il était difficile de ne pas soutenir un texte en faveur des consommateurs.” Josée Doyère, *Le Combat des consommateurs* (Paris: Éditions du Cerf, 1975), pp 69-70.

³⁰⁷ Michel Wieviorka, *L’Etat, le Patronat, et les Consommateurs: Etude des mouvements de consommateurs* (Paris: Presses Universitaires de France, 1977), pp 53-54.

³⁰⁸ Emmanuelle Réju, “Commerce «défendre le pain artisanal contre le pain industriel»,” *La Croix*, 4 January 1997.

The Ladenschlußgesetz and Store Hours in Germany

If store size regulations were the leitmotif of retail protection in France, strict store closing requirements served as a similar focal point for the politics of retail protection in Germany. German shop hour restrictions were imposed by the 1956 Store Closing Law, or *Ladenschlußgesetz*, which was itself derived from the 1938 regulation of general working time (*Arbeitszeitverordnung*).³⁰⁹ Until the Store Closing Law was liberalized in 1996, it imposed a 6:30 PM closing time on weekdays, a 2:00 PM closing time on Saturdays, and a strict interdiction on Sunday opening. Permitting a total of 64.5 hours per week, the German law offered consumers the shortest shopping hours of any country in Europe.

The persistence of the *Store Closing Law* was surprising primarily because of its lack of support in the general public. Surveys conducted from the early 1960s to the mid-1990s show that a majority of consumers has always favored store hour liberalization. See Table 21 below. Political support for the policy has long been based on what critics have called an unholy alliance between supporters on the left and right.³¹⁰ The basis of this alliance, however, has changed over time.

³⁰⁹ Bruno Tietz, *Konsument und Einzelhandel: Strukturwandlungen in der Bundesrepublik Deutschland von 1970 bis 1995* (Frankfurt: Lorch, 1983), p 79.

³¹⁰ Sighart Nehring, "Ladenschlussgesetz: Deregulierung auch im Einzelhandel?" *Wirtschaftsdienst* 1 (1984), p 41.

<i>year</i>	<i>favor liberalization</i>
1963 ³¹¹	52 %
1964 ³¹²	55 %
1969	74 %
1972 ³¹³	62 %
1985 ³¹⁴	77 %
1995 ³¹⁵	74 %
1996 ³¹⁶	60 %

Figure 21. Consumers favoring store hour liberalization in Germany, 1963-1996.

Early support for the store closing law coalesced around a bipartisan interest in modernizing the retail sector. Trade unions saw that short store hours had the advantage of placing retail employees on an equal footing with other industrial workers in negotiating wage contracts. The peak retail trade union (Gewerkschaft Handel, Banken, und Versicherung, or HBV) recognized that retailers could only participate in patterned wage bargaining so long as work hours were limited and part-time labor kept to a minimum. The law was also seen at the time to promote modern kinds of distribution by insulating them against owner-operated family stores. Whereas family stores could compete by extending their opening hours at little extra cost, larger stores were bound by wage contracts and faced high labor costs if they wished to stay open particularly late.³¹⁷

³¹¹ *Jahrbuch der Öffentlichen Meinung: 1965-1967*, (Allensbach: Verlag für Demoskopie, 1967), p 126.

³¹² Klaus Reichert, *Das Ladenschlußproblem in der Bundesrepublik Deutschland* (Vienna: Verlag Notring, 1971), p 38.

³¹³ *Jahrbuch der Öffentlichen Meinung: 1968-1973* (Allensbach: Verlag für Demoskopie, 1973), p 391.

³¹⁴ Monika Ketterer, "Die Diskussion um den Ladenschluß – eine Diskussion der Theoretiker," *Verbraucher und Recht* 3 (1987), p 143.

³¹⁵ "Kaufen ohne Ende," *Focus*, 14 August 1995.

³¹⁶ The Reuter European Business Report, February 2, 1996.

³¹⁷ *Ladenschluß in Europa: Erfahrungen der Nachbarn – Konsequenzen für die Bundesrepublik?* (Königswinter: Friedrich Naumann Stiftung, 34-24 October 1985), p 6;

It was precisely to put larger stores on an equal competitive footing that the law was applied not only to store owners with paid employees but also to family stores without paid employees. Hence early supporters of restrictive store hours on the Left and Right shared an interest in extending the modern organization of labor relations into distribution. The Peak Association of Small Retailers (Hauptverband Deutscher Einzelhandel, or HDE) recognized the negative impact that the law was likely to have on its members and strongly opposed the project.³¹⁸

By the early 1970s, however, the original arguments in favor of the *Store Closing Law* appeared to have lost their substance. Many of the most traditional distributors had already been eradicated. In 1955, for example, Germany boasted 622,000 retail stores with an average of only 3 employees.³¹⁹ By 1972 Germany had only 350,000 stores with over 6 employees per store.³²⁰ Furthermore, the *Store Closing Law* appeared increasingly to conflict with broader union priorities. An important reason was the growing female union membership. At the Ninth National Congress of Germany's peak labor association (Deutsche Gewerkschaftsbund, or DGB), two women from the metal-working industry called for union support of longer store hours. They argued that, given recent price increases, they required more time for comparative shopping.³²¹ Women's organizations

Christian Uwe Träger, Kurt Vogler-Ludwig, and Sophia Munz, *Das deutsche Ladenschlußgesetz auf dem Prüfstand: Binnenhandels- und wettbewerbspolitische sowie beschäftigungspolitische und arbeitsrechtliche Überlegungen* (Berlin: Duncker & Humblot, 1995), p 75.

³¹⁸ *Bundestagdrucksache* 10/517 (1955), question 23.

³¹⁹ James B. Jefferys, and Derek Knee, *Retailing in Europe: Present Structure and Future Trends* (London: Macmillan & Co., 1962).

³²⁰ Patrick Molle, *Le Commerce et la Distribution en Europe* (Paris: Editions Liaisons, 1992).

³²¹ Andreas Fischer, *DGB-Verbraucherpolitik zwischen Anspruch und politischer Praxis* (Frankfurt am Main: Peter Lang, 1991), p 165.

such as the German Housewives' Association (Deutschen Hausfrauenbund) called traditional union opposition to longer store hours "unfriendly to women" ("frauenfeindlich").³²² Indeed Sweden, faced with similar pressures from women's groups in 1972, eliminated its store hour regulations as part of a broader economic rationalization program.³²³ Among German consumers, 62 percent favored such a deregulation.

What saved the German *Store Closing Law* was a reconceptualization, first by Germany's unions, then by the CDU, of the function of small retailers in Germany's economy and of their contribution to consumers. On the left, support came from the powerful retailing union (Gewerkschaft Handel, Banken, und Versicherung), which argued that longer work days would hurt the interests of women who worked in retailing as well as their families. Moreover, they argued, longer store hours were likely to mean more part-time employment and a lower overall workforce skill level in the retail sector. The goal of store hour regulation, was now recast as a protection for retail workers against the social dislocation that modern distribution could cause. The relevant interest of consumers, in other words, was not convenient shopping times, but a professional and skilled retail sector.

With the fall of the SPD/FDP coalition in 1981 and the formation of the CDU/FDP coalition, life became more difficult for small retailers. On the one hand, the CDU embraced retailers as a natural constituency. Shopkeepers were traditionally conservative, and short shopping hours were seen by the Christian wing of the

³²² Fischer, p 171.

³²³ Boddewyn, Jean J., and Stanley C. Hollander, *Public Policy Toward Retailing: An International Symposium* (Lexington, Mass.: Lexington Books, 1972), p 264.

conservative party to offer needed protection for families. On the other hand, the FDP coalition partner was pushing a strong deregulatory program, and the *Store Closing Law* was high on its list of priorities.

The first attempt to lengthen store hours came in 1984 when Helmut Kohl, who as recently as 1980 had proclaimed his support for the *Store Closing Law*, called for liberalization.³²⁴ He was supported in this effort by the FDP, by the Association of Consumer Groups (Arbeitsgemeinschaft der Verbraucherverbände, or AgV), and by the peak industry association (Bund Deutscher Industrie, or BDI).³²⁵ The response from retailers to this threat was swift and forceful. The Peak Association of Small Retailers (HDE) voted unanimously to reject store hour liberalization, arguing that this would increase product costs for consumers who would, in the end, bear the costs of additional operating expenses. They also argued that liberalization would hurt single-family stores, which would be forced to stay open longer to remain competitive.³²⁶ The Association of Middle and Large Retailers (BAG) also opposed liberalization on the grounds that increased wage costs would be likely to push a number of stores out of business.³²⁷ Larger stores located downtown feared that longer shopping hours would draw consumers to new shopping centers located outside of town. Like Jean Royer in France a

³²⁴ Günter Triesch, "Mehr Sachlichkeit in der Ladenschlußdiskussion," *BAG-Nachrichten* 5 (1984), p 4.

³²⁵ "Eine liberalere Ladenschlußregelung ist überfällig," *Verbraucherpolitische Korrespondenz* 21 (22 May 1984), p 3.

³²⁶ "Das Ladenschlußgesetz: Die Argumente des Einzelhandels," *Hauptgemeinschaft des Deutschen Einzelhandels*, Press Release, 3/4 November 1983.

³²⁷ "BAG für sachliche Argumentation in der Ladenschlußdiskussion," *Press-Information* (Bundesarbeitsgemeinschaft der Mittel- und Großbetriebe des Einzelhandels, 22 May 1984).

decade earlier, Kohl quickly recognized the political importance of small retailers for the Right and backed down from his liberalization project.

The next challenge to the Store Closing Law came in 1989, when, again under pressure from the FDP, the governing coalition proposed the creation of a so-called “service evening” (*Dienstleistungsabend*) that would allow stores and other service providers to remain open until 8:30 PM on Thursdays. While apparently small in scope, the new service evening proposal drew a line in the sand that mobilized forces on all sides of the store hour debate. The Ministry of Labor argued that the extended Thursday hours would be a boon to all, leading to a higher quality of life for consumers and new job opportunities for the unemployed.³²⁸ The SPD raised vehement opposition, arguing that women working in retailing would have even less time with their families on Thursday evenings.³²⁹ The retailer union, HBV, argued that the benefit of two extra shopping hours was risible compared to the damage that the service evening would do to the families of shop workers.³³⁰ Retail employees took to the streets in protest, with over 200 retail firms with 30,000 employees participating in strikes during June 1989.³³¹

When strikes failed to derail the legislation, retail unions across Germany renegotiated their labor contracts to include a mandatory closing time of 6:30. They also called for a 37.5 hour work week, and for part time workers to be hired for at least 4 hours per day and at least 20 hours per week.³³² In some of Germany's federal states,

³²⁸ “Blüm: Dienstleistungsabend ein Gewinn für alle,” *Süddeutsche Zeitung*, 23 June 1988.

³²⁹ “Gesetz über Dienstleistungsabend gebilligt,” *Süddeutsche Zeitung*, 3 June 1989.

³³⁰ “Ladenschluß: die Stimmung ist geladen,” *Der Spiegel*, 29 May 1989, p 105.

³³¹ Hans Jürgensen, “‘Langer Donnerstag’ auch in Warenhäusern?” *Frankfurter Allgemeine*, 29 June 1989.

³³² “‘Langer Donnerstag’ nur bei Konkurrenz,” *Frankfurter Allgemeine*, 12 July 1989.

these new labor contracts specified that the stores could only stay open late if an early closing would place the store at a competitive disadvantage (Rheinland-falz and Saarland), or, stricter yet, if longer hours were necessary to ensure the survival of the store (Bremen).³³³ And because these contracts were negotiated at the peak level, they were binding on all retailers in the state in which they were signed. Retail employers, who also generally opposed longer store hours, were content to assent to the restrictive wage agreements. The SPD, in support of the retail unions, also called on its constituency not to shop during the service evening.³³⁴ Thus once again middle class shop-keepers were shielded by the protection that labor union solidarity afforded.

In 1996, the same year in which France further restricted large store licensing, Germany amended its store closing law to allow stores to remain open until 8:00 PM on all week nights. This change is difficult to explain based on the preferences of consumers. Only 60 percent of consumers reported favoring store hour liberalization in 1996, fewer than in the past.³³⁵ Among retailers, though, only 56 percent opposed liberalization in 1996³³⁶, compared to 79 percent who had opposed longer store hours in 1983.³³⁷ This lower rate of retail opposition may have made store hour liberalization more politically palatable on the right. But the real pressure for change came from the growth in unemployment. In a study commissioned by the government, the Ifo Institut estimated

³³³ Hans Jürgensen, "'Langer Donnerstag' auch in Warenhäusern?" *Frankfurter Allgemeine*, 29 June 1989.

³³⁴ Peter Gillies, "Die SPD im Kampf gegen den abendlich Einkauf," *Die Welt*, 5 October 1989.

³³⁵ The Reuter European Business Report, February 2, 1996.

³³⁶ Ifo Institut, *Überprüfung des Ladenschlußgesetzes vor dem Hintergrund der Erfahrungen im In- und Ausland* (Munich: Ifo Institut, 1995), p 10.

³³⁷ Wilfred Paulus, *Ladenschluß* (Königswinter: Friedrich Naumann Stiftung, 1985), p 140.

that lengthening store hours to 8:00 PM would increase retail employment by at least 50,000.³³⁸ This argument was particularly persuasive given that Germany supported a very low level of overall employment in the retail sector compared to other countries.

Shopkeeper Protectionism and Consumer Protection

The outcome of retail struggles in France and Germany has had a profound impact on the image and status of the consumer in society. Small retailers in both countries were able to win political support by portraying themselves as defenders of the consumer interest. But the way in which that consumer interest was perceived differed significantly. In France, small retailers portrayed themselves as a barrier against the forces of monopoly capital, both in production and in distribution. Consumers, they argued, should always retain the choice of shopping at artisanal stores. Only in this way could the risks and disappointments inherent to mass distribution be countered. Large retailers too recognized the need to express their claims in terms of the consumer interest. They argued that only the collective purchasing power of large retailers was capable of negotiating on an even footing with large industry. Large retailers could thereby secure lower prices for consumers. In both instances, retailers portrayed their goals in terms of the consumer interest, and that interest was understood by small and large retailers as a form of opposition to the power of producers.

In Germany, small retailers found protection in the restriction of retail opening hours. As in France, the arguments deployed for restricting store hours implied a particular conception of the consumer identity. The basis of ongoing support for the

³³⁸ Ifo Institut für Wirtschaftsforschung, Überprüfung des Ladenschlußgesetzes vor dem Hintergrund der Erfahrungen im In- und Ausland (Munich: Ifo Institut, August 1995), p

Ladenschlußgesetz came from a combination of producer and labor union interests. Producers were concerned about the growing negotiating power of larger retailers, especially in so far as they could negotiate for lower batch prices on products. Labor unions too feared downward price pressure, as this would place limits on wage demands. But they also supported short store hours as a form of solidarity with the retail union. If manufacturing laborers enjoyed a short work week and had their evenings free, then distribution workers should enjoy similar benefits. Undercutting the interests of the retail union looked like the thin edge of the wedge of broader union concessions. The threat was especially poignant for bank and insurance workers, who shared the same labor union with retailers.

From this discourse on store hours and working time emerged a very different conception of the consumer interest in Germany than in France. First, consumption, like production, was understood as an economic activity that should take place during the course of the work day. On this view, restricted store hours were seen to protect not only retailers but also consumers, especially shopping mothers. Moreover, unionized retailers were especially qualified to inform consumers. The average shop clerk in Germany has over two years of retail training. If shop hours were lengthened, shopkeepers argued, sales clerks worried that retail distribution would become a part-time profession in which training and wages would suffer. For consumers, they argued, this would mean the loss of a valuable source of information for product selection. Unlike France, where retailers portrayed themselves as a buffer for consumers against the abuses of producers, German retailers portrayed themselves as a professional advisory service for consumers, guides to

the marketplace, that would be undermined by longer store hours and a proliferation of large distributors. In retailing, therefore, as in the consumer movement, French discourse reproduced the theme of consumer protection, whereas German discourse reproduced the theme of consumer information.

Section III. Case Studies in Product Market Regulation

The previous section describes the role of consumer groups and retailers in forging a new consumer identity in France and Germany. It argues that emerging consumer policies in both countries were not simply imposed from above. Rather, different societal actors came to a common understanding of the consumer identity and interest that was grounded in a conflict between consumer and producer interests in the two countries. The three chapters that follow present the case histories of eight areas of product market regulation. These studies constitute the empirical core of my research. They describe how coherent national regulatory patterns have emerged within diverse areas of regulation. Following the typology of product market regulations elaborated in Chapter 1 (see Figure 4 above), the chapters treat information regulation, risk regulation, and then direct product regulation.

Chapter six surveys three areas of market regulation that focus on product information: advertising, comparative product testing, and product labeling. Germany has imposed a high standard of accuracy in product information. France has imposed a low standard of accuracy in product information. The puzzle is that producers in both countries called for an information strategy to consumer protection. Better informed consumers, they reasoned, would be able to protect themselves by making wiser purchasing decisions. The reason that this information approach prevailed in Germany and failed in France rests in large part on the way in which consumers in the two countries organized. In Germany, where the consumer was perceived as an economic actor, better consumer information was seen as an appropriate solution to what looked

like a market failure. Furthermore, accurate product information would abet competition, which would in turn also benefit consumers. This economic view of the consumer was consonant with the organization of production in Germany. Because German production was already oriented towards high quality goods, accurate information would help to reinforce the market for the kind of goods that industry was already producing. Moreover, German industry enjoyed the associational capacities and expertise to collaborate with consumer groups on product labeling and testing projects.

The opposite situation prevailed in France. Although industry saw an information approach to consumer protection as preferable to direct product regulation by the government, industry efforts to intervene in the provision of accurate product information failed for two reasons. First, individual producers were not oriented towards producing highly engineered goods and therefore had little real incentive to emphasize technical product information. Second, consumer groups in general opposed the information approach to consumer protection on the grounds that it would keep consumer interests fragmented. As consumer mobilization grew, government policies increasingly attended to consumers' policy preferences.

Chapter seven considers the distribution of product-related risk through product liability law and national product safety regulations. France has emphasized consumer protection through risk reduction and consequently imposed a high burden of product risk on producers. Germany has downplayed product risk to consumers, focusing instead on regulatory strategies that work to reinforce the quality orientation of production. Whereas French risk regulation has typically focused on end results, the German approach has focused on procedures. In product liability for example, France's strict standard of

liability makes producers responsible for any defective product that causes damage. Germany's negligence standard requires instead that manufacturers adhere to accepted design and production standards. In product safety regulation, Germany has acted to make industry standards mandatory on all producers. France has instead imposed government safety standards on producers. As in the case of information regulation, the reason for these differences lies in the organization of consumer and producer interests in the two countries. Strong associational capacities in Germany have made industry a valuable force for pursuing product safety. In France, by contrast, where individual companies are not bound by industry-wide conventions, product safety standards had to be enforced from outside of industry.

Chapter eight presents three areas of regulation that focus on specific characteristics of consumer products: standard setting, pricing, and terms of sale. In each case, Germany has pursued a strategy of regulation consistent with industry self-regulation and a strong quality orientation of production. Price setting in Germany is dominated by producers. Consumers participate in standard setting, but only within the framework of Germany's industry-run standard setting body, DIN. Finally, German terms-of-sale regulations have emphasized quality competition. In France, different priorities emerge in these area of direct product regulation. Product price setting was, until 1986, imposed by the government. Product standards have been negotiated between consumer groups and individual producers outside of the formal context of technical standard bodies. And terms of sale in France have been broadly permissive. Each of these policies reflected a distinctive conception of the consumer. In Germany the consumer was

understood as an economic actor with the same status as producers. In France, the consumer was understood as a political actor with the same status as a citizen.

Chapter 6. Consumer Protection Through Information Regulation

A fundamental strategy of consumer protection in all countries has been an emphasis on providing consumers with accurate information about products. Of the wide variety of means by which information is distributed, most have been subject to regulatory scrutiny in an effort to improve the quality of information with which consumers purchase. Both consumers and producers have shown an interest in providing consumers with accurate information, and both groups have acted in different ways to secure that information. For producers, who faced increasingly competitive, often saturated consumer markets, better information was seen as a means of stimulating demand for their products. For consumers, who faced an increasingly diverse and complex set of products from which to choose, better information became the key to making a good purchase. This growing need for information was intensified by trends toward large-scale distribution and retailing. Whereas knowledgeable retailers had previously served as information brokers between consumers and producers, rationalization in the retail industry was reducing the amount of reliable information to which consumers had access at the point of sale. When these long-term trends intersected with the economic slow-down of 1973, governments stepped in to regulate consumer information in an effort to improve the position of consumers in the economy.

My research has focused on three channels—advertising, product labeling, and product testing—by which consumers and producers have met their needs for greater information transparency in the consumption sphere. Industry has typically approached the information needs of consumers through advertising campaigns. Consumers have, in

turn, commonly resorted to third-party comparative testing—of the sort found in the US publication *Consumer Reports*—in order to obtain useful, objective information about products. Finally, in many cases producers and consumers have collaborated to improve product information transparency by creating labeling systems designed to provide accurate technical information of use to consumers in comparative shopping.

Within the common scope of government regulation to improve consumer information, France and Germany have adopted different approaches. France has pursued far more lenient standards of information content than has Germany. Whereas Germany has focused on providing consumers with technically precise product information through a strict set of regulatory policies that producers have strongly endorsed, France has imposed relatively weak information requirements. Consumer information in Germany is understood to help consumers by permitting them to recognize incremental product quality. Once they can recognize higher quality, consumers can then rely on product quality in order to reduce their risk in the marketplace. In France, although both consumers and producers expressed an interest in a similarly strict approach to consumer information, regulations that were put in place enforced a far lower standard.

The reason that such different outcomes emerged from broadly similar priorities among consumers and producers rests with their organizational capacities. In Germany, industry was genuinely interested in providing accurate product information and invoked government regulations to enforce this standard. In France, industry also supported an information solution to consumer grievances, since this approach was compatible with continued industry autonomy. But French industry had neither the basic interest in accurate product information, nor the organizational capacity to self-regulate that a strict

standard of product advertising demanded. Moreover, French consumer groups were skeptical that information alone would redress consumer grievances. Hence French efforts to create a standard of accurate advertising information were undermined in large part by the inability of industry to implement it, in part by a lack of interest from consumer groups.

In this way, national approaches to regulation for advertising, testing, and labeling reflect the organization of consumer and producer groups in France and Germany. German consumer groups take the dissemination of technical product information as one of their main goals. French consumer groups have tended to emphasize instead the distribution of negative product information, in the form of warnings against dangerous or faulty products. Moreover, a similar set of priorities had arisen within the retail sector in the two countries. In Germany, retailers came to emphasize the role of their trained, competent sales staff in giving consumers product-related advice. In France, small retailers argued that their value lay instead in their independence from large economic interests. If German retailers acted as guides to the marketplace, French retailers served as an insulation against the marketplace. German concerns about technically accurate information and French concerns about consumer freedom also reflected broader strategies adopted by consumer groups and retailers in the two countries.

Truth in Advertising

Advertising is one of the most prominent channels for consumer information about new products. Levels of advertising spending grew over the 1970s in both France and Germany, with Germany consistently spending more than France on advertising. See Figure 22 below. This rise in advertising brought with it a growing concern over the

negative impact that advertising might be having on consumers. Beginning in the early 1960s, France and Germany had put in place advertising regulations that prohibited flagrantly false advertisements. These early regulations had been aimed at cases of obvious fraud. But by the 1970s both manufacturers and consumers in both countries began to push for a higher standard of truth in advertising. Consumers groups supported more accurate advertising as a source of consumer protection, since consumers would be better informed about the products they purchased. Producers, recognizing a growing political pressure for a consumerist agenda, saw regulations that focused on advertising as a relatively painless strategy.

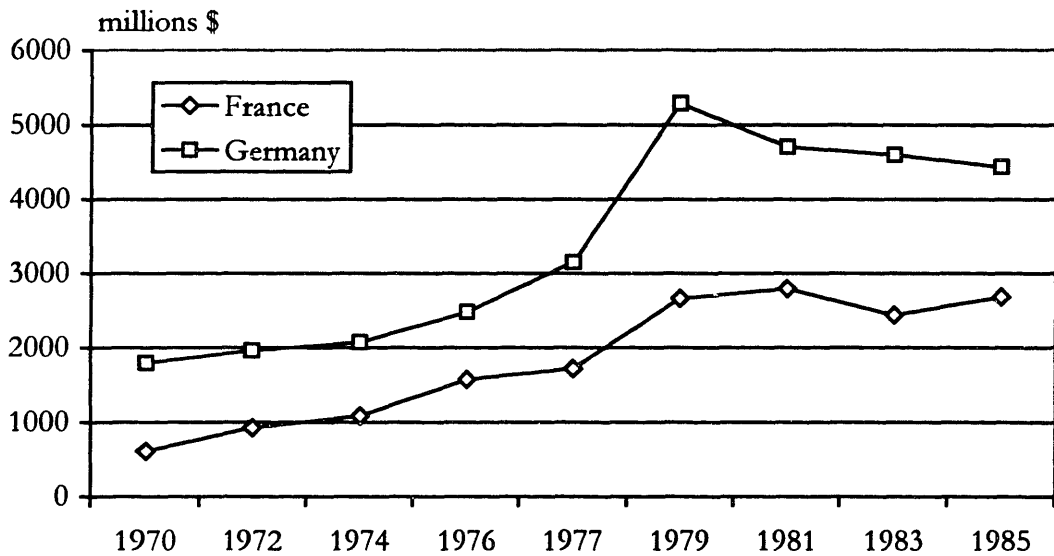


Figure 22. French and German spending on major advertising media, 1970-1985.³³⁹

Efforts were made in both France and Germany to impose strict standards of truth in advertising. New regulatory bodies were created in both countries to oversee the new standards. Yet the standards they applied were different. In France, courts interpreted advertising standards loosely, granting advertisers a broad margin for creativity. Advertising regulation rested largely in the hands of the advertisers, who set standards for appropriate content. Furthermore, advertising in France was addressed under criminal law, which limited the ability of consumer groups to bring direct suits against transgressors. The application of criminal rather than civil law solutions also encouraged judges to be lenient in marginal cases. In Germany, by contrast, courts held advertisers to an extremely strict standard of truth in advertising that ensured that consumers would not be misled. The law implementing strict advertising standards also granted consumer groups a privileged position to bring legal suits against companies that transgressed. The result was a lenient, creative environment for advertising in France and a rigorous standard of truth in advertising in Germany.

German Advertising Regulation as Competition Policy

The basic law of advertising in Germany was established in the 1965 amendment to the Law against Unfair Competition (Gesetz gegen Unlauteren Wettbewerb, or UWG), requiring that advertising not be misleading. The wording of the amendment states that "...any person who in the course of business and for the purpose of competition makes misleading statements about business related facts, in particular about the characteristics, origin, mode of production or pricing of any goods or services...the mode and source of

³³⁹ *World Advertising Expenditures, 1981 Edition*. Mamaroneck, New York: Starch Inra Hooper, 1983; *World Advertising Expenditures, 1986 Edition*. Mamaroneck, New York:

supply, the possession of warrants...may be subject to an injunction."³⁴⁰ Because Germany's advertising law resides within competition law rather than criminal law it does not provide for imprisonment, as is the case in France, except in cases of gross negligence. Moreover, the sense of the term "misleading" left significant room for interpretation by the courts, and was initially viewed with leniency.

This lenient approach to German advertising policy changed in the wake of a groundbreaking 1971 court ruling against the Company Philips. In this case, the German Supreme Court (Bundesgerichtshof) found the advertised claim that their electric razor was "the world's most purchased" ("der meistgekaufte der Welt") to be misleading. The court finding was striking because the razor did in fact have the highest total sales in the world. The factual accuracy of the advertising was therefore not in question. Instead, the court argued that the manner in which the information was presented might be interpreted by consumers to mean that the Philips razor was also the most popular in Germany, and this was not the case.³⁴¹ From this case emerged the rule of thumb, still applied today, that any advertisement that is thought to deceive more than 10 percent of the population is considered misleading in Germany. One of the reasons for setting the bar for public credulity so high appears to have been a concern that advertisements would disproportionately mislead the members of society that were less well educated.³⁴²

In response to this new standard of advertising, in 1972 Germany's Zentralausschuß für Werbewirtschaft (ZAW) created the German Advertising Council

Starch Inra Hooper, 1987.

³⁴⁰ Gesetz gegen unlauteren Wettbewerb, Section 3.

³⁴¹ Gerhard Schrickler, "Soll der einzelne Verbraucher ein Recht zur Klage wegen unlauteren Wettbewerbs erhalten?" *Zeitschrift für Rechtspolitik* 8 (1975), 195.

³⁴² Interview, HDE, August 1995.

(Deutscher Werberat, or DWR). Organized similarly to the French BVP, the DWR had the goal of helping German industry to meet the new regulatory standards for truth in advertising. Both consumers and competitors were encouraged to bring complaints to the DWR. The DWR was not legally bound to respond to these complaints, but it could at its own discretion send notices of possible violation to companies that did not in its appraisal appear to be meeting the strict standard of misleading advertising. While producers were not legally bound to respect these notices, the probability of legal recourse by competitors has caused German companies to respect the findings of the DWR.

Advertising is considered in Germany to be an important component of competition policy. Many cases are also taken to court each year. Two-thirds of all court cases against misleading advertising are brought by producers in direct competition with the defendant. The remainder of these cases have been raised by consumer groups. The 1965 amendment to the UWG gave consumer associations the right to file legal suit directly against companies that were not complying with the prohibition against misleading advertising. Germany has long allowed professional associations to bring legal suit under civil law (so-called 'Verbandklage'), although this right had in the past been restricted to producer associations. The main consumer organization charged with bringing suits for UWG infraction is the Consumer Protection Union (Verbraucherschutzverein, or VSV), established in Hamburg in 1966 and moved to Berlin in 1974. By 1981, the Verbraucherschutzverein alone had brought 577 suits against companies for misleading advertising.³⁴³ These represented only a distillation of the most common complaints that consumer groups receive. In 1977, for example, 80 thousand

complaints were lodged with consumer organizations. Of these, 20 thousand fell under competition law concerning advertising, 400 were addressed by the three main consumer groups that typically take on UWG cases, and 150 reached the courts. Once in court, consumer groups have enjoyed a success rate of 80 percent.³⁴⁴

Cases raised by consumer groups are typically focused on specific consumer interests rather than impacts on competition, but their cases tend to be equally exacting. In a typical case raised by consumer groups, a German biscuit company was brought to court on the grounds that the slogan they employed to advertise their low-sugar biscuits, "Nibbling allowed" ("Naschen erlaubt"), was misleading. Since the phrase implied that nibbling was in general a bad thing, the plaintiff argued, it therefore implied that something particular about these biscuits made them a unique exception in the marketplace. But given that the competition also produced similar low-sugar biscuits, the advertisement was deemed misleading by the courts. German courts try thousands of similar cases every year. In Hamburg alone 1,000 such unfair-competition cases are tried yearly. In an evaluation of business opportunities in Germany, the business newsletter *Lloyds List* writes that German advertising regulation "...is based upon the idea of a totally immature pathologically stupid and absent minded consumer."³⁴⁵

Because the emphasis of Germany's strict advertising regulation is on promoting competition rather than explicit consumer protection, as in France, consumers have in general been unable to recover financial damages resulting from misleading advertising.

³⁴³ Jürgen Bornecke, *Handbuch der Verbraucherinstitutionen* (Bonn: Verlag für die Wirtschaft, 1982), p 107.

³⁴⁴ Roland von Falckenstein, "Praktische Erfahrungen mit der Verbraucherverbandsklage in Deutschland," *Journal of Consumer Policy* 1/2 (1977), pp 173-175.

³⁴⁵ *Lloyds List*, January 17 1992.

The 1965 amendment to the UWG permitted established consumer groups to sue producers, but not collections of consumers themselves. An amendment to the UWG submitted by the government on 29 September 1978 placed strong limitations on suits even by individual consumers, requiring that any consumer seeking damages show that misleading advertising was the specific reason they purchased a product, and that they would not otherwise have made the purchase. This raised significantly the barrier to claiming compensation based on false advertising, as this burden of proof has proved nearly impossible to meet.³⁴⁶ The bundling of consumer legal suits against misleading advertisers is still not permitted in Germany. When in 1982 the newly elected Christian Democratic Union proposed permitting class action suits of this kind, their Free Democratic Party coalition partners blocked the move on the grounds that it would simply provide a new source of income for consumer groups.³⁴⁷

German consumer groups have seen accurate consumer advertising as an important pillar of consumer protection, and argued that Germany's strict standard of advertising has not adequately been enforced. One researcher, for example, in order to evaluate the effectiveness of Germany's self-regulatory Deutscher Werberat (DWR), submitted 321 complaints based on advertisements of well-known companies from 30 popular German magazines published from June 1976 to 1978. This amounted to nearly half of the DWR's yearly total of 670 complaints. Of the author's complaints, 74 percent were simply rejected. The average time for processing the remaining complaints was 32

³⁴⁶ Alex Stein, "Die Verbraucheransprüche und ihre Geltendmachung durch Verbraucherverbände nach der UWG-Novelle," *Journal of Consumer Policy* 3 (1979), pp 29-40.

³⁴⁷ "Mehr Schutz vor unlauterem Wettbewerb," *Frankfurter Rundschau*, 28 Jan 1982.

days, long when measured against the duration of an advertising campaign.³⁴⁸ A 1974 study commissioned by the AgV found that only 35 percent of all advertising in popular magazines was *not* misleading to the consumer. Worst were advertisements for cleaning chemicals, cosmetics, over-the-counter drugs, and erotica, for which the advertising was found to be misleading in 90 percent of the cases. The study evaluated 2265 advertisements from 18 magazines: 46 percent made exaggerated claims, 6 percent included double meanings, 6 percent left out basic information, and 7 percent included deceiving information.³⁴⁹ More recent studies of advertising compliance have not been conducted.

Expressive Freedom in French Advertising Regulation

The earliest law governing advertising in France, written in 1963, prohibited advertising that was “created in bad conscience” (“faite de mauvaise foi”). Under this standard, false advertising was punishable only if it was shown to be intentionally false. As in Germany, France experienced a dramatic shift in the standard of truth in advertising in the early 1970s. In 1973, Article 44 of the *loi Royer* replaced the lenient bad-conscience standard with a broad proscription against any advertising “of a misleading nature” (“du caractère trompeur”). The new standard depended not on the intention of the advertiser, but instead on the actual impact on consumers. Its wording, as transcribed in Law 121-1 of the Consumption Code, appears to make illegal an extraordinarily broad range of advertising content:

³⁴⁸ Udo Beier, “Schwachstellen der Werbeselbstkontrolle: Aufgezeigt am Beispiel des Deutschen Werberats,” *Journal of Consumer Policy* 3 (1979), pp 300-313.

“All advertising in any form is illegal that provides false or misleading assertions, information, or provisions when it applies to one or more of the following elements: availability, nature, composition, substantial quality, active content, kind, origin, quantity, means and date of production, ownership, price and conditions of sale of goods or services that are the subject of advertising, conditions of use, results that can be expected as a result of their use, grounds for or means of sale or provision of services, extent of responsibility assumed by the maker, identity, size or ability of the producer, sellers, marketers or providers.”³⁵⁰

Punishments were also harsh, with responsible parties subject to as much as two years in jail, a 250,000 franc fine, and a responsibility to finance further advertising to rectify misleading claims.³⁵¹

While the 1973 law called for stringent restrictions on misleading advertising, it was not interpreted strictly by the courts. In an early case, an advertisement for Samsonite luggage showed bulldozers playing soccer with a suit case in order to demonstrate its strength. A rival company argued that since in fact Samsonite had had to replace the

³⁴⁹ Arbeitgemeinschaft der Verbraucher, "Verbraucherschutz überwiegend irreführend," *Verbraucherpolitische Korrespondenz*, (April 1974); "Verbraucherverband: Zuviel Irreführung," *Handelsblatt*, Friday, 14 February 1975.

³⁵⁰ "Est interdite toute publicité comportant, sous quelque forme que ce soit, des allégations, indications ou présentations fausses ou de nature à induire en erreur, lorsque celles-ci portent sur un ou plusieurs éléments ci-après: existence, nature, composition, qualités substantielles, teneur en principes utiles, espèce, origine, quantité, mode et date de fabrication, propriétés, prix et conditions de vente de biens ou services qui font l'objet de la publicité, conditions de leur utilisation, résultats qui peuvent être attendus de leur utilisation, motifs ou procédés de la vente ou de la prestation de services, portée des engagements pris par l'annonceur, identité, qualités ou aptitudes du fabricant, des revendeurs, des promoteurs ou des prestataires."

³⁵¹ Jean Beauchard, *Droit de la distribution et de la consommation* (Paris: Presses Universitaires de France, 1996), pp 314-316.

suitcase several times in making the commercial, the advertisement was misleading. Courts found in favor of Samsonite on the grounds that "attractive advertising commonly demands a certain use of fantasy."³⁵² In a 1978 case against General Foods France, a law suit was raised against their advertising claim that the drink *Tang* had "the taste of freshly pressed oranges." General Foods France too was exonerated, on the grounds that there was no fraudulent intent and that the statement itself was not purely false.³⁵³

The logic behind these cases was later spelled out by courts when the Wonder battery company was sued for advertising with the slogan "loses its charge only when used." Competitors brought suit against Wonder, arguing that this claim was simply physically impossible, since all batteries naturally lost charge during storage. Yet the Tribunal of Paris found that the slogan was not "of the nature to lead into error" ("de nature à induire en erreur"), the standard set by the 1973 law, because the battery also contained an expiration date. Consumers could therefore reasonably be expected to understand that the claim was merely an exaggeration.³⁵⁴ Advertisements were not, in other words, completely bound to a standard of factual truth so long as "an average consumer with a normal intelligence" might reasonably understand the nature of the exaggeration.³⁵⁵

³⁵² "la publicité attractive se traduit fréquemment par un certain usage de la fantaisie." Jean-Jacques Biolay, *Le Droit de la Publicité* (Paris: Presses universitaires de France, 1986), p 79.

³⁵³ "de nature à induire en erreur le consommateur." "'L'affaire Tang' pourrait remettre en cause la lutte contre la publicité abusive," *les Echos*, 22 Mar 1978.

³⁵⁴ "ne s'use que si l'on s'en sert!" Claude Vaillant, "La publicité mensongère et la protection du consommateur en France: bilan d'application jurisprudentielle," *INC Hebdo: Actes des VI Journées du droit de la consommation* (12-13 December 1988), p 18.

³⁵⁵ "Publicité comparative: Mensongère ou non?" *Consommateurs Actualités* 505 (18 April 1986), p 7.

France's permissive standard for truth in advertising was enforced through a strategy of self-regulation by industry that helped encourage a liberal interpretation of what might be construed as misleading. France's Office for Advertising Verification (Bureau de Vérification de la Publicité, or BVP), created in 1954, began as a purely self-regulatory body of the advertising industries. Its activities were expanded in 1971 to treat truth in advertising, and it was reorganized to introduce the National Consumption Institute (INC) onto its administrative council, which included 23 representatives of announcers, advertising agencies, and the National Council on Commerce. But while in principle the 1971 reform introduced consumer interests into advertising regulation in the form of three seats on the board of directors allocated to the INC, in fact the INC was wary of becoming too closely associated with any industry association, and opted to occupy only one of these seats.³⁵⁶ Moreover, BVP control over individual companies was limited to a published admonishment and to the possibility of taking transgressors to court.³⁵⁷ Because of its close ties with industry and its weak recourse in cases of misleading advertising, the BVP has never been able to enforce a very strict standard of truth in advertising.

A later attempt was made in France to introduce a more powerful oversight body that could set and enforce stronger advertising standards. In 1976 the Consumption Commission, organized by the new Secretary for Consumption (Secrétaire d'Etat à la Consommation) Christiane Scrivener to make suggestions on consumer-friendly policies,

³⁵⁶ J.J. Boddewyn, "Outside Participation in Advertising Self-Regulation: The Case of the French Bureau de Vérification de la Publicité (BVP)," *Journal of Consumer Policy* 7 (1984), p 51.

³⁵⁷ Jean-Jacques Biolay, *Le Droit de la Publicité* (Paris: Presses universitaires de France, 1986).

recommended that advertising standards be set through equitable negotiations between consumer groups and advertisers. This proposal led to the creation in 1977 of the 28-member National Advertising Council (Conseil national de la publicité, or CNP).³⁵⁸ The new CNP included representatives from 11 national consumer organizations and 11 representatives of the media, plus expert witnesses from the government, the INC, and the BVP. The CNP was organized into three permanent committees, focusing on ethical “deontology” questions, concertation, and training, plus special working groups created on an ad hoc basis. The council was funded through a levee on advertising earnings. All meetings of the group were secret.³⁵⁹

Many of the industry participants in the CNP favored these discussions, saying that it helped them to keep track of the interests of consumer groups on subjects that can change over time. They also saw it as a way of reinforcing the mechanism of industry self-regulation.³⁶⁰ Between 1980 and 1983 consumer and professional representatives negotiated within the CNP to set new standards for advertising. These discussions were spurred on by the 1981 election of François Mitterrand, who had proposed to make any decision arrived at by consumer and professional members of the CNP binding on industry.

With the economic crisis of 1983, however, this corporatist solution to advertising regulation was abandoned, and concertation under the CNP halted. In the shadow of this failure, French advertising returned to lenient standards set by, and enforced through, the

³⁵⁸ J.J. Boddewyn, "Outside Participation in Advertising Self-Regulation: The Case of the French Bureau de Vérification de la Publicité (BVP)," *Journal of Consumer Policy* 7 (1984), pp 55-6.

³⁵⁹ Jean-Jacques Biolay, *Le Droit de la Publicité* (Paris: Presses universitaires de France, 1986).

courts. Behind this failure to enact more stringent standards of advertising lay the opposition of French producers. The peak employer's association, CNPF, opposed state enforcement of advertising standards negotiated with consumers on the grounds that it would undermine the originality that they felt was fundamental to effective advertisement. They argued instead for self-regulation (autodiscipline) by the advertising industry.³⁶¹ French unions, by contrast, understood that more accurate information about products would encourage consumers to purchase higher quality goods, and that this quality emphasis would favor union jobs. The consumer group that represented the major French trade unions at the time, ORGECO, called for the government to provide greater funding to consumer associations to help fight false advertising. In the words of Jacques Dubois, president of ORGECO, "If one man warned is worth two, one consumer informed is worth at least ten."³⁶² But in the end a lack of corporatist authority in French industry combined with a strong opposition from France's peak employer association, the CNPF, to undermine this effort at a system of advertising regulation that would be more responsive to consumer interests and needs.

This lenience in relation to truth in advertising is particularly striking given that France has not in general been opposed to restrictive regulation in the area of advertising. Indeed this sort of intervention has been a staple of French competition and cultural politics. In the area of competition, for example, France does not permit the advertisement of product prices that, given the nature of the demand, are not expected to

³⁶⁰ "La guerre est finie," *CNPF Patronat* 447 (July 1983), pp 71-72.

³⁶¹ "Le role de la publicité," *CNPF Patronat* 359 (May 1975), pp 47-8.

³⁶² "Si un homme averti en vaut deux, un consommateur informé en vaut au moins dix." Jacques Dubois, "La publicité contre le consommateur?" *Information Consommateur* 2 (1971), p 4.

remain in stock. The law is intended to stop the practice of derivative sales (“*derive de ventes*”) in which retailers draw in consumers for a product that is quickly sold out, then offer them competing products at higher prices. Legislators were particularly concerned that less expensive French goods would be advertised, and more expensive foreign goods sold in their place. Producers whose goods are thus advertised have the legal right to refuse distribution to the abusing retailers, a practice that is otherwise illegal in France.³⁶³

Competitive concerns, too, have motivated advertising restrictions that discriminate against foreign products. One example is the regulation of advertising of alcoholic beverages, which are classified for this purpose on a scale of increasing strength from 1 to 5. Higher values on the scale entail greater restrictions on advertising. Yet the constitution of the scale is flagrantly discriminatory against foreign alcohols. Grade 5 alcohols, which include mainly aperitifs, cannot be advertised at all. Aperitifs, such as whiskies, gins, and vodkas, are mostly foreign alcohols. Grade 4 alcohols, by contrast, which includes digestifs, *can* be legally advertised. Digestifs, including rhums and distilled alcohols such as brandy, contain no less alcohol than aperitifs but are primarily French products. This sort of discrimination is in principle not permitted under the Treaty of Rome, but it has not so far been corrected.³⁶⁴

France has also long condoned government restriction on advertising for cultural reasons. The law requiring that the French language be used exclusively in advertising has its origins in the 1510 ordinance of Louis XII, the 1539 ordinance of Viller-Cotterets, and the law of 2 Thermidor in year 2 of the French Revolution. Practices that have been

³⁶³ Jean-Jacques Biolay, *Le Droit de la Publicité* (Paris: Presses universitaires de France, 1986), p 65.

found illegal under this law include the use of the words “new filter” in the advertisement for French-made cigarettes, and the distribution of an English handbill by the Paris Opera. The French language has frequently been augmented to provide French equivalents for borrowed foreign words. On 25 March 1983, for instance, the “hit parade” was rendered as *palmares*, and the newspaper “scoop” became *exclusivité*.³⁶⁵

Finally, some kinds of advertising regulation have been put in place to manage demand for dangerous or scarce products. Cigarette advertisements can contain images only of the cigarette package itself. Lawyers, doctors, and pharmacies do not advertise for “deontological” reasons, meaning in this case that advertising would undermine their aura of professionalism. Other restrictions have specifically economic goals. In an effort to keep down the price of government health care, for example, pharmaceutical products reimbursed by social security are not allowed to be advertised. And in 1974, in response to the first oil crisis, the government banned all advertising for energy. The goal of such advertising restrictions is not to improve competition but rather to mitigate the deleterious effects that advertising might have on consumption.

Comparative Product Testing

Advertising as a means of disseminating product information is necessarily dominated by the interests and priorities of producers. Seeking a more objective source of product information, consumers in most advanced industrial countries have also adopted private solutions to information transparency. This has often taken the form of consumer

³⁶⁴ Jean-Jacques Biolay, *Le Droit de la Publicité* (Paris: Presses universitaires de France, 1986), p 73.

³⁶⁵ Jean-Jacques Biolay, *Le Droit de la Publicité* (Paris: Presses universitaires de France, 1986), p 66.

publications, modeled on *Consumer Reports* in the United States, that distribute the results of comparative product tests to the consuming public. France and Germany have been relative late-comers to this activity, but the market has grown rapidly. The US-based Consumers Union, which publishes *Consumer Reports*, began testing products in 1936. Sweden, the Netherlands, and the United Kingdom all saw the creation of similar testing organizations in the 1950s. Germany's *Stiftung Warentest*, by contrast, was established only in 1966, and France's two product testing publications *Que choisir?* and *50 millions de consommateurs* were first circulated in 1961 and 1970, respectively. As circulation figures suggest, consumer interest in these journals rose rapidly in both countries in the first half of the 1970s. See Figure 23 below.

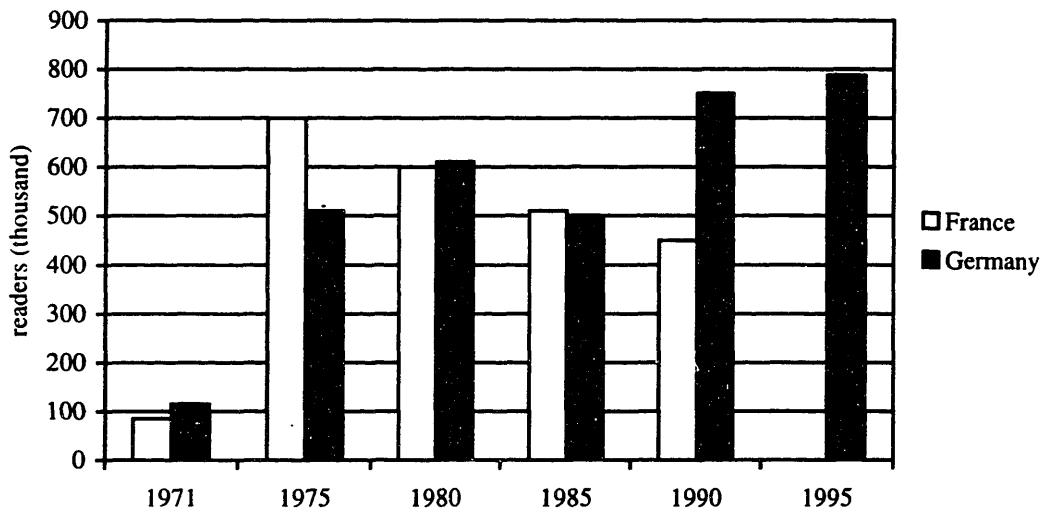


Figure 23. Circulation of comparative product test results in France and Germany, 1970-1990.

By the 1980s these publications had become extremely popular, even by international standards. A 1994 survey in Germany found that *Stiftung Warentest* was the second most popular organization in Germany, behind only the Red Cross.³⁶⁶ Consumer groups in both countries saw comparative product tests as a source of valuable information for consumers. But producers in both countries also expressed concerns that independent product tests would be biased, inaccurate, or unfair to the interests of industry. Early publishers of comparative product tests faced a barrage of lawsuits from industry charging them with inaccuracy and defamation. As governments in France and Germany recognized the potentially useful role of comparative product testing, they stepped in to create and fund their own product testing organizations.³⁶⁷ Along with this government support came public scrutiny of the kind and substance of product tests that should be undertaken. With similar interests at stake, government policies that emerged in the two countries in relation to comparative product testing showed important differences. Germany has opted for significant producer participation at all stages of the product evaluation process. France has granted a great deal of independence to product testers, who have established a reputation for independence from producer influence.

³⁶⁶ *Tagesspiegel*, "Interview mit dem Chef der Stiftung Warentest, Roland Hüttenrauch," 27 November 1994.

³⁶⁷ Because product testing is relatively expensive, funding can be problematic. By the time Germany and France faced this problem, three different solutions had been elaborated. The first approach, employed by Sweden, was to grant state subventions to an independent testing organisation in order to defray the testing costs. The second approach, adopted in Austria, was to encourage labor unions to finance and conduct comparative product tests. The third approach, modeled on the experience of *Consumer Reports* in the United States, was to finance product testing exclusively through magazine subscriptions. Both France and Germany have chosen the Swedish model, although France also has an independent product testing organisation that functions on the U.S. model. Klaus Wieken, *Die Organisation der Verbraucherinteressen im internationalen Vergleich* (Göttingen: Verlag Otto Schwartz & Co., 1976), p 22.

Product Testing in Collaboration with Industry in Germany

Comparative product testing in Germany began with two false starts. In September 1961 the publishing house Waldmar Schweitzer began publishing the results of product tests in their monthly magazine *DM – Deutsche Mark*. Its circulation grew to 350 thousand by 1963, when its publication was changed to a weekly format, and reached a peak of 800 thousand in 1964. Between January 1963 and December 1964 *DM* published results on an astounding 215 product categories and 3000 product brands.³⁶⁸ Success proved transitory, however, as circulation fell to 450 thousand in 1965. In 1966 *DM* was discontinued.³⁶⁹ The core problem was that *DM* financed its product tests not only through subscriptions, which were relatively inexpensive, but also by selling advertising space in the magazine. This created a tangible conflict of interest that undermined both public confidence in their reporting and the legal status of *DM* as a neutral testing organization. *DM* was continually sued, beginning with a chocolate manufacturer that received a negative evaluation in the first issue, and ending with a law suit leveled by Volks Wagon that the *Neue Züricher Zeitung* touted as the “greatest industrial trial in Germany.”³⁷⁰ *DM*'s experience revealed both the potential size of public demand for comparative product testing and the potential strength of industry opposition to product testing by a for-profit organization.

³⁶⁸ Klaus Wieken, *Die Organisation der Verbraucherinteressen im internationalen Vergleich* (Göttingen: Verlag Otto Schwartz & Co., 1976), p 24.

³⁶⁹ Dieter Meiners, *Ordnungspolitische Probleme des Warentests* (Berlin: Duncker and Humblot, 1968), pp 181-3.

³⁷⁰ "größte Industrieprozeß der Bundesrepublik," cited in: Stiftung Warentest, *Zeichen setzen für Verbraucher* (Berlin: Stiftung Warentest, 1996), p 7; Peter Ditgen, *Der vergleichende Warentest als Instrument der Verbraucherinformation* (University of Cologne: Doctoral Thesis, 1966), p 66.

The second false start came from Germany's umbrella consumer organization (Arbeitsgemeinschaft der Verbraucherverbände, or AgV), which had already begun in 1959 to make critical product comparisons. In 1962 they created a product test center that tested 8 product categories and 115 product brands in the next two years.³⁷¹ They too were sued, in August 1962, but by the association of branded products (*Markenverband*) for brand name defamation. In 1963 the AgV stopped their testing program, announcing that they had decided "to conduct future tests not in opposition to industry, rather...to carry them out in technical collaboration with branded products industries and retailers."³⁷² In fact they never again entered the field of product testing.

These early signs of industry opposition to comparative product testing contrasted sharply with the political enthusiasm for this activity in Germany. As early as 1957 Ludwig Erhard had proposal for institutionalized consumer protection via product tests. In 1962 Konrad Adenauer called, in his government's platform, for the creation as soon as possible of a neutral testing body. At the same time, the Minister of Justice affirmed that there was a sound legal basis for objective, technical, and neutral comparative tests.³⁷³ The CDU under Adenauer called for the creation of a state-run testing facility for products. The opposition SPD favored instead an independent public association.³⁷⁴ Under pressure from its FDP coalition partner, the CDU accepted the SPD proposal, and

³⁷¹ Klaus Wieken, *Die Organisation der Verbraucherinteressen im internationalen Vergleich* (Göttingen: Verlag Otto Schwartz & Co., 1976), p 22.

³⁷² "Warentests in Zukunft nicht mehr in Frontstellung gegen die Industrie, sondern in sachlicher Zusammenarbeit mit der Markenartikelindustrie und dem Handel durchführen zu wollen." Peter Ditgen, *Der vergleichende Warentest als Instrument der Verbraucherinformation* (University of Cologne: Doctoral Thesis, 1966), p 67.

³⁷³ "möglichst bald die Errichtung einer Körperschaft für newutrale Warentests"; Stiftung Warentest, *Zeichen setzen für Verbraucher* (Berlin: Stiftung Warentest, 1996), pp 7-8.

on 4 December 1964 the Bundestag voted unanimously for the creation and financing of the *Stiftung Warentest*.³⁷⁵ By the organization's own account, its founding responded to four emerging consumer concerns: the growing abundance of products, the increasingly technical nature of products that often precluded expert advice at the point of sale, the growth in advertising, and the time-consuming task of comparative pricing.³⁷⁶

The first test results appeared in the magazine *Test* in 1966. Government funding for the program, which was originally intended as a five-year start-up grant, had to be extended when sales remained disappointingly low. In 1970 *Test* became available at newsstands. Circulation first reached 100 thousand in 1972, and in 1973 sales receipts began to exceed government financial support.³⁷⁷ What followed was a boom in circulation that appears to have been spurred in large part by a growing demand from consumers under economic stress from the first oil embargo. *Test* has since been extremely successful. Circulation reached one million in 1995, with government support providing 13 percent of its operating expenses.

Unlike its failed predecessors, *Warentest* has never lost a law suit to the companies that it evaluates. This record has rested on a ground-breaking 1975 ruling by the German Supreme Court (Bundesgerichtshof, or BGH). Ruling on a law suit filed against *Warentest*'s 1967 evaluation of ski bindings, the BGH defended *Warentest*, finding that the organization served a valuable function of market transparency so long as

³⁷⁴ Dieter Meiners, *Ordnungspolitische Probleme des Warentests* (Berlin: Duncker and Humblot, 1968), pp 60-63.

³⁷⁵ Stiftung Warentest, *Das Wichtigste in Kürze*, (Berlin: Stiftung Warentest, July 1996).

³⁷⁶ Stiftung Warentest, *Zeichen setzen für Verbraucher* (Berlin: Stiftung Warentest, 1996), p 6.

³⁷⁷ Klaus Wieken, *Die Organisation der Verbraucherinteressen im internationalen Vergleich* (Göttingen: Verlag Otto Schwartz & Co., 1976), p 25.

the tests were carried out in a fair way. The economic logic is stated explicitly in the ruling: "Consumer enlightenment through an increase in market transparency is essential, not only in the interest of the consumer, but plainly also from an economic perspective."³⁷⁸ The goal of testing, in other words, combined consumer interests with the interests of a more efficient industrial sector. Because product testing was also in the interest of industry, the condition set by the court for fair testing was that industry itself be allowed to participate in the evaluation process.³⁷⁹

The charter of the *Stiftung Warentest* provides for industry actors to participate in product evaluation at least four different stages in the testing process.³⁸⁰ First, the board of trustees (*Kuratorium*) of *Warentest* consists of five representatives from industry, five representatives from consumer associations, and 5 neutral specialists. A three-quarters vote of this board can veto any test proposal. About five percent of all proposals are stopped in this way, usually because the board of trustees feels that the evaluation would depend heavily on matters of taste. Champagnes and perfumes, for example, typically fall outside of *Warentest*'s purview.

Second, *Warentest* consults closely with industry and consumer associations in choosing which brands to evaluate. Individual tests normally include about 20 similar products. In order to select them, *Warentest* polls about 100 retailers to find out what

³⁷⁸ "Verbraucheraufklärung zur Gewinnung von Markttransparenz unerlässlich ist, und zwar nicht nur im Interesse der Verbraucher, sondern schlechthin unter volkswirtschaftlichen Gesichtspunkten." Stiftung Warentest, *Zeichen setzen für Verbraucher* (Berlin: Stiftung Warentest, 1996), p 14.

³⁷⁹ The test would be illegal when "...das Vorgehen des Testveranstalters 'als nicht mehr vertretbar (diskutabel)' erscheint." Werner Brinkmann, "Rechtsprobleme des vergleichenden Warentests in der Bundesrepublik Deutschland," *Zeitschrift für Verbraucherpolitik* 1 (1977), p 257.

brands they stock. Popular brands are usually included because their strong market share renders them of greatest interest to readers. While some manufacturers do not want their products evaluated, more often companies complain of not being included in the evaluation. Once the test products are selected, manufacturers are then notified. This gives them the opportunity either to suggest a different product in their product line would be more suited to the evaluation, or to announce that a new and better product will be coming out in the next few months.

Third, *Warentest* consults with industry and consumer groups to decide what product properties to evaluate. Criteria proposed by engineers on the staff of *Warentest* are discussed and amended by a special advisory council (*Fachbeirat*) with 5 to 10 representatives from industry, consumer associations, and retailers. The final testing criteria are then distributed to all manufacturers whose products are being tested. Manufacturers are encouraged to indicate whether any criterion has been omitted that might show their product in a good light. This avoids an unfair advantage to firms who happen to be participating on the *Fachbeiräte*.

Warentest has no test facilities of its own. It has relied instead on 90 different organizations to carry out the actual evaluation, based on identified criteria. The actual evaluation lasts from one to six months, depending on the characteristics of the product. These raw results are then distributed to participating manufacturers for scrutiny. This allows manufacturers to raise objections before publication. Once any objections are dealt with, the *Warentest* staff then weighs the importance of the different test results and

³⁸⁰ Roland Hüttenrauch, "Zur Methodik des vergleichenden Warentests," *Journal of Consumer Policy* 1/2 (1977), pp 143-150.

combines them to create an overall evaluation on a five point scale, running from 'very good' to 'very unsatisfactory.'

Product Testing is Insulated from Industry in France

Comparative product testing in France has long been divided between two organizations that publish their own consumer magazines. The first group, the Federal Consumers Union (Union fédérale des consommateurs, or UFC), began publishing the results of product tests in its journal *Que choisir?* in 1961. The second group, the National Consumption Institute (Institut national de la consommation, or INC) began publishing the results of product tests in its journal, *50 Millions de Consommateurs*, in 1970. While performing roughly the same function, the two organizations took markedly different approaches. Whereas testing undertaken by the UFC is funded, like *Consumer Reports*, exclusively through subscriptions to *Que Choisir?*, INC receives government support in addition to subscription fees. The magazines also appear to enjoy different reputations among the general public. In general, *50 Millions de Consommateurs* is more popularly oriented than *Que Choisir?*.³⁸¹ The first product test reported by *50 Millions de Consommateurs* evaluated cleaning powders. The first test by *Que Choisir?* evaluated tennis balls. A consumer survey commissioned by the employers association, the CNPF, reported that consumers appreciate the impartiality of *Que Choisir?*, while regretting its lack of finances. Conversely, consumers recognize the value of *50 Millions de Consommateurs* but regret its partiality towards nationalized industries.³⁸²

³⁸¹ Michel Wieviorka, *L'Etat, le Patronat, et les Consommateurs* (Paris: Presses Universitaires de France, 1977), pp 146-7.

³⁸² "[Ils] apprécient *Que choisir?* pour son impartialité mais déplorent son manque de moyens. Ils reconnaissent l'efficacité de *50 Millions de Consommateurs* mais regrettent sa

The Union fédérale des consommateurs (UFC), a non-profit consumer association created in 1951, published the first edition of *Que Choisir?* in December 1961. For the first eight years of its distribution, circulation did not exceed five thousand copies. In 1969, the UFC opted to associate with the Association belge des consommateurs (ABC), whose journal *Test Achat* enjoyed at the time a circulation of 100 thousand in Belgium. Indeed in 1969 *Que Choisir?* began to appear in exactly the same format as *Test Achat*.³⁸³ The UFC later revealed that not only the tests themselves but also most of the production work for *Que Choisir?*, including editing, layout, and printing, had been transferred to the Belgian group.³⁸⁴ Yet by the end of 1973, as sales began to pick up with growing economic stress to consumers, the UFC split from ABC. Running comparative product tests proved an expensive activity, and despite the new subscribers *Que Choisir?* fell 3 million francs into debt over the course of the next year.³⁸⁵

Salvation for the UFC came, ironically, in the form of a law suit filed in December 1973 by the Arthur Martin company for a false report in *Que Choisir?* about a refrigerator they manufactured. In what appears to have been a typographical error, the volume of the refrigerator was reported in *Que Choisir?* to be 226 liters instead of its actual 266 liters. On 18 February 1974 the French Commercial Court, a body that represents industry and retail interests, ruled that *Que Choisir?* would have to reimburse Arthur Martin 310,000 francs for damages. Furthermore, they were required to pay for

partialité." Alain Poirée, *Les Discours consuméristes et leur perception par les Français* (Paris: I.C.C.-C.N.P.F., 1984), p 16.

³⁸³ Hans B. Thorelli, and Sarah V. Thorelli, *Consumer Information Handbook: Europe and North America* (New York: Praeger Publishers, 1974).

³⁸⁴ "Defense timorée du consommateur aisé," *Libération*, 29 May 1975.

³⁸⁵ Jean-Marc de Preneuf, "La crise de *Que choisir?*: Un triste gout d'échec," *La Croix*, 15 Dec 1974.

the publication of the court finding in five major newspapers. The decision was upheld on appeal in 1975.³⁸⁶ This ruling, based on the advertising clause of the *loi Royer* of 1973, established a particularly high level of responsibility for the publication of comparative product tests. So long as product evaluations were treated with the same standards as advertisements, defendants had only to prove that an error had been made, not whether that error had been negligent.³⁸⁷

Unlike lawsuits against Germany's *DM*, however, the Arthur Martin proved beneficial for *Que Choisir?*. They felt that they benefited from the law suit because it proved that they were not under the influence of industry.³⁸⁸ This kind of antagonism against industry became a central theme for *Que Choisir?*. In April 1977, finding that many aerosol cans on the market exploded if heated to over 90 degrees Celsius, *Que Choisir?* called for a consumer boycott of these products.³⁸⁹ In February 1978, when *Que Choisir?* evaluated doctors by sending them patients with constructed symptoms, Doctor Albert Cohen brought a defamation suit against UFC.³⁹⁰ In December of the same year eleven medical testing labs sued *Que Choisir?* for a critical report in their May 1978 edition entitled "Thirty-two laboratory tests, thirty-one errors." In these cases the appeals court in Paris found against *Que Choisir?*, on the grounds that their methods were not

³⁸⁶ Mary Blume, "The Rocky Road of Consumerism in France," *International Herald Tribune*, April 30 1977; "31 millions pour Arthur Martin," *Libération*, 3 March 1977.

³⁸⁷ Jean-Philippe Vidal, "Les organisations de consommateurs peuvent-elles revendiquer le droit à l'erreur?" *Les Echos*, 25 Mar 1977.

³⁸⁸ Jean-Philippe Vidal, "Les organisations de consommateurs peuvent-elles revendiquer le droit à l'erreur?" *Les Echos*, 25 Mar 1977.

³⁸⁹ "L'Union federale des consommateurs appelle au boycott des aerosols," *Libération*, 5 April 1977.

³⁹⁰ Elisabeth Rochard, "Peut-on tester un médecin?" *Le Matin*, 15 Nov 1978.

“scientifically incontestable,” but fines were kept relatively low and the publicity from these cases spurred sales of *Que Choisir?*.³⁹¹

Que Choisir? had by the end of the 1970s become the scourge of French industry. In 1979, for example, *Que Choisir?* reported that in 750 different cases automobile tires manufactured by the French Kléber-Colombes company had exploded when cars reached 120-130 kilometers per hour (80-86 mph). Kléber-Colombes at the time enjoyed sales of 2 billion francs, of which 36 percent came from foreign sales, and controlled 40% of the French tire market. Michelin, the leading producer, held 48 percent of Kléber-Colombes stock.³⁹² In response to the criticism raised by *Que Choisir?*, Kléber-Colombes organized on 28 November 1979 a “réunion d’information” at their testing center in Mirmas, where some of France’s best race drivers were invited to put the suspect tires, the models V10 and V12, through a rigorous workout. One engineer giving a presentation to reporters said: “Journalists, your attack is tragic. What you are attacking is the entire French automobile industry. It is the backbone of France.”³⁹³ François Lamy, who had pursued the case at *Que choisir?*, presented himself at the center but was not admitted. Asked why Lamy was not allowed to participate, the CEO of Kléber responded: “We do not allow a criminal to speak.”³⁹⁴

France’s state-run product test journal, *50 millions de consommateurs* (today called *60 millions de consommateurs*) was less militantly anti-industry than *Que*

³⁹¹ *Le Monde*, 26 Dec 1978.

³⁹² François Bourbon Destrem, “Kléber-Colombes met toute la gomme,” *Quotidien de Paris*, 30 November 1979.

³⁹³ “Journalistes, l’attaque est malheureuse. Ce que vous attaquez, c’est toute l’industrie automobile française. Qui fait vivre en épine dorsale la France...”

Choisir?, but it nonetheless resisted pressures to be more responsive to industry interests. The Institut National de la Consommation (INC), which publishes *60 millions de consommateurs*, was proposed by Minister of Economy and Finance Michel Debré in article 34 of the 'loi de finances rectificative' and approved by a vote of the National Assembly on 15 December 1966. Its organization and tasks were set by decree on 5 December 1967.³⁹⁵ Although its primary goal was to provide technical support on consumer issues to the government as well as to consumer associations, the INC was also charged in article 2 of its charter to conduct product tests at the request of these groups. The first test results appeared in 1970 in the organization's monthly magazine, *50 Millions de Consommateurs*. In 1970 the advisory group to the Sixth French Plan recommended increasing funding to comparative product tests conducted by INC.³⁹⁶ Between 1971 and 1975 INC conducted 140 such tests.³⁹⁷

Today, renamed *60 Millions de Consommateurs*, the publication has a circulation of roughly 250,000 and shares the national market almost evenly with *Que Choisir?*. INC also distributes its test results through other media. Each year INC broadcasts ten hours of consumer programming in 126 television spots of the program *D'accord pas d'accord* (OK not OK). In a 1986 survey, 88 percent of consumers knew of the *D'accord pas d'accord*, 70 percent avowed interest in such television spots, although 71 percent of

³⁹⁴ "Nous ne donnons pas la parole à un criminel." Patrick Berthreu, "Kleber-Colombes en rechappe," *Liberation*, 7 December 1979; Josée Doyère, "Information sélective," *Le Monde*, 1 December 1979.

³⁹⁵ Josée Doyère, "Le dixième anniversaire de l'INC: Un outil au service d'une politique libérale," *Le Monde*, 24 January 1978.

³⁹⁶ Jacques Dubois, "Les consommateurs et le VIe plan," *Information Consommateur* 70/5 (1970), p 5.

³⁹⁷ Claude Duchamp, "Les essais comparatifs," *Revue des études coopératives* 186 (1977), p 81.

viewers said they watched it simply because it happened to be on while they were watching.³⁹⁸ INC test results also appeared in 1,400 external magazine and newspaper articles in 1989, as well as in 75 external citations on television and radio. Since July 1989, all of INC publications have been available via Minitel from the service "BINC." This service received 348,900 calls in 1989 alone.³⁹⁹

The INC's initial approach to product testing is similar to that employed by the UFC. Products to be tested are purchased anonymously, with the test sample generally amounting to three quarters of the total selection of products available on the market. When the price of products and tests permits, several products of each brand are included in the testing sample. Labels are then removed from the products, which are then either tested in-house or, for more complicated tests, sent to external testing labs. The raw test results are generally sent to the companies whose products had been tested, but *50 Million de Consommateurs* writers are not required to take into account company responses. Tests last between six months and a year from the date of product purchase to the date of publication.⁴⁰⁰

Government sponsorship of comparative product testing initially drew mixed reactions from consumer and producer associations. ORGECO, the consumer association representing the big French labor unions, favored product tests as a counter-force to industry prerogative. They felt that "...only comparative tests are capable of truly **impeding** producers and distributors and thus of permitting an effective defense of the

³⁹⁸ "Les émissions télévisées de l'INC 'D'accord pas d'accord'," *Consommateurs Actualités* 513 (13 June 1986), pp 3-6.

³⁹⁹ Marie-Hélène dos Reis, "L'Institut national de la consommation," *Revue française d'administration publique* 56 (October-December 1990), pp 659-660.

consumer."⁴⁰¹ While most family-oriented consumer associations also favored the INC tests, the UFC voiced concern about the conflict of interest posed by the dual role of the INC as both advisor to the government and evaluator of products. In part for this reason, and in part due to the growing competition *Que Choisir?* faced from *50 Millions de Consommateurs*, the UFC withdrew in protest from the governing board of the INC in 1972.⁴⁰²

Producers generally opposed INC's move into product testing. CNPF president Huvelin opposed all government support to comparative product testing.⁴⁰³ The Paris Chamber of Commerce and Industry (CCIP) did not object to product testing *per se*, but complained that industry had no input into the evaluations. Taking their cue from Germany's *Stiftung Warentest*, they proposed that INC consult professional associations in drawing up the list of brands to be tested, in studying the "physionomie" of the market, and in establishing criteria for evaluating specific products. Results of product tests should then be distributed to producers with enough lead time to allow for their responses to be incorporated into the evaluations.⁴⁰⁴ The Minister of Economy and Finance, in a letter to the President of the CCIP of 8 October 1973, rejected this German-inspired

⁴⁰⁰ Claude Duchamp, "Les essais comparatifs," *Revue des études coopératives* 186 (1977), p 78.

⁴⁰¹ "Seuls les essais comparatifs sont susceptibles de **gener** [bold in text] véritablement les producteurs et distributeurs et donc de permettre une défense efficace du consommateur." Jacques Dubois, "L'Étiquetage d'information et les essais comparatifs," *Information Consommateur* 4 (1970), p 2.

⁴⁰² Marie-Hélène dos Reis, "L'Institut national de la consommation," *Revue française d'administration publique* 56 (October-December 1990), p 656.

⁴⁰³ Jacques Dubois, "L'Étiquetage d'information et les essais comparatifs," *Information Consommateur* 4 (1970), p 2.

⁴⁰⁴ Chambre de commerce et d'industrie de Paris. "Problèmes de la consommation." Rapport présenté au nom de la Commission du Commerce Intérieur par H. Ehrsam (Adopted 24 May 1973), p 7.

approach. Greater company participation in the preparation of comparative tests would, he claimed, "...risk to accentuate the disequilibrium in favor of producers who would rapidly become masters of what products were submitted to tests, of the choice of laboratories, and of the results that were diffused." He proposed instead that product testers be held to high standards of quality in product testing that could be contested after a product test was published. The CCIP rejected this *a posteriori* solution as overly burdensome for companies, testing organizations (which would face large fines), and consumers.⁴⁰⁵

Responding to these criticisms from the business community, France's standard setting organization AFNOR published in March 1975 an experimental standard, denoted NF X 50-005, intended to provide "a charter of good relations between organizations conducting comparative tests, producers, and consumers."⁴⁰⁶ The new standard called for testing organizations to maintain financial independence from producers and distributors, which precluded any form of advertising in the magazine where comparative test results were presented. It also stipulated that tests should cover products from the entire price range, that reviews of subjective qualities should be based on consumer surveys, and that

⁴⁰⁵ "risque d'accentuer le desequilibre en faveur des producteurs qui deviendraient rapidement maitres de la selection des produits soumis aux tests, de la determinatnion des methodes d'essai, du choix des laboartiores et des resultats diffuses." Chambre de commerce et d'industrie de Paris, "Reglementation des essais comparatifs de produits," Rapport présenté au nom de la Commission du Commerce Intérieur par H. Ehrsam (Adopted 6 December 1973), p 8.

⁴⁰⁶ "...une charte des bonnes relations entre les organismes d'essais comparatifs, les producteurs et les consommateurs." Claude Duchamp, "Les essais comparatifs," *Revue des études coopératives* 186 (1977), p 77.

companies implicated by comparative tests be consulted about the testing procedure and its results.⁴⁰⁷

French business continued to put pressure on the government to incorporate business input into INC's product testing program. In January 1978, for example, the office of the Secretary of Consumption called for access to *50 millions de consommateurs* articles before they were published in order to avoid damage to certain companies.⁴⁰⁸

This proposal was dropped when the Secretariat itself was eliminated later that year. The issue resurfaced again ten years later, in 1987, when the new right government endorsed business interest in comparative product testing. In a sweeping indictment of both INC and the UFC, the new Secretary of Consumption and Competition, Jean Arthuis, stated in July 1987: "France is cruelly lacking a system of comparative product tests worthy of the name... One need only observe the use made by our German neighbors of their *Stiftung Warentest* to be persuaded that such an organization is an essential element for economic performance, joining the aspirations of consumers and professionals alike."⁴⁰⁹ One of his goals, drawn from the German experience, was to make INC results available for producers to incorporate into their advertising. Yet producers were unlikely to accept this

⁴⁰⁷ Chambre de commerce et d'industrie de Paris, "Reglementation des essais comparatifs de produits," Rapport présenté au nom de la Commission du Commerce Intérieur par H. Ehrsam (Adopted 6 December 1973), p 6.

⁴⁰⁸ Pierre Pujol, "Un souch non désintéressé pour les 'consommateurs'," *Quotidien du Peuple*, 25 jan 1978.

⁴⁰⁹ "La France manque cruellement d'un système d'essais comparatifs digne de ce nom....Il n'est que de voir l'usage que font nos voisins allemands de leur *Stiftung Warentest* pour être persuadé qu'un tel organisme est un élément essentiel d'une économie performante, en même temps qu'il fédère les aspirations des consommateurs et des professionnels." "Intervention de M. Jean Arthuis, Secrétaire d'Etat chargé de la Consommation et de la Concurrence, devant le Conseil d'Administration de l'INC (26 juin 1987)," *Consommateurs Actualités* 558 (10 July 1987): 2-3.

change unless they also had more input into the process by which their products were being evaluated.⁴¹⁰

Consequently, in October 1987, the National Council on Consumption called for the creation of an autonomous Authority on Comparative Tests (Autorité des essais comparatifs, or ADEC) to oversee the testing operations at INC. This new oversight body included six members of consumer associations, six members of professional associations, and four neutral professionals (drawn from AFNOR, LNE, INC, and Qualitel). ADEC was assigned three functions in product testing. First, they would help in the selection of the product categories to be tested, and product categories would be selected two to three years in advance of publication so that interested industries could register their opinions. Second, ADEC would participate in developing the testing methodology, including setting the composition of expert groups to oversee particular tests. Finally, ADEC would participate in the effort to draw conclusions from the test results.⁴¹¹

The CNPF vice-president in charge of consumer issues, Roger Cabal, favored the creation of ADEC, and praised especially the longer development period for the tests. This, he felt, would allow companies to change their product designs so that they would better conform to the testing criteria.⁴¹² Whereas most consumer groups in the CNC also assented to the change, the UFC stood in strong opposition to the creation of ADEC.

⁴¹⁰ Professional representatives had been removed by the Socialist government in 1982 from the Advisory Council of the INC and placed instead in the National Council on Consumption, formerly the National Committee on Consumption, in order to create a high-level forum for concertation between consumers and producers.

⁴¹¹ "La réforme des essais comparatifs." *CNPF Patronat* 499 (March-April 1988): 78-9.

⁴¹² "Mise en place d'une Autorité des essais comparatifs au sein de l'INC," *INC Hebdo* 563 (2 October 1987), p 5.

Apparently at the UFC's behest, the new French testing authority was also condemned by the European Office of Consumer Unions (Bureau européen des unions de consommateurs, or BEUC) for permitting state intervention in the process of product evaluation. BEUC found that the level of industry participation in ADEC far exceeded even that in Germany's *Stiftung Warentest*, and warned that "...any direct or indirect interference by the state or producers [in comparative product testing], in the rare cases where that has occurred, throws discredit on product tests for many reasons: because of an arbitrary choice of products to be tested, by the exclusion of foreign competitors, by juggling the relationship between quality and price, by reference exclusively to national standards, or by the uneven use of results by companies or the state."⁴¹³ Yet the activities of ADEC have never attained the level of industry collaboration that lies at the center of Germany's *Stiftung Warentest*. While industry representatives do sit on ADEC, companies have been largely unwilling to contribute at different stages in the evaluation process. ADEC today continues to set broad policies for product testing in *60 millions de consommateurs*, but it has not led to an integration of industry into the process of product testing.

Quality Labels

Consumers and producers have in some instances collaborated to provide consumers with accurate technical information about products. One case of this is product

⁴¹³ "...toute interférence directe ou indirecte des Etats ou des producteurs ou distributeurs dans les rares cas où cela s'est produit, jetait le discrédit sur le test, par les risques d'arbitraire dans le choix des produits testés ou d'exclusion de concurrents étrangers ou d'escamotage de la notion de rapport qualité/prix, ou par la référence exclusive à des normes nationales, par des exploitations tronquées ou inégales des résultats par les

labeling. In both France and Germany in the early 1970s, governments worked with producers and consumers to design informative product labels that would assist buyers in comparing the relative qualities of products on the market. So long as these labeling programs remained objective and voluntary, producers in both countries were staunch advocates of the process. Following the early success of product labeling, however, France and Germany both experimented with more comprehensive labeling projects that sought to provide consumers with composite scales reflecting different aspects of product quality. These new quality labeling initiatives were viewed with skepticism by industry, and succeeded only in Germany.

French Product Labeling

In France, informative labeling for consumer products was launched as a collaborative effort by the National Council of French Employers (Conseil national du patronat français, or CNPF) and the National Consumption Institute (Institut national de la consommation, or INC). In September 1970 they founded the French Association for Product Labeling (Association française pour l'étiquetage d'information, or AFEI), a non-profit organization in the public interest with the goal of designing and distributing model product labels. The content of the labels was to be strictly factual, and negotiated among consumer and industry representatives. Different kinds of labels were negotiated for different product lines, and their use was strictly voluntary. The first product label

producteurs out les Etats." "UFC-BEUC: pleins feux sur l'ADEC," *INC Hebdo* 578 (22 January 1988), p 3.

appeared in 1972. AFEI had issued 300 labels by 1974, 1000 by 1978, and 1300 by 1980.⁴¹⁴

Following on the success of AFEI, and amid growing concern over product quality, an effort was made to extend the range of informative labeling beyond objective product dimensions to include composite indicators that would approximate qualitative characteristics of interest to the consumers, such as durability and usefulness. The model for this initiative was the Swedish VDN-Skala (Varudeklarationsnämnd, or value declaration office scale) established in 1951, that provided relative product quality information on five-point scales. By 1971 the VDN-Skala had been successfully applied to 110 different kinds of products.⁴¹⁵ Following this lead, the French Ministry of Industry and Research under Michel d'Ornano created in November 1975 a 'Service de la qualité' under the Direction des Mines.⁴¹⁶ This Service de la qualité would work with AFEI to create new qualitative product labels. The proposal was endorsed by the President, the Ministry of Commerce, and the National Consumption Institute (INC). The association of companies that produce electrical goods (CEDEF-GIFAM), which was likely to be heavily influenced by the new label format, gave a restrained approval: "We accept this

⁴¹⁴ AFEI was eliminated in 1984. Pierre Frybourg (president of AFEI), "L'Etiquetage d'Information," *Revue de la concurrence et de la consommation* 12 (1980), pp 14-16; "L'Etiquetage informatif vous aide dans vos achats," *Information Consommation Or-Ge-Co* 27 (Mar-April 1978), pp 3-4; Jacques Dubois "L'affichage des prix...ne doit etre qu'un premier pas." *Information Consommateur* 1 (1972), pp 3-4.

⁴¹⁵ Adrian Weser, *Warenkennzeichnung – ein Mittel der Verbraucherinformation* (Verlag Göttingen: Otto Schwartz & Co, 1976), pp 126-133.

⁴¹⁶ *Le Monde*, 22 Nov 1975.

project rather favorably but we remain concerned by the modality of the dialogue with the consumers.”⁴¹⁷

In 1976 the project was taken on by the newly appointed Secretary of Consumption, Christiane Scrivener, as a flagship for her campaign to promote consumer interests. After protracted closed-door discussions with industry, she helped to write and pass a law on consumer information on 10 January 1978 that provided for so-called ‘Quality Certificates’ (certificats de qualification). The content of the Quality Certificates was to be negotiated between industry, consumers, and the administration. The first range of products to be labeled under the new scheme, for example, was shoes. Each kind of shoe would be described on three separate scales measuring comfort, durability, and a third composite category called ‘finition.’ In addition to offering measures of quality, the project also provided for enforcing a minimum level of guaranteed quality, to be set by the Ministry of Industry.⁴¹⁸ Product testing to establish product quality levels was to be carried out by the National Testing Laboratory (Laboratoire national d’essais, or LNE), an organization that, with 350 employees and a 44 million franc budget, was probably not prepared for the task.⁴¹⁹

French industry had neither the will nor the capacity to carry out such a broach labeling project. First, French producers were not oriented towards producing the qualities that were likely to be the basis of qualitative labeling. Because many products were expected to fall short of the requisite level of quality specified by the Ministry of

⁴¹⁷ “Nous accueillons plutôt favorablement ce projet mais nous demeurons préoccupés par les modalités du dialogue avec les consommateurs.” Rosemonde Pujol, “Protection du consommateur: d’Ornano intervient,” *Le Figaro*, 20 November, 1975.

⁴¹⁸ Jean Calais-Auloy, *Droit de la Consommation* (Paris: Editions Dalloz-Sirey, 1992).

⁴¹⁹ Gisèle Prevost, “Qualification de produits industriels,” *Les Echos*, 27 Sep 1979.

Industry, it was projected that 280 product brands would disappear from the market if the Quality Certificates program was initiated.⁴²⁰ Moreover, industry resisted participating in many of the committees for setting labeling standards. The ambitious goal, to have all products relabeled in this way by the end of 1981, was finally ruled out by the election of François Mitterrand's Socialist government, which quickly eliminated the project. Rather than pursue qualitative labeling further, the new government had a different idea for promoting quality: they would attempt to engage consumer groups to negotiate quality standards directly with industry. This approach is discussed in Chapter eight below.

German Product Labeling

Product labeling followed a more constructive trajectory in Germany. Informative product labels were initiated in 1964 by the German Institute for Product Safety and Labeling (RAL Deutsches Institut für Gütesicherung und Kennzeichnung, formerly the Reichsausschuß für Lieferbedingungen). Founded in 1925 with the goal of certifying raw materials for production, RAL was discontinued in 1942, when wartime production conditions caused quality levels to sink below the acceptable threshold set by RAL. The organization was resurrected in 1952 under the influence of Ludwig Erhard's Economics Ministry as a committee of the German Standards Committee (Deutsches Normenausschuß, DNA), the precursor to the German Standards Institute (Deutsches Institut für Normung, or DIN). The main goal of the new RAL was to create product quality symbols for both industrial and consumer products that assured conformity with a minimal level of safety and quality. RAL recognized 68 such symbols in 1960, 103 in

⁴²⁰ Elisabeth Rochard, "Pour informer les consommateurs: un 'certificat de qualification'," *Le Matin*, 27 Jun 1979.

1978, and 145 in 1995.⁴²¹ Over half of these quality symbols applied to building materials, with the rest going to consumer products and, to a lesser extent, to agricultural products.⁴²² Although RAL focused its efforts primarily on quality symbols, it also issued standard specifications for product colors (RAL-Farben), and certificates of provenance (Herkunftsgewährzeichen, such as for Lübecker Marzipan).⁴²³

RAL began issuing a series of informative product labels under the name “RAL-Testate” in 1964. Like the proposed French Quality certificates, these informative labels included scales for those properties of the product that consumer and producer representatives agreed would be helpful to the consumer. The characteristics of the product being sold were marked on a scale that indicated its position relative to the full range of products on the market. Companies interested in including an RAL-Testate on their product packaging had to submit the product to a testing center for evaluation. Any products that did not meet DNA minimum standards were not allowed to incorporate the RAL-Testate on their packaging.

By 30 April 1974, RAL had created Testate for 122 product kinds, including household electronics (vacuum cleaners were big users), cooking wares, metal goods, plastic and leather goods, textiles, and cleansers. Heat storage units were required to be sold with RAL-Testate because the electric companies allowed only products with this marking to be installed. Interestingly, one in four RAL-Testate tests were requested by mail order companies, who sought a means to convey more information to consumers

⁴²¹ RAL Deutsches Institut für Gütesicherung und Kennzeichnung, *70 Jahre RAL-Gütezeichen: Eine moderne Idee feiert Geburtstag* (Sankt Augustin: RAL, 1995), p 22.

⁴²² Adrian Weser, *Warenkennzeichnung – ein Mittel der Verbraucherinformation* (Verlag Göttingen: Otto Schwartz & Co, 1976).

who did not have direct access to their products. A survey by the University of Gießen reported that one in six housewives were familiar with the RAL-Testate label.⁴²⁴

Despite this early success, the RAL-Testate enjoyed a short life. On 26 August 1973, RAL separated from the DNA. The impetus came not from RAL or the DNA administration, since they had worked well together and continued to collaborate after the separation, but from pressure by Germany's peak association for the household equipment industry (Hauptgemeinschaft der Deutschen Hausgeräteindustrie, or HDHI). As a member of DNA, the HDHI was concerned that the rising prominence of consumer politics would soon draw political scrutiny to RAL activities. If RAL remained in DNA, they argued, then the entire process of standard setting in consumer goods could become politicized, with consumer groups and the government requesting input into the standard-setting process. While most members of DNA made industrial products that would be unaffected by consumer politics, they nonetheless acceded to the wishes of the HDHI and banished RAL.⁴²⁵

Under its new charter as an independent organization, the RAL in 1973 invited diverse participation in order to secure its neutrality and legitimacy. Consumer organizations, trade unions, peak production associations, and chambers of commerce now participated in RAL-Testate design. Consumer and producer groups met in a newly-created RAL Committee on RAL-Testate (Ausschuß RAL-Testate im RAL) to set

⁴²³ Jürgen Bornecke, *Handbuch der Verbraucherinstitutionen* (Bonn: Verlag Information für die Wirtschaft, 1982).

⁴²⁴ Adrian Weser, *Warenkennzeichnung – ein Mittel der Verbraucherinformation* (Verlag Göttingen: Otto Schwartz & Co, 1976), pp 124-125.

⁴²⁵ Annemarie Bopp-Schmehl, Uwe Heibült, and Ulrich Kypke, *Technische Normung und Verbraucherinteressen im gesellschaftlichen Wandel* (Frankfurt am Main: Haag & Herchen Verlag, 1984).

priorities for products to be considered and product values to be included on labels. As the HDHI had feared, this new negotiating table became a forum for imposing new minimum quality and safety levels.⁴²⁶ The effect was to create a negotiating arena outside of DIN for product standard setting. The business response to this move was hostile. Even the Consumer Council (Verbraucherrat, or VR) of DIN opposed the new RAL-Testate format. When RAL applied in 1974 for a contract from the Economics Ministry to help finance the cost of the new RAL-Testate system, it was turned down. Under pressure from industry and the Economics Ministry, RAL abandoned the RAL-Testate program altogether in 1975 and returned to its original focus on content symbols.

Unlike France, however, Germany did not abandon all effort to create an information labeling system that could address the specific quality needs of consumers. When the Economics Ministry turned down RAL's request, it also approached Germany's peak industry association (Bund Deutscher Industrie, or BDI) and other economic groups for proposals for an alternative product information system. After two years of discussions, the peak consumer association AgV, the Economics Ministry, and Stiftung Warentest worked together with RAL to pass a 1977 law setting guidelines for the provision of product information in Germany ("Richtlinien für Produkt-Information in der Bundesrepublik Deutschland").⁴²⁷

In order to implement this new set of guidelines, a working group of prominent social and economic associations⁴²⁸ came together in 1977 to create an alternative set of

⁴²⁶ "Grundsätze für Gütezeichen," *Bundesanzeiger*, 23 March 1974.

⁴²⁷ Willi Laschet, "Verbraucher sind auch Kunden," in *Verbraucherpolitik kontrovers*, ed. Hartwig Piepenbrock and Conrad Schroeder (Köln: Deutscher Instituts-Verlag, 1987).

⁴²⁸ The group included the Economics ministry (BMWi), RAL, the peak consumer association (AgV), the Stiftung Warentest, the peak industry association (BDI), trade

informative labels that would provide end-consumers with standard, objective measures of the most important qualities of a product. This new Produkt-Informationssystem (PI) was distinct from the RAL-Testate in that it focused on measurable qualities of products rather than attempting to create a composite scale. To ensure that the information provided was both accurate and useful to consumers, the PI comprised two standing committees, each with representation from industry, consumer groups, and retailing. The Community Board for Product Information (Gemeinschaftsausschuß für Produkt-Information, or GA-PI) was responsible for setting the operating guidelines of the PI system. A second Technical Committee for Product Information (Fachausschuß für Produkt-Information, or FA-PI) was responsible for the content and form of the PI, as well as the enforcement of guidelines set down by the GA-PI.⁴²⁹ Both committees were kept small so that they could work effectively.

In January 1979, RAL and DIN collaborated to create a private company, the German Society for Product Information (Deutsche Gesellschaft für Produktinformation GmbH, or DGPI) that took over management and promotion of the PI system in Germany. This new management ensured that neither the government nor consumers would interfere in PI labeling.⁴³⁰ In 1980 DGPI signed a contract with the Economics Ministry to provide product information, and to transpose European level environmental

associations, DIN, and the Federal association for materials testing (Bundesanstalt für Materialprüfung, or BAM).

⁴²⁹ Members included 5 producer representatives, 3 from BDI, 2 from retailing industries, 5 from AgV, 1 from DIN, and 1 from BAM. Jürgen Bornecke, *Handbuch der Verbraucherinstitutionen* (Bonn: Verlag Information für die Wirtschaft, 1982), p 326.

⁴³⁰ Annemarie Bopp-Schmehl, Uwe Heibült, and Ulrich Kypke, *Technische Normung und Verbraucherinteressen im gesellschaftlichen Wandel* (Frankfurt am Main: Haag & Herchen Verlag, 1984), p 86.

quality requirements into German product information labels.⁴³¹ By 1984, 20 PI labels had been produced, and an additional 16 were in production. DGPI was later amalgamated into DIN. The PI system continues to be used in Germany, particularly for white wares, electronics, gas, oil and coal equipment, heating pumps, and solar panels.⁴³²

Divergent Policy Paths in Information Regulation

A common thread links these apparently disparate areas of policy relating to the provision of consumer information in the marketplace. In France, ambitious plans for the provision of accurate product information faltered through the objections of industry and a lack of commitment on behalf of consumer groups and the government. In Germany, industry itself has been a strong proponent of high quality consumer information, on the condition that it retain control over the content of that information. This policy divergence has generated a strong product information regime in Germany, by which consumers have come to rely on and emphasize technical product information in their purchasing decisions. German companies, confronting informed consumer demand, have in turn focused on product quality and technical sophistication as the central arena of competition and comparative advantage.

France, by contrast, has created a weak consumer information regime in which consumers face difficulties in distinguishing incremental quality and technical advances. Confronting consumer demand of this kind, French producers have oriented their production strategy not primarily towards product quality, where marginal improvements

⁴³¹ Reinhard Hector, "Verbraucherpolitische Aspekte aus Sicht der Gebrauchsgüterindustrie," in *Verbraucherpolitik in der Sozialen Marktwirtschaft*, ed. Jürgen Bornecke (Köln: Verein für wirtschaftliche und soziale Fragen, 1984), p 28.

are unlikely to be recognized by consumers, but instead towards radically new kinds of products that can be distinguished from existing products on the market even in the absence of accurate technical information.

In the area of advertising, the policy divergence in France and Germany has led to different national expectations in relation to advertising. In a study of European attitudes, Françoise Bonnal surveyed the qualities that consumers in different European countries associated with good advertising. While all countries called for informative advertising, the way in which the advertising should be informative differed importantly. France and Germany in particular showed a marked divergence. France (and Italy) placed a strong emphasis on the value of creative advertising. “The French...insist on defending the idea of an inventive and aesthetic advertising that creates new languages, sometimes at the risk of forgetting the needs of the product.”⁴³³ In Germany (as well as in Denmark, the UK, and Spain) informative advertising was seen as honest advertising: “The particularity of German advertising is its severity. Ideal advertising must be honest, informative, and in good taste.”⁴³⁴

In the area of comparative product testing, the different national orientations are evoked by the positions of trade unions in the two countries. In Germany, trade unions sided with producers to request a business presence in the evaluation process. Their main

⁴³² Hans-Wolfgang Micklitz, “Three Instances of Negotiation Procedures in the Federal Republic of Germany,” *Journal of Consumer Policy* 7 (1984), p 213.

⁴³³ “Les Français...s’obstinent à défendre une idée de la publicité inventive, esthétique et créatrice de nouveaux langages, au risque parfois d’oublier les exigences du produit.” Françoise Bonnal, “Les Goûts publicitaires des Européens,” in *Six manières d’être Européen*, ed. Dominique Schnapper and Henri Mendras (Paris: Gallimard, 1990), p 267.

⁴³⁴ “La particularité du public allemand est la sévérité. La publicité rêvée doit être honnête, informative et de bon goût.” F. Bonnal, p 274.

goal was to lower the risk to production lines by controlling the market uncertainty that independent product testing could create. So long as producers had sufficient advanced notice about poor test results, undue shocks to the labor force could be avoided. German policy choices were, through the help of the Justice Ministry, held in close alignment with these economic interests of trade unions and of industry. In France, by contrast, unions felt that an independent testing authority was critical to counter-balance the power of industry. Hence they favored both the total independence of *Que Choisir?* and the absence of industry input into *50 Millions de Consommateurs*. The result was a system of product testing in which test results supported a strong consumer and union opposition to the force of industrial capital.

Finally, the German and French experiences with product labeling reform in the 1970s reveal a similar divergence of interests in relation to consumer information. In Germany, consumer product labeling grew out of RAL, an organization originally created to provide a service to producers by ensuring the quality of raw materials. In France, consumer product labeling began as an equal collaboration of producers and consumers in a new organization, AFEI. RAL's attempt to negotiate minimum quality thresholds for RAL-Testate was rebuffed primarily by industry, which was able to have the program eliminated and the more business-friendly PI system erected in its place. In France, by contrast, qualitative product labeling failed, due primarily to industry opposition. Product labeling in Germany, in other words, proceeded by the grace of industry, whereas in France it responded more closely to capacities and political interests of the government.

Chapter 7. Consumer Protection Through Risk Regulation

An important stimulus for improving consumer information in France and Germany grew out of a concern in the 1960s and 1970s over the social risk posed by modern products. The new risks were partly real and partly subjective. On the one hand, increasingly complicated products made it difficult for consumers to assess their safety or design. As Horst Albach writes, "Buying a new product carries a risk for the consumer: the new product may not function properly, and may even prove dangerous to the health of the user."⁴³⁵ Dramatic product failures like Thalidomide dramatized this risk. On the other hand, consumer fears also increased with affluence.⁴³⁶ Ulrich Beck has argued that this growth in affluence stimulated a fundamental shift in public policy. Whereas industrialization during periods of scarcity had been dominated by the theme of wealth distribution, emphasis changed with the onset of prosperity to the theme of risk distribution. Socially recognized risks became the new focus of politics. "Suddenly," Beck writes, "the public and politics extend their rule into the private sphere of plant management -- into product planning and technical equipment."⁴³⁷

The new societal emphasis on product risk represented a change from risk strategies that had evolved in earlier stages of industrialization. Faced with the risks inherent to industrialization, most countries had responded by created broad social

⁴³⁵ Horst Albach, *Culture and Technical Innovation: A Cross-Cultural Analysis and Policy Recommendations* (Berlin: Walter de Gruyter, 1994), pp 282-284.

⁴³⁶ Harvey M. Sapolsky, "The Politics of Product Controversies," in *Consuming Fears: The Politics of Product Risk*, ed. Harvey Sapolsky (New York: Basic Books, 1987), p 200.

insurance schemes. These had the effect both of guaranteeing medical and social support to workers and consumers injured by industry, and also of distributing the societal costs of industrialization widely in society. By externalizing the risk of production, the social insurance approach in effect provided a social subsidy to industry. The growing emphasis on product risk in the 1960s and 1970s signaled a completely different approach to the risks of industrialization. Instead of externalizing these risks through insurance schemes, policy-makers moved to internalize product risks to the company.⁴³⁸ Product risks that had previously appeared inevitable were now perceived to be the responsibility of producers. This set a new standard for production, in which product safety was made an abiding goal of product design and manufacture.

But the social perception of these risks differed significantly in different countries. Mary Douglas and Aaron Wildavsky have argued that the perception of risk is largely socially constructed, with countries tending to emphasize risks that reflect the social organization of society: "Deep differences in attitudes toward risk derive from insitutional life." In particular, they contrast hierarchical institutions with individual market institutions. In hierarchical institutions, individuals attempt to limit radical action, in the implicit understanding that this can lead to collapse. This leads them in turn to emphasize long-term risks that are susceptible to system-level solutions. In market organizations, by contrast, individuals see uncertainties as opportunities, and thus tend to

⁴³⁷ Ulrich Beck, *Risk Society: Towards a New Modernity* (London: Sage Publications, 1992), pp 20-24.

⁴³⁸ Spiros Simitis, "Products Liability: The West-German Approach," in *Comparative Product Liability*, ed. C.J. Miller (London: Comparative Law Series, 1986), p 100.

focus social attention on short-term, dramatic risks.⁴³⁹ These categories do not map directly onto the perceptions of product risk in France and Germany. But they do evoke the way in which societal institutions work to constitute a social perception of risk.

This chapter describes the societal construction of consumer risk through the elaboration of product liability law and product safety regulation in France and Germany. In product liability law, France and Germany have adopted different standards of risk allocation despite apparent similarities in their legal traditions. Whereas France has pushed the entire burden of product-related risk onto producers and distributors through a strict standard of liability, Germany has applied a negligence standard of liability that holds producers responsible only for those product failures that they could reasonably have prevented. This divergence stems not from specific legal traditions or cultures, but instead from broader national orientations toward product risk. The difference in national attitudes towards product risk also characterizes French and German standards of product safety. Whereas the French government has set mandatory safety standards for all goods that pose a risk to consumers, the German government has acted to make industry-set safety standards binding on all producers within the country.

Product Liability

While France and Germany share the common goal of consumer protection, they pursue product liability in different ways that have depended upon the organization of consumers and producers in the two countries. In Germany, where consumers have been poorly mobilized, strong industry associations have managed to avoid a strict standard of

⁴³⁹ Mary Douglas, and Aaron Wildavsky, *Risk and Culture: An Essay on the Selection of Technical and Environmental Dangers* (Berkeley: University of California Press, 1982),

product liability. In France, where consumers enjoyed strong popular mobilization and industry interests have been disorganized, courts have tended to push the full burden of product-related loss onto producers and distributors. But this difference in policy derives not only from the different political strength of consumers and producers in the two countries.

Product liability is, after all, only one of a number of different approaches that countries employ to secure the safety of consumers against product damage. Courts in these countries have selected national standards of product liability that conformed with a broader conception of the consumer interest, based in turn on the organizational context of production. In Germany, product liability law enforces a collective approach to product safety by giving producers incentives to participate in industry-wide product standards and worker training. In France, by contrast, where the institutions of product standardization and uniform labor training are not binding on individual producers, the courts have instead placed the burden of product safety wholly on individual companies. I argue that court decisions bearing on product liability law can best be understood, in both France and Germany, as optimizing consumer safety by taken into account this broader institutional context of protection in interpreting the appropriate national standard of product liability to apply.

One implication of this research is that national legal traditions have played only a small role in determining national product liability practice, despite the fact that national product liability standards have been elaborated almost entirely through the courts. France and Germany have indeed found different legal foundations for product liability

law. Whereas France relies primarily on contract law, Germany relies primarily on tort law. Yet comparison with the US and British cases suggests that such legal differences have not played a decisive roll in the persistent divergence of national product liability standards. It would therefore be inaccurate to attribute the difference of French and German treatments solely to different legal cultures.

Strict Versus Negligence Standard of Product Liability

The core issue in product liability law is the standard of producer responsibility that should be applied when a product defect results in injury or damage. France has generally imposed a *strict standard* of product liability, meaning that companies are strictly liable for damage caused by a product defect, even if no amount of care by the company could have prevented the defect. Germany, by contrast, has applied a *negligence standard* of product liability, meaning that companies are legally liable only if damage has resulted from a product defect *and* that product defect is due to negligent behavior by the producer. The German producer has, in other words, an obligation of means, requiring that appropriate care be taken in production. The French producer has an obligation of ends that cannot be diminished by any level of care in production.⁴⁴⁰

Prior to the 1960s, negligence was the common standard of product liability in all industrialized countries. Under this standard, companies were held responsible for product related damage only if the consumer, typically only the direct purchaser, could prove that his or her loss was caused by a defect in the product, and that the defect resulted from negligent behavior by the producer. Proving producer negligence outside of

⁴⁴⁰ Oliver Berg, "La notion de risque de développement en matière de responsabilité du fait des produits défectueux," *La Semaine juridique* 27 (1996), p

cases of obvious fraud was not only extremely difficult, but the legal standard of negligence typically gave considerable leeway to producers. In a typical 1956 German case in which a bicycle collapsed and injured its rider, the German Supreme Court (Bundesgerichtshof, or BGH) argued that “common experience...suggests that such technical defects cannot be prevented.”⁴⁴¹ Industrialization during this period was understood to entail social costs. The European solution to these costs was to socialize them through inclusive national insurance provisions such as universal health care and social security.

Product liability as it is understood today arrived in Europe in the mid-1960s. The German legal term, *Produkthaftung*, was coined only in 1968. The move to reform product liability law reflected a critical re-evaluation of the cost and benefits of industrialization.⁴⁴² This new skepticism was fed in part by a series of dramatic product failures. The Thalidomide disaster, which struck Germany in the early 1960s, highlighted the devastating damage that could accompany technical innovation. Ralph Nader’s *Unsafe at Any Speed* emphasized that many product-related accidents were due not just to chance or user error but also to corporate indifference to the consequences of product design. The popular indignation generated by these incidents was reinforced by a shift in thinking about the economics of social cost. In his influential article, “The Problem of Social Cost,” Ronald Coase argued that social costs would be redistributed in an efficient

⁴⁴¹ Geraint Howells, *Comparative Product Liability* (Aldershot, U.K.: Dartmouth Publishing Company, 1993), p 123.

⁴⁴² Lynn J. Loudonback, and John W. Goebel, “Marketing in the Age of Strict Liability,” *Journal of Marketing* 38 (January 1974), p 63.

way through market mechanisms regardless of how those costs were initially allocated.⁴⁴³

Although commonly understood as an argument against government intervention in the economy, for advocates of product liability reform the Coase theorem implied that the costs of product damage could be placed entirely on producers without creating adverse economic consequences.

Product liability can in general be understood to serve two economic functions. First, it serves an insurance function, distributing the cost of product loss for a single consumer across a large population of consumers by pushing some or all of that cost into the price of the product. Construed as insurance, product liability operates alongside national health care plans, social welfare provisions, and individual insurance policies of consumers. Second, product liability serves as a form of deterrence. By holding companies responsible for harmful products, product liability claims give manufacturers an incentive to invest in safer products at a level that is proportional to the damage that the products inflict. Construed as deterrence, product liability operates in conjunction with national safety codes, voluntary industry standards, and local and regional product inspection services to ensure a high level of product safety.⁴⁴⁴ Different countries employed different rationales for reforming their product liability standards depending upon whether they emphasized the insurance or the deterrence roll of product liability. The United States, for example, was strongly motivated by arguments grounded in

⁴⁴³ Ronald Coase, "The Problem of Social Cost," *Journal of Law and Economics* 3 (October 1960).

⁴⁴⁴ Product liability in the United States has increasingly served a punitive function to chasten companies for past damage. Because this punitive function is virtually unknown in European countries, it will not be considered as a factor in national policy making.

insurance, although deterrence did remain an important goal. France and Germany pursued reforms primarily in order to enhance the deterrence roll of product liability.

Liability as Insurance. The insurance justification for reforming product liability focused on the greater ability of companies than of individuals to acquire inexpensive comprehensive insurance. This problem was highlighted as a main reason for reforming product liability in the United States. In the 1944 case of *Escola v. Coca Cola Bottling Co.*, Justice Traynor argued that, absent negligence on either side, manufacturers were better able both to spread the risk (e.g. inexpensive insurance) and to invest in safety precautions. “Tort law became, in effect, a vehicle by which public authorities and courts created a private insurance scheme. Manufacturers insure product users—period.”⁴⁴⁵ In the context of the United States, where no universal healthcare program had been established, the need to ensure an adequate private approach to insurance against product-related damage was felt acutely.

Of course, individuals could have simply opted to pursue private insurance of their own without relying on producers to, in effect, bundle insurance with their products. A further insurance argument in favor of a strict standard of liability was that consumers were simply not very good at estimating product risk. Psychological studies had found, for example, that consumers tended to over-emphasize large but infrequent losses while under-emphasizing frequent but smaller losses. Hence automobile deaths far outstrip commercial aircraft deaths, yet travelers tend to fear the latter more than the former. Given this apparent bias in consumer orientation, strict liability in the United States was

⁴⁴⁵ Jules L. Coleman, *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992), p 412-413.

intended to help consumers make rational decisions about product risk by including the entire cost of that risk in the price of the product.⁴⁴⁶

Liability as Deterrence. The insurance logic was not a strong incentive in France or Germany, because both countries had already created strong national health care and social security systems.⁴⁴⁷ In these countries, the justification for product liability reform was grounded instead on a deterrence argument.⁴⁴⁸ The difference in French and German approaches to product liability today has its root in different strategies of deterrence. To understand the reason for their different strategies, it is necessary to understand problem with traditional private law solutions to product liability grounded in producer negligence.

Traditional producer liability in both France and Germany had rested on a negligence standard. Producers were legally liable when they did not take consumer interests adequately into account in their production decisions. In economic terms, an adequate level of safety by companies was understood to exist when a company had pursued a socially efficient level of investment. That is, a company was not legally negligent so long as total company investment in product safety exceeded the expected value of consumer loss due to product failures.⁴⁴⁹ According to this economic definition, a company was understood to have acted negligently if its marginal investment in

⁴⁴⁶ Anthony J. Duggan, "Saying Nothing With Words," *Journal of Consumer Policy* 20/1 (1997), pp 79-80.

⁴⁴⁷ Droste Killius Triebel (law firm), *Business Law Guide to Germany, Third Edition* (Oxfordshire: CCH Editions, 1991), p 121; Hans-Wolfgang Micklitz, "Produzentenhaftung - ein Problem des Verbraucherschutzes? Thesen zur Ergänzung der Reformdiskussion," *Journal of Consumer Policy* 3/3-4 (1979), p 330.

⁴⁴⁸ Richard A. Posner, "A Theory of Negligence," *The Economics of Legal Relationships*, ed. Henry G. Manne (St. Paul: West Publishing Company, 1975), p 216.

prevention fell short of the marginal cost of product-related loss. The problem was that this economic test for negligence placed an extremely high burden both on plaintiffs, who had to demonstrate producer negligence, as well as on courts, which required a high level of technical expertise to apply the negligence principle. Because it was difficult to apply, this negligence standard of liability commonly permitted companies to shirk on investment in product safety. It was in an effort to improve the deterrence effect of liability law that both French and German courts reformed their approaches to product liability in the late 1960s.

The French response ensured that companies faced the full costs of product-related risk by imposing a strict standard of liability. In this approach, companies themselves rather than courts would be left to judge whether the marginal expenditure on product safety improvement met the marginal savings in the area of product-related accidents. Companies would therefore be guided by purely economic goals to secure the optimal combination of investment and insurance. A strict standard of product liability thus forced companies to internalize the total cost of product risk. Faced with the actual cost of the damage caused by its products, the producer could then invest in an efficient combination of safer design and outside liability insurance in order to minimize the total risk premium.

The Germany approach was to reverse the legal burden of proof in establishing negligence. Under this new standard of evidence, a consumer had only to show that a product defect had caused damage, then the legal burden fell to the producer to prove that the product defect had not resulted from fault. By requiring that defendants prove that

⁴⁴⁹ Christian Gollier, "Le risque de développement, est-il assurable?" *Risque* 14 (April-

they had not acted negligently, the courts were able to compel all producers to comply with accepted standards of good practice. French courts changed the legal principle of liability from negligence to a strict standard. German courts improved company accountability under the negligence standard with a reversed burden of proof.⁴⁵⁰

Why did Germany and France pursue different solutions to the shirking encouraged by a straight negligence standard of product liability? Such differences of legal approach are typically attributed to differences in the legal systems of the two countries. I argue instead that they arise out of broader national approaches to product safety, premised on different conceptions of the consumer interest. These different conceptions derive in turn from the distinctive institutional setting in which courts addressed the problem of product liability.

It is worth noting that many countries did not rely at all on product liability law as a form of consumer protection. In Britain, the Royal Commission on Civil Liability and Compensation for Personal Injury convened by Prime Minister Edward Heath in 1972 issued the Pearson Report advocating a move to strict liability similar to that pursued in

June 1993), p 51.

⁴⁵⁰ France and Germany have in fact applied different standards of liability for different product dimensions, including design, manufacturing, product information, and the legal requirement to survey the market after a product is sold. See the table below.

	France	Germany
Design	strict	reversed burden
Manufacturing	strict	reversed burden
Information	negligence	negligence
Surveying the market	strict	negligence

Kalman Leloczky, "General and Specific Features of Certain European Product Liability Laws," in *Product Liability: Prevention, Practice and Process in Europe and the United States*, ed. Rudolph Hlusenbek and Dennis Campbell (Boston: Kluwer, 1989), p 67; Patrick Kelly, and Rebecca Attree, *European Product Liability* (London: Butterworths, 1992), p 138.

the United States and in France. But this proposed reform was never adopted.⁴⁵¹ In Sweden, the Product Liability Committee proposed the adoption of a similar strict liability standard for medicines in 1973. Here, too, the proposal was set aside when pharmaceutical producers and importers established a system of collective insurance.⁴⁵² These Britain and Sweden cases serve as a reminder that product liability reform was not a necessary outcome in either France or Sweden.

A Small Role for National Law Traditions

Does the divergence in French and German responses to the product liability directive have its origins in national legal traditions? A survey of national approaches to product liability suggests that this factor alone did not constitute an overwhelming constraint. Western legal traditions are commonly divided into those grounded in common law, as in Britain and in the United States, and those grounded in civil law, as in France and Germany. In general, civil law countries form and modify their civil codes through legislative decision-making rather than by judicial interpretation. Product liability is unusual as an area of law in that it has arisen in both France and Germany almost exclusively through judge-made law based on the interpretation of legal case history.⁴⁵³ In part for this reason, national standards of liability would not appear to depend heavily upon the conventional distinction between civil law and common law. Indeed, contrary to what this distinction might predict, France and the United States

⁴⁵¹ Thomas V. Greer, "Product Liability in the European Community: The Legislative History," *The Journal of Consumer Affairs* 26/1 (summer 1992), p 168.

⁴⁵² Geraint Howells, *Comparative Product Liability* (Aldershot, U.K.: Dartmouth Publishing Company, 1993), pp 151-2

⁴⁵³ Germany's 1968 Drug Law, which imposes a strict standard of liability on pharmaceutical companies, is the single exception.

endorse a strict standard of liability, whereas Germany and Britain employ a negligence standard. The OECD, in its survey of national approaches to product liability, finds no practical link between types of national legal system and the standard of product liability they adopt: "As a matter of practice, it appears that the distinction between civil law systems and common law systems has little affect on those elements of liability important to consumers."⁴⁵⁴

This finding alone does not vitiate the argument for legal culture or legal determinism in product liability. Indeed, the fact that product liability law has been created in France and Germany through judge-made law rather than through legislation should have helped to isolate these decisions from the logic of political and economic interests. It should in other words strengthen the case for an explanation based on distinctive national legal trajectories. This makes product liability law something of a critical case for evaluating the independent role of historical institutions, embodied in this case in legal traditions, in shaping national approaches to product market regulation. If we find that deep national legal traditions were not decisive in this case, we can reasonably conclude that such institutional legacies were not decisive in consumer protection regulation overall. Evidence from this case shows that historical traditions did influence the legal framework in which product liability was adopted but was not decisive in setting the standard of protection that was applied.

Products liability doctrine has arisen in France and Germany through judicial interpretation of existing contract law and tort law. The focus of these two areas of law is quite different. Contract law addresses the qualities of the product itself, tort law focuses

⁴⁵⁴ *Product Liability Rules in OECD Countries* (Paris: OECD, 1995), p 28.

on the conduct of people.⁴⁵⁵ Although France and Germany have based product liability in both areas of law, France has relied more on contractual product liability while Germany has relied more on tortious product liability.

French product liability has primarily been grounded in contract law. The earliest text in contractual liability in France is the 1 August 1905 law against hidden defects ('vices cachés').⁴⁵⁶ The law was originally intended to apply only to producers who knowingly sold goods with defects. This standard was gradually reinterpreted by the courts. In 1965 manufacturers were presumed to know of the defect. In 1973, the manufacturer was found to have a duty "to deliver an effective product appropriate for the user's needs," creating a strict standard of liability.⁴⁵⁷ This case marks the transition in France to a strict standard of liability.

Even with this new strict standard of contractual product liability, three legal obstacles impeded effective consumer redress. Two of these were removed through case law. First, contractual privity limited liability to those directly engaged in a contract. This meant that any individual product defect would create a chain of law suits, in which the consumer sued the retailer, the retailer sued the distributor, and the distributor sued the manufacturer. In 1972, French courts permitted consumers to bring legal suits directly against the manufacturer—so-called 'action-directe'—in cases based on the 1905 law.⁴⁵⁸

⁴⁵⁵ Christopher Hodges, *Product Liability: European Laws and Practice* (London: Sweet & Maxwell, 1993), pp 3-6.

⁴⁵⁶ Luc Bihl, *Une histoire du mouvement consommateur* (Paris: Editions Aubier Montaigne, 1984), p 214.

⁴⁵⁷ Geneviève Viney, "The Civil Liability of Manufacturers in French Law," in *Comparative Product Liability*, ed. C.J. Miller (London: Comparative Law Series # 6, 1986), p 77.

⁴⁵⁸ Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Oxford: Clarendon Press, 1987), p 171.

The 21 July 1983 law on product safety extended 'action directe' to all product liability cases pursued under general contract law.⁴⁵⁹

A second obstacle to contractual product liability was the increasing incorporation into consumer contracts of clauses to exclude producer liability. In 1966, such exclusions were found not to apply in cases of gross negligence ('faute lourde') which were treated under criminal law. In March 1983, a government decree declared contractual clauses excluding product liability to be null and void.⁴⁶⁰

The third obstacle to contractual product liability, its extension to third parties, has never been overcome in France. Such claims arise when a product injures anyone who is not its owner. Because no contract exists, third party claims must be made under tort law, based on § 1382 of the *Code civile*. While tort law is less commonly used in France, primarily because of the clarity and high level of protection afforded by contract law, it too has been extended from a negligence standard to a strict standard of liability.⁴⁶¹ In 1962 courts first found that "the simple act of putting a defective product on the market is considered an act of negligence." A 1975 ruling, based on § 1384 section 1 of the *code civile*, found that manufacturers could be found liable without fault based on their status as "guardian of the structure" ('gardien de la structure') of the product.⁴⁶²

⁴⁵⁹ Geneviève Viney, p 80.

⁴⁶⁰ Geneviève Viney, p 82.

⁴⁶¹ In the French system, based on the principle of "non-cumul des responsabilités," plaintiffs are not allowed to bring suit under both tort and contract law for the same grievance.

⁴⁶² Agnès Chambraud, Patricia Foucher, and Anne Morin, "The Importance of Community Law for French Consumer Protection Legislation," in *European Consumer Policy after Maastricht*, ed. Norbert Reich and Geoffrey Woodroffe (Dordrecht, The Netherlands: Kluwer Academic Publishers, 1994), p 218.

Germany, unlike France, has offered only narrow grounds for products liability under contract law. Although German courts found in 1902 the basis for a positive breach of contract analogous to the 1905 French law governing hidden defects, German law has continued to require that the plaintiff demonstrate a fraudulent concealment of the defect. Moreover, the plaintiff must have been in direct contractual relationship with the producer.⁴⁶³ These restrictions place severe limitations on the applicability of contractual solutions to product-related loss, although they are occasionally applied.

Instead of broadening the contractual obligations of producers, as France has done, German courts have instead grounded product liability reform in tort law (Deliktrecht).⁴⁶⁴ The turning point for tortious liability in Germany was the 1968 chicken disease suit (Hühnerpestfall), in which a chicken farmer lost several thousand chickens due to a contaminated inoculation administered by his veterinarian. Because the farmer was not in direct contractual relation with the inoculation producer, and because the veterinarian could not have known of the contamination, the farmer had no recourse under contract law. The farmer therefore sued the inoculation producer under tort law. The court, recognizing that it was nearly impossible for an individual outside of a company to evaluate whether a company has acted negligently or not, reversed the burden of proof. Once the farmer had shown that a defect in the inoculation had killed his chickens, the court then called on the producer to prove that it had not acted negligently in producing the inoculation. Although reversing the burden of proof did not change the

⁴⁶³ Geraint Howells, *Comparative Product Liability* (Aldershot, U.K.: Dartmouth Publishing Company, 1993), p 124; Henricus Duintjer Tebbens, *International Product Liability: A Study of Comparative and International Aspects of Product Liability* (The Hague: Asser Institute, 1979), p 67.

⁴⁶⁴ Based on § 823 I of the Bürgerlichgesetzbuch (civil code).

legal standard of negligence, it did mean that this standard could be broadly applied. In 1975 this presumption of negligence was extended to all manufacturers of industrial products.⁴⁶⁵

Germany's presumption of negligence (reversed burden of proof) falls short of strict liability because it admits several routes of exculpation for the producer. First, German companies are not always responsible for defects caused by their employees. Although Germany's civil code does call for vicarious liability by employers for product-related damage caused by their employees,⁴⁶⁶ the courts have found that companies can avoid this liability through proper organization of the workplace: "The duty to compensate does not arise if the employer has exercised ordinary care in the selection of the employee, and, where he has to supply appliances or implements or to superintend work, has also exercised ordinary care as regards such supply or supervision."⁴⁶⁷ This interpretation has tended to favor union-sanctioned worker training programs, in the first instance, and large companies with several levels of management in the second. One legal scholar summarizes the practical consequence of this approach: "The risk of unexplained runaway products [in Germany] fell upon the injured party when a large and duly organized enterprise had manufactured them."⁴⁶⁸

⁴⁶⁵ Warren Freedman, *International Products Liability* (Buffalo, N.Y.: William S. Hein, 1995), p 77.

⁴⁶⁶ BGB § 831 states: "A person who employs another to do any work is bound to compensate for any damage which the other unlawfully causes to a third party in the performance of this work."

⁴⁶⁷ Arthur Taylor Von Mehren and James Russell Gordley, *The Civil Law System: An Introduction to the Comparative Study of Law* (Boston: Little Brown, 1977), p 340.

⁴⁶⁸ Henricus Duintjer Tebbens, *International Product Liability: A Study of Comparative and International Aspects of Product Liability* (The Hague: Asser Institute, 1979), pp 74-75.

A second grounds for exculpation in the German system is that companies are held responsible only for those design defects that could be foreseen given the current state of science and technology. This so-called "development defense," also elaborated in the 1968 chicken disease case, exonerates producers when the present state of knowledge would not have permitted them to foresee the damage caused by their product.⁴⁶⁹ This development defense places pressure on companies to comply with voluntary industry standards, as these are commonly, although not necessarily, accepted by the courts as embodying the present state of knowledge.⁴⁷⁰

Other provisions in Germany limit the liability of producers under tort law even if they have not been able to exculpate themselves. Their liability can be reduced, for example, by showing a contributory negligence by the product user. Contributory negligence is interpreted broadly in Germany, so that even an omission by the consumer to mitigate the damage caused by a product can reduce the liability of the producer.⁴⁷¹ Moreover, Germany has long imposed a financial ceiling both on the damages that can be claimed by a single plaintiff, and on the total cumulative claims on a single product. This ceiling, set now at 160 million DM per product, ensures that a single product defect will not undermine a large company.

The emphasis on contract law in the French approach to product liability and tort law in the Germany approach does appear to have its origins in a different historical treatment of associational and contractual rights within the two systems. German law is

⁴⁶⁹ Oliver Berg, "La notion de risque de développement en matière de responsabilité du fait des produits défectueux," *La Semaine Juridique* 27/2945 (1996), p 273.

⁴⁷⁰ A third form of exculpation, the so-called *Ausreißer* clause, exempts product defects that occur as a normal result of mass production. This defense is rarely used today.

⁴⁷¹ BGB § 254. Product Liability Rules in OECD Countries (Paris: OECD, 1995), p 16.

grounded in strict Roman law as interpreted and normalized by the 19th century pandectist (“all receiving” or comprehensive) school of legal history.⁴⁷² French law, by contrast, combines elements of Roman law (‘droit écrit’) as applied in the south of the country with a common law tradition (‘droit coutumier’) that was recorded and consolidated by the long tradition of French legal nobility (‘noblesse de robe’) in the north of the country.⁴⁷³ These different heritages are evident in the extreme formalism of the German civil code (Bürgerlichgesetzbuch, or BGB) as compared to the briefer and more elegant treatment of the French civil code (Code civile).

In German law, as under Roman law, associations are treated as legal entities with the same rights as individuals. French law, by contrast, assigns rights only to natural persons. Moreover, contracts in the German legal system are not inviolable, as they are in the French legal tradition, but must meet a legal standard of appropriateness that precludes exploitative contracts. In effect, the Germany legal tradition draws a different line between legal concepts of individual and contractual agency than does the French legal tradition. The French legal individual is more narrowly defined, but her contractual agency is greater. The German legal individual is construed more broadly to include organized groups of people, but they enjoy a diminished set of contracting rights. It is precisely this limited conception of contractual sovereignty that raised obstacles to adopting a strict standard of liability under contract law in Germany. Yet a look to the United States suggests that these different historical legal traditions did not necessarily dictate different standards of product liability in France and Germany.

⁴⁷² Konrad Zweigert, and Hein Kötz, *Introduction to Comparative Law* (Oxford: Clarendon Press, 1987), p 146.

In the United States, strict liability has been grounded equally in tort and in contract law. Contractual liability in the United States evolved, as in France, by extending an implied warranty. Historically, this evolved in two stages. In the 1916 *MacPherson v. Buick* case, contractual privity was abrogated by extending a duty of care to third parties. This opened the way for liability claims for innocent bystanders injured by producer negligence. Then, in the 1960 *Henningsen v. Bloomfield Motors, Inc.* case, the court found producer responsible based on an implied warranty against product-related damage.⁴⁷⁴ This finding was standardized in the 1972 US Uniform Commercial Code and has become the basis of strict liability in contract.⁴⁷⁵ But most US states have also found a strict standard of product liability in tort law. The 1965 Second Restatement of Torts imposed strict product liability by extending responsibility to “any product in a defective condition unreasonably dangerous to the user or consumer” (§402A).⁴⁷⁶ In this new doctrine of ‘res ipse loquitor’ (let the thing speak for itself), the fact of a defective product was taken to be sufficient evidence of producer negligence. This presumption of negligence under tort was extended to wholesalers and distributors in the 1970 *Price v. Shell Oil* case.

In sum, national legal traditions do appear to have influenced the legal approach that France and Germany have taken to product liability, but they do not appear to have

⁴⁷³ Konrad Zweigert, and Hein Kötz, *Introduction to Comparative Law* (Oxford: Clarendon Press, 1987), pp 80-81.

⁴⁷⁴ Roland N. McKean, "Product Liability: Implications of Some Changing Property Rights," in *The Economics of Legal Relationships*, ed. Henry G. Manne (St. Paul: West Publishing Company, 1975), p 261.

⁴⁷⁵ Fred W. Morgan, "Marketing and Product Liability: A Review and Update," *Journal of Marketing* 46 (summer 1982), pp 69-78.

⁴⁷⁶ Konrad Zweigert, and Hein Kötz, *Introduction to Comparative Law* (Oxford: Clarendon Press, 1987), pp 713-716.

placed insurmountable barriers to the adoption of different standards of liability. The case of the United States suggests that a strict standard of liability was in principle compatible with the legal logic of either tortious or contractual product liability. Germany could have adopted a *res ipse loquitur* doctrine under tort law that would have opened the door to a strict standard of product liability.⁴⁷⁷ I argue below that the courts in France and Germany have adopted different standards of product liability, not in order to conform with national legal traditions, but rather to conform to a particular conception of the consumer's role in the economy.

French and German Responses to the European Product Liability Directive

Because French and German product liability standards were established almost exclusively within the legal sphere, it is difficult to assess directly what impact the interests of economic and political groups in society may have had on this area of policy formation. But in the case of product liability, a parallel surrounding the European Product Liability Directive, first proposed in 1974 and adopted in 1985, has helped to clarify the array of interests of different social actors in both France and Germany. Extended negotiations over the terms of the European directive reveal that the legal standards of liability adopted in France and Germany reflected broader societal strategies for consumer protection. What has driven a wedge between the product liability policies of France and Germany is not the divergent legal traditions upon which they are based, but instead the different conceptions of and approaches to consumer protection within the broader society. In Germany, where producer interests have been given preeminence, and

⁴⁷⁷ A contract approach does not necessarily imply a strict standard. England, which employs a contractual approach to product liability, has nonetheless retained a negligence

where the quality orientation of production affords a feasible approach to consumer safety, courts have been willing to grant industry a diminished liability. In France, where consumer interests have been conceived as a political right and industry has shown little capacity to produce high-quality, safe consumer goods, courts have attributed to industry the maximum possibility liability for product-related loss.

Although the Product Liability Directive was adopted in 1985, negotiation over its content began a decade earlier when the proposal was first drafted in 1974. Unlike the 1985 draft, this original proposal endorsed a strict standard of liability that was considered to be even more stringent than the US policy, as described in the Second Restatement of Torts.⁴⁷⁸ This early European proposal, which closely resembled existing French practice, met with vehement opposition from Germany.

The 1974 proposal was novel in two respects. First, at the same time that the European Community proposal was being negotiated, the Council of Europe—European Community and European Free Trade Area countries plus Turkey, Cyprus, and Malta—was completing a similar product liability proposal, known as the Strasbourg Convention, which was published in 1975.⁴⁷⁹ Given the work that had already begun in the Council of Europe, it is surprising that the European Community set out to write its own proposal from scratch. On the one hand, any countries that were joint signatories to the European Community and the Council of Europe would face an inevitable conflict of law were both proposals to be accepted. On the other hand, if the European Community did not feel that

standard of liability.

⁴⁷⁸ Børge Dahl, "An Introduction to the Product Liability Debate." *Journal of Consumer Policy* 3/1 (1979), p 20.

⁴⁷⁹ Council of Europe, *European Convention on Products Liability in Regard to Personal injury and Death* (Strasbourg: Council of Europe, 1977), pp 3-11.

the Strasbourg Convention was going to be ratified by the members of the Council of Europe, it was surprising that their own draft, once completed, so closely resembled the Strasbourg Convention.⁴⁸⁰ In part, the European Community appears to have wanted to claim full rewards for any successful agreement. They also appear to have felt that the process of negotiation itself could help to create consensus among the member states.⁴⁸¹ This device apparently failed, for only France, Belgium, and Luxembourg agreed to the proposal.⁴⁸²

The second remarkable feature of the draft directive was that it remained unaltered in the face of strong opposition when it was issued by the European Community Commission in October 1976. Opposition came from within and without the EC bureaucracy. The legal affairs committee of the European Community, for example, argued that the goal of the draft was not regulatory approximation, as called for in the Treaty of Rome, but instead a substantive change in the overall standard of consumer protection in Europe. They advocated a negligence standard of liability that would be more compatible with the current policies of member nations. The European Parliament also voted for the Commission to incorporate a development defense into the draft directive, a move that would have significantly lowered the threshold of producer

⁴⁸⁰ Christian Larroumet, "Réflexions sur la convention européenne et la proposition de directive de Bruxelles concernant la responsabilité du fait des produits," *Recueil Dalloz Sirey* 33 (1978), p 219.

⁴⁸¹ Thomas V. Greer, "Product Liability in the European Community: The Legislative History," *The Journal of Consumer Affairs* 26/1 (summer 1992), p 174.

⁴⁸² France, Belgium, Luxembourg and Austria signed the Strasbourg Convention. Thierry M. Bourgoignie, "Consumer Law and the European Community: Issues and Prospects," in *Integration Through Law: Europe and the American Federal Experience*, ed. Thierry Bourgoignie and David Trubek (Berlin: Walter de Gruyter, 1987), p 95.

responsibility for product-related damage.⁴⁸³ Neither recommendation was accepted by the Commission.

Objections also came from a strong lobbying effort by industry. The Union of European Community Industries argued that the proposal would raise production costs and stifle innovation.⁴⁸⁴ German insurers estimated that industrial insurance fees would increase by 15 to 40 percent if a strict liability standard were to be imposed. German industry criticized the directive for drawing too heavily on the US experience. They also disputed that competitive advantage was affected at all by different national product liability laws, since companies selling in any given national market were bound by the liability standard of that market, regardless of their country of origin.⁴⁸⁵ This opinion appears to have been shared by France and Luxembourg who, because they already employed a strict standard of producer liability, arguably stood to gain the most from a level European playing field. But neither country pressed hard for passage.⁴⁸⁶ Had the Commission heeded these objections and adopted a policy of approximation, whose goal was to remove inconsistencies in national regulation without attempting a substantive

⁴⁸³ Thomas V. Greer, "Product Liability in the European Community: The Legislative History," *The Journal of Consumer Affairs* 26/1 (summer 1992), pp 169-170.

⁴⁸⁴ Thomas V. Greer, "Product Liability in the European Community: The Legislative History," *The Journal of Consumer Affairs* 26/1 (summer 1992), p 171.

⁴⁸⁵ Friedrich Ketschmer (BDI), "The Proposed EEC Directive on Products Liability: Is there a Need for it and Which Effects could it have on Industry?" in *The Effect of International Consumer Protection Laws in Europe: Proceedings of the Third International Seminar on Product Liability* (London: Institute of Quality Assurance, 1980), pp 85-89.

⁴⁸⁶ Thomas V. Greer, p 172.

shift, the project would have been more successful. Instead harmonization took the form of imposing a new standard on most member countries, and the project failed.⁴⁸⁷

When the newly negotiated product liability draft directive was finally reissued in 1985, Germany's earlier objections had been largely incorporated. A development risk clause had been inserted at Germany's insistence, as well as a limit on total industry liability, the exclusion of agricultural products, and the inclusion of the principle of contributory negligence by consumers.⁴⁸⁸ Most of these new provisions had been drawn directly from existing German practice.⁴⁸⁹ These exemptions were not binding on member countries, which could choose whether or not to incorporate them as they saw fit. Hence France, Belgium, and Luxembourg, which already embraced a strict liability standard, were in principle able to retain this standard simply by excluding the new exculpatory provisions. So far Luxembourg has been the only country to exclude the development risk when transposing the Directive.⁴⁹⁰

Given the policy latitude afforded by the 1985 draft directive, why did France not yet transcribed it into law until 1998? In principle, the standard of liability supported in France today was already compatible with the EU Directive. The problem was that harmonization within the European Union required that France's strict standard of liability, which was established exclusively through judge-made law based on judicial

⁴⁸⁷ Anita Bernstein, "L'Harmonie Dissonante: Strict Products Liability Attempted in the European Community," *Virginia Journal of International Law* 31 (summer 1991), p 676.

⁴⁸⁸ Oliver Berg, "La notion de risque de développement en matière de responsabilité du fait des produits défectueux," *La Semaine Juridique* 27/2945 (1996), 271.

⁴⁸⁹ Warren Freedman, *International Products Liability* (Buffalo, N.Y.: William S. Hein, 1995), p 78.

⁴⁹⁰ Oliver Berg, "La notion de risque de développement en matière de responsabilité du fait des produits défectueux," *La Semaine Juridique* 27/2945 (1996), p 271.

interpretation, be established in positive law. This effort to write legal precedent into law raised two kinds of objections.

First, nearly all interest groups in France feared that transcribing the Product Liability Directive will obscure a set of legal policies that were, if not simple, at least clearly understood. Consumers, who under the existing system enjoyed a high level of protection, worried that any change could only constitute a lowering of standards.⁴⁹¹ But even producers resisted adopting a new law because of the uncertainty of its impact. France's main employer association (CNPF), for example, argued that while the Directive might lower insurance premiums in the long run, the business community should be wary of the uncertainty that the new proposal would introduce: "the juxtaposition of several basic principles risk[s] to introduce incoherence and uncertainty into our law."⁴⁹² This view was supported by the French government, which argued that any change would render France's existing policy "uselessly complex by integrating obscure rules."⁴⁹³

The second problem with adopting the directive centered specifically on the development defense. Such a defense was foreign to French precedent and apparently contradicted the consumer protection law of 21 July 1983.⁴⁹⁴ While France was not required to incorporate this provision, the EU Directive created a stormy debate that

⁴⁹¹ "La responsabilité du fait des produits," *Consommateurs Actualités* 528 (30 July 1988): 9-12.

⁴⁹² "Ces différences sensibles et la juxtaposition de plusieurs fondements risquaient d'introduire, dans notre droit, incohérence et insécurité." Dominique Rambure, "Le nouveau droit de la responsabilité du fait des produits défectueux," *CNPf Patronat* 497 (January-February 1988), p 75.

⁴⁹³ "le rendre inutilement complexe en y transposant des règles absconses." "Des députés RPR se révoltent contre une directive européenne," *Le Monde*, 12 March 1997, p 11.

⁴⁹⁴ Geneviève Viney, "The Civil Liability of Manufacturers in French Law," in *Comparative Product Liability*, ed. C.J. Miller (London: Comparative Law Series # 6. 1986), p 88.

pitted consumers against producers over this issue. French industry argued that they would suffer a competitive disadvantage if they were to exclude the development defense that producers in other countries enjoyed.⁴⁹⁵ The Paris Chamber of Commerce, which advises the government on business-related decisions, suggested that any problems created by incorporating the development defense could eventually be solved through negotiations among producer and consumer representatives.⁴⁹⁶ Consumer groups adamantly opposed the admission of a development defense. The Federal Consumers Union (UFC), for example, pointed out that Thalidomide producers would have been exempted had such a development risk clause existed at the time.⁴⁹⁷ Such objections were particularly poignant coming as they did in the shadow of France's 1985 scandal over HIV-tainted blood transfusions.

Product Safety Regulation

Product liability law helped to set the terms by which product safety was understood in France and Germany. But governments have rarely been content to rely on the deterrence effect of private law solutions in order to keep producers from selling dangerous goods. Both countries have therefore also acted to set general safety standards that products must meet *before* they arrive on the market. They have also put in place monitoring and recall systems for products that fell short of the necessary level of safety.

⁴⁹⁵ "Responsabilité du fait des produits: vers une conservation du 'risque de développement," *Consommateurs Actualités* 607 (30 September 1988), p 15.

⁴⁹⁶ Chambre de Commerce de l'Industrie de Paris, *L'Introduction en Droit Français de la Directive Communautaire sur la Responsabilité du Fait des Produits Defectueux* (Report presented by M. Mercier and adopted by the General Assembly 7 January 1988), pp 25-26.

⁴⁹⁷ "L'Europe et la responsabilité du fait des produits," *Consommateurs Actualités* 621 (13 January 1989), p3.

But the nature of product safety regulation has differed in a systematic way in the two countries.

The French approach has been characterized by government input into product safety. The German system granted industry a strong voice in ensuring the safety of products. Christian Joerges writes that the “French product safety law is hard to fit into a market oriented approach. The French analytical framework, conceived from a State or administrative viewpoint...cuts straight across a German market-oriented category frame of market-related rules, setting of standards and follow-up controls.”⁴⁹⁸

French Product Safety through Administrative Intervention

Over the course of the 1970s and 1980s France experienced a shifting standard of product safety. Early efforts at imposing product safety focused on surveying the marketplace for dangerous products. Starting in the early 1970s, the French government began to regulate individual classes of products that were felt to be especially dangerous. This kind of legislation, targeting products such as toys or drugs, typically appeared in response to a particularly public incident of product failure. Such administrative intervention at the sectoral level constituted the major strategy of product safety in France in the late 1960s and early 1970s. Only in legislation of 1978 and 1983 did the French government move to a general standard of product safety that applied to all products placed on the market.

Beginning in the early 1960s, any product that was not specifically targeted by government safety regulation was covered by general prohibitions against fraudulent

business practice. This approach had its roots in a 1963 decree that extended the competency of the Service for the Repression of Fraud, created in 1907 to implement the 1905 law prohibiting 'hidden defects,' to include the control of product quality.⁴⁹⁹ The resources and impact of the Service for the Repression of Fraud were impressive. In 1971 alone, its 1,000 inspection agents evaluated over 400,000 products. Fifty regional laboratories tested product samples removed during such inspections. Twelve thousand products were found to be fraudulent or unsafe in that year, and half of these cases ended up in court.⁵⁰⁰ By the late 1970s, however, it became evident that a wide range of products were potentially dangerous, and that a general standard of product safety should be established.

The French government was not content merely to survey the market for dangerous products, however, and in the early 1970s industries whose products were particularly dangerous faced specific sectoral regulation, often in response to a particularly dramatic instance of product failure. One such case was the Morhange talcum affair of 1972, in which 36 children died, 167 were poisoned, and 8 remained crippled for life after having been given a talcum powder containing too much hexachlorophene.⁵⁰¹

⁴⁹⁸ Christian Joerges, Joseph Falke, and Hans-W. Micklitz, *Die Sicherheit von Konsumgütern und die Entwicklung der Gemeinschaft* (Baden-Baden: Nomos, 1988), Translated as a working paper of the EUI, Florence, Italy: IUE, 1991, Chapter 2, page 1.

⁴⁹⁹ Charles Castang, "Consommation: prévenir ou réprimer," *Figaro*, 4 march 1975.

⁵⁰⁰ Gérard Cas, *La défense du consommateur* (Paris: Presses Universitaires de France, 1975), p 70.

⁵⁰¹ The Morhange case also highlighted problems of consumer access to justice in France. In 1978, the families of the children hurt by the Morhange talcum powder were awarded 25 thousand francs for children that had died, a few thousand francs for children that had been incapacitated for up to a month, and 1.5 million francs for the four children who survived but were considered 100 percent handicapped. Shocked by the small remuneration, the families came together in 1979 to form the "comité des familles victimes du talc Morhange" in order to launch a class action suit against the Morhange

The US Food and Drug administration had already shown this chemical to be dangerous in 1971, and these findings appear to have been known in France.⁵⁰² The Morhange affair led directly to the creation of the 10 July 1975 Law on Cosmetic and Hygiene Products, requiring that information about all new product of this kind to be compiled and distributed to antipoison centers across France.⁵⁰³ The products also had to be approved by the Ministry of Health, after which the labeling of the product was determined by subsequent decrees and regulations of 15 April and 28 December 1977. Non-compliance was punishable with fines and imprisonment.⁵⁰⁴

Similarly, for the drug industry, a Technical commission on Pharmaco-vigilance (Commission technique de pharmaco-vigilance) was created on 2 October 1976. Its goal was to “systematically collect in the greatest possible number of hospital locations information on all dangerous accidents, apparently connected to the use of pharmaceutical products, and certainly those incidents and accidents for which there is reason to think that they are related to the use of a pharmaceutical product.” Its members were eminent professors. In 1978, under the influence of the Barre government, the Ministry of Family Health created a new ‘Liaison avec les organisations de

company. While such class action was in principle permitted under the 1973 law, the courts ruled that the committee of families did not constitute an acceptable legal party. Two consumer groups, the UFC and the UNAF, also brought legal suits against the company, but were allowed to sue only for damages that the case had caused their organisations, not the damage to consumers as a whole. The courts awarded them 40 thousand francs each. Denise Nguyen Thanh-Bourgeois, "La sécurité des consommateurs: réflexions sur l'affaire du talc Morhange," *Recueil Dalloz Sirey* 12 (1981), pp 89-94.

⁵⁰² "L'Affaire du Talc Morhange," *Le Monde*, 1 Aug 1978.

⁵⁰³ Rosemonde Pujol, "Cosmétique et santé: nouvelle législation," *Le Figaro*, 25 Jan 1979.

⁵⁰⁴ Rosemonde Pujol, "Cosmétique et santé: nouvelle législation," *Le Figaro*, 25 Jan 1979.

consommateurs' in which the new Commission technique de pharmaco-vigilance would be able to consult with consumer groups.⁵⁰⁵

A third example of direct government intervention was in children's toys. The toy industry in France, the second largest exporter of toys in the world at the time, produced 6.6 billion francs and employed 10,500 workers. In a regulation of 22 June 1976, the French government required that formerly voluntary AFNOR standards for toy manufacture be made obligatory.⁵⁰⁶ This approach was particularly attractive to the government because it permitted regulation to take into account the latest technical developments without having to be redrafted. French toys had to be certified by a testing laboratory to conform to AFNOR safety standards. This regulatory approach was similar to that employed to enforce safety standards in Germany, but with the important difference that certification in France was mandatory. This difference was highlighted with the 1988 European Directive on toy safety. The Directive required that all toys placed on the European market include a "CE" mark to indicate that they conform with European toy safety standards. The problem was that the CE symbol relied on auto-declaration by the producer rather than on systematic laboratory testing. Many toys from China, for example, included the CE label but had no manufacturer's label on them. Alan Bryden, general director of the French National Testing Laboratory (Laboratoire national d'essais), warned that "the directive will afford a level of security equivalent to that

⁵⁰⁵ "...de recueillir systématiquement dans le plus grand nombre possible de services hospitaliers, des informations sur tous les accidents graves, apparemment liés à l'emploi de produits pharmaceutiques et surtout les incidents et accidents dont on est en droit de soupçonner qu'ils peuvent être en relation avec l'emploi d'un produit pharmaceutique." Rosemonde Pujol, "Une antenne pour les consommateurs au ministère de la Santé," *Le Figaro*, 8 Nov 1978.

which we possess only if the administration exercises an extreme vigilance over the use of the CE mark.”⁵⁰⁷

Two pieces of legislation, adopted in 1978 and 1983, marked a transition away from the selective regulation of dangerous products and toward a general standard of product safety that would apply to all producers. The 1978 Law for the Protection and Information of Consumers, or *loi Scrivener*, required that products be safe under “conditions of proper use” (“conditions normales d’utilisation”). The more rigorous 1983 law on product safety extended that standard to include product safety given any “reasonably foreseeable use.” Producers were required to ensure safety not only when the product was used properly, but also when consumers used the product in an incorrect way that might reasonably have been foreseen by the producer.⁵⁰⁸ France remains the only European country to explicitly incorporate foreseeable misuse into its general standards of safety.⁵⁰⁹

Beyond setting general standards of product safety, the 1978 and 1983 laws also extended the powers of the government to intervene in the market to enforce the new standards. The 1978 *loi Scrivener* permitted the government to regulate dangerous

⁵⁰⁶ Gérard Cas, *La défense du consommateur* (Paris: Presses Universitaires de France, 1980).

⁵⁰⁷ “La directive n’apportera...une sécurité équivalente à celle que nous possédions que si l’administration exerce une extrême vigilance sur l’emploi à bon escient du marquage ‘CE’.” Françoise Vaysse, “Jeux dangereux,” *Le Monde*, 8 December 1992.

⁵⁰⁸ In parliamentary debate over the 1983 law, consumer groups pushed for a wording that would have extended the standard of safety even further to include so-called “improper misuse”, which meant consumer misuse that was not foreseeable. While industry was willing to accept a standard of foreseeable misuse, they strongly opposed a further extension of their responsibility to include improper misuse.

⁵⁰⁹ Christian Joerges, Joseph Falke, and Hans-Wolfgang Micklitz, *Die Sicherheit von Konsumgütern und die Entwicklung der Gemeinschaft* (Baden-Baden: Nomos, 1988). Translated as a working paper of the EUI, Florence, Italy: IUE, 1991, Chapter 2, page 5.

products and even to have them removed from the market if they were found, by study of an independent testing lab, to be dangerous "in their normal use."⁵¹⁰ If a product presented an immediate or serious threat to the health or safety of consumers, a 'procédure d'urgence' allowed the government to have the product immediately barred from sale, import, or manufacture. This new right was used first in June 1978 when pajamas treated with the chemical TRIS were removed from the market. The procedure d'urgence cannot exceed one year. Hence in 20 June 1979 a specific decree was issued prohibiting the treatment of pajamas with TRIS.⁵¹¹

Such a high level of government intervention in production proved unpopular with both the left and the right. The Communists, concerned that government recall actions could lead to firings or workforce displacement, abstained from voting on the 1978 law.⁵¹² At the other end of the political spectrum, the conservative RPR objected that manufacturers should have greater rights to oppose public intervention if they felt that the criticism of their product was unjustified. But no legislator wanted to be seen voting directly against consumer protection, and when Scrivener threatened to call for a public referendum (*scrutin public*) on the issue, the RPR acceded.⁵¹³

If the 1978 legislation introduced the notion of greater government intervention in order to ensure product safety, the April 1983 law on product safety supplied the tool for enforcing safety. It created a Consumer Safety Commission (*Commission de la Sécurité*

⁵¹⁰ The first of the two Scrivener Laws treated consumer credit, granting consumers a 7 day grace period during during which consumers could opt to break off the agreement.

⁵¹¹ Gérard Cas, *La défense du consommateur* (Paris: Presses Universitaires de France, 1980), p 27; also *Journal Officiel*, 24 June 1979.

⁵¹² Michele Thimert, "L'information du consommateur," *L'Humanité*, 28 Jul 1978.

des Consommateurs, or CSC), modeled broadly on the US Food and Drug Administration, that was charged with investigating products that posed a threat to public safety. The CSC has been relatively successful. In 1991, the 7th year of operation, the CSC received 207 requests—of which 159 fell within its area of expertise—and gave 21 decisions. Of the requests, 31 percent came from consumer associations and 61 percent from individual customers. The CSC itself does not have regulatory power, as does the FDA in the United States, but its advice is followed closely. When they published a warning against heating baby food in microwave ovens, warning that uneven heating could burn children without the parents being aware, 30 manufacturers and importers of baby foods included the warning in their user instructions.⁵¹⁴

Industry opposed the new Consumer Safety Commission. Producers felt that it granted government agencies too great an ability to investigate. They also expressed concern that the CSC would become a further forum for employee opposition, with labor unions filing complaints against management.⁵¹⁵ In practice, the CSC was staffed by impartial academic experts in an effort to insulate product studies from political or economic pressures.⁵¹⁶ But it was a case in which ministerial initiative had imposed a significant constraint on business that business itself was powerless to throw off.

⁵¹³ "Par ce biais vous permettez le retour aux prix imposés, ce qui est un facteur d'inflation et une mauvaise chose pour les consommateurs." Patrick Francès, "La protection et l'information des consommateurs," *Le Monde*, 12 Dec 1977.

⁵¹⁴ Françoise Vaysse, "Les anges gardiens de la sécurité," *Le Monde*, 14 April 1992.

⁵¹⁵ Chambre de commerce et d'industrie de Paris, *Projet de loi sur la securite des consommateurs*, Rapport présenté au nom de la Commission du Commerce Intérieur par M. Devincre (adopted 21 april 1983), pp 8-11.

⁵¹⁶ When the new members of the CSC were appointed by the administration on 17 November 1987, one member was not readmitted. Professor Fournier, head of the antipoison center in Frenand-Vidal, had argued forcefully during his tenure to have have Bergasol tanning cream removed from the market. INC lobbied hard to have him

German Product Safety Through Industry Self-Regulation

Consumer safety in Germany rests on a combination of food regulation and equipment regulation, supplemented by additional regulations applying to particularly dangerous sectors such as automobiles and pharmaceuticals. These two pillars of consumer protection, enacted in 1975 and 1980, each embody a focus on market solutions and producer sovereignty. They nonetheless operate quite differently. The law on food reform (*Lebensmittelreformgesetz*), enacted in 1975, relies primarily on product labeling and industry self-policing to ensure the safety of products. It imposes national safety, quality, and information standards, but places enforcement with the federal states. The 1980 amendment to the Law on Safety of Equipment (*Gerätsicherheitsgesetz* or *GSG*) makes standards created by Germany's standardization board (*Deutsche Industrie Normung* or *DIN*) effectively mandatory for producers of equipment used by consumers. Hence both areas of regulation have tended to emphasize industry self-regulation. Neither provides for a legal recall duty on the producer. Unlike French consumer safety regulation, both German laws pursue consumer protection conceived as an economic and not a political goal.

On 18 June 1974 the Bundestag unanimously passed the new Food and Necessities Law (*Lebensmittel- und Bedarfsgegenstände-Gesetz*), which became active on 1 January 1975.⁵¹⁷ The new law, seen at the time as the "basic law of consumer protection," replaced a variety of national and state-level quality regulations. The new

retained, but without success. "La nouvelle Commission de la sécurité des consommateurs," *Consommateurs Actualités* 570 (20 November 1987): 11.

⁵¹⁷ Formally the law was entitled 'Gesetz zur Neuordnung und Bereinigung des Rechts im Verkehr mit Lebensmitteln, Tabakerzeugnissen, Kosmetischen Mitteln und sonstigen Bedarfsgegenständen' or simply 'Gesetz zur Gesamtreform des Lebensmittelrechts.'

law was extraordinarily broad in scope, imposing standards on labeling, safety, and sanitation for food, regulating additives and advertising, and extending not only to food but also to tobacco and cosmetic products. Chemical tests for the safety and conformity of food products today are carried out by 67 chemical testing labs throughout Germany. The law also provides for foods that do not meet required safety standards to be kept from distribution.⁵¹⁸ A new Food Labeling Law (*Lebensmittelkennzeichnungsrecht*) passed in 1981 required that the full contents of food products be included on the packaging, and that all perishable products include an expiration date.⁵¹⁹

Unlike the French product safety laws, however, Germany never created a central authority with a mandate and regulatory capacity to apply the new food law. Indeed all enforcement was delegated to the federal states, which were, however, given no additional funding for enforcement. One reason for this weak enforcement was the opposition by both the FDP and the CDU to the legislation. The FDP argued that the new law only multiplied the number of legal texts that would have to be enforced, and that the same goals could be achieved by enforcing existing laws.⁵²⁰ The CDU argued that such regulation was overly intrusive in the economy. For example, the CDU opposed any advertising restrictions on tobacco products on the grounds that this would not, as the SPD claimed, limit smoking. In the end, no member of parliament could be seen to

⁵¹⁸ Susanne Langguth, and Matthias Horst, "Zum Schutz der Konsumenten," *Verbraucher & Markt* '83 34 (18 Aug 1983), p 10.

⁵¹⁹ Susanne Langguth, and Matthias Horst, "Zum Schutz der Konsumenten," *Verbraucher & Markt* '83 34 (18 Aug 1983), p 10.

⁵²⁰ Gerhard Wilhelm Bruck, *Perspektiven der Sozialpolitik: Synopse sozialpolitischer Vorstellung der Bundesregierung, SPD, FDP, CDU, CSU, DAG, des DGB und der Bundesvereinigung der Deutschen Arbeitgeberverbände* (Göttingen: Otto Schwartz, 1974), pp 134-136.

oppose such broadly popular legislation, although by the time the proposed law came to a vote the Bundestag chamber was nearly empty.⁵²¹

The lack of centralized enforcement of the new food law was due in part to CDU opposition, but also to the way in which the SPD itself justified the legislation. Namely, they focused on the economic advantages the law would bring by normalizing safety standards across Germany's states. Until 1975, each state regulated foods in its own traditional way. The new law, the SPD argued, made economic sense because it promoted market transparency. Even the peak consumer association, the AgV, argued that one of the big advantages of the new food law was that it would reduce the burden on retailers, who until then had to track and apply over 200 different laws and regulations.⁵²² Hence the 1975 Food and Necessities Law, conceived as the "basic law of consumer protection," was pushed by the SPD on the grounds not specifically of consumer safety, but instead of its unifying effect on the marketplace.

Regulation of consumer safety for equipment adopted a different strategy, one that drew on a more extensive application of existing technical standards within industry. Two government initiatives, in 1977 and 1980, were crucial. After seven years of trying to establish a product safety standard, the Federal Minister of Labor created in 1977 the "GS" (Geprüfte Sicherheit – tested safety) label for products to indicate conformity with all relevant (primarily DIN) technical standards. Permission to use the "GS" symbol is granted today by over 80 test centers throughout Germany and, since 1985, in France. Approximately 16-17,000 testing certificates are issued annually. In December 1985,

⁵²¹ Ingeborg Jahn, "Neues Lebensmittelrecht soll die Verbraucher besser schützen," *Frankfurter Rundschau*, 19 June 1974.

85,000 kinds of equipment and machines carried the GS symbol.⁵²³ Companies that apply for GS certification and fail are referred to the Trade Supervisory Offices (Gewerbe Aufsichtsämter) for mandatory testing.

The government remained unsatisfied with the voluntary nature of the GS symbol, and in 1980 moved to make industry standards of safety mandatory for all technical products on the market. The core of this legislation, named the Equipment Safety Act (Gerätsicherheitgesetz, or GSG), was a general safety requirement (allgemeine Sicherheitspflicht) that reads: "The producer or importer of technical equipment may only display or circulate goods such that, in accordance with the generally recognized rules of technology as well as the labor protection and accident avoidance regulations, the user or third party to its specified application is protected against all kinds of risk to life and health, as specified by the manner of its particular application."⁵²⁴ Thus unlike France's 1983 law, Germany's GSG employs a standard of safety based on the "specified application" of a product, and hence is not intended to cover the "foreseeable misuse" included in the French standard.

One impact of this narrower German interpretation of industry responsibility for product safety has been a distortion of estimations of total product-related accidents in the

⁵²² Katharina Olbertz, "Beim Verbraucherschutz hängt alles an der Kontrolle," *Handelsblatt*, 8 September 1975.

⁵²³ Josef Falke, "Post Market Control of Technical Consumer Goods in the Federal Republic of Germany," in *Post Market Control of Consumer Goods*, ed. Hans-W. Michlitz (Baden-Baden: Nomos Verlagsgesellschaft, 1990), p 364-365.

⁵²⁴ "Der Hersteller oder Einführer von technischen Arbeitsmitteln darf diese nur in den Verkehr bringen oder ausstellen, wenn sie nach den allgemein anerkannten Regeln der Technik sowie den Arbeitsschutz- und Unfallverhütungsvorschriften so beschaffen sind, daß Benutzer oder Dritte bei ihrer Bestimmungsgemäßen Verwendung gegen Gefahren aller Art für Leben oder Gesundheit soweit geschützt sind, wie es die Art der bestimmungsgemäßen Verwendung gestattet." *GSG*, Section 3, paragraph 1.

country. One of the few studies of home and leisure accidents in Germany, conducted by the Association of Liability Insurers, Accident Insurers, Automobile Insurers, and Legal Cost Insurers (HUK-Verband), found that 99% of all such accidents resulted from mistaken actions by consumers, and not by flaws of design or construction of the product itself. The Stiftung Warentest has contested this finding. Joerges points out how improbable this finding is, given that the Trade Inspection Offices in North Rhein-Westphalia found in a 1984 study that nearly one quarter of all home appliances on the market were in some way defective.⁵²⁵ Indeed efforts to assess systematically the number of product-related accidents in Germany have been discouraged, to the point that accidents have become largely irrelevant to discussions of product safety.

The “generally recognized rules of technology” described in the law had the effect of making industry standards quasi-mandatory. While the GSG does provide the possibility for manufacturers to avoid existing standards in favor of new technical approaches that offer equivalent or greater levels of safety, for most producers the effect of the GSG has been to enforce compliance with DIN standards. By 1981, 637 DIN standards as well as 101 other kinds of standards fell under the GSG.⁵²⁶ Why did German industry accept this kind of intervention in their production decisions? The reason is that standards within DIN are set in technical committees comprising representatives from the major manufacturers in the relevant field. Hence the effect of the GSG was to force all

⁵²⁵ Christian Joerges, Josef Falke, Hans-Wolfgang Micklitz, and Gert Brüggemeier, *Die Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft* (Baden-Baden: Nomos, 1989), p 134.

⁵²⁶ Annemarie Bopp-Schmehl, Uwe Heibült, and Ulrich Kypke, *Technische Normung und Verbraucherinteressen im gesellschaftlichen Wandel* (Frankfurt am Main: Haag & Herchen Verlag, 1984), p 101.

competitors in a particular market to compete on technical standards that had been set by the industry leaders.

The GSG is applied by Trade Supervisory Offices (Gewerbeaufsichtämter), of which Germany had 71 in 1986, with a total staff of nearly 3000. With an estimated 180,000 new products coming on the market each year, the trade supervisory offices are only able to evaluate a fraction of all products. Over half of these are tested at trade fairs and exhibitions, with most of the remaining tests coming from referrals from Germany's comparative product testing organization, Stiftung Warentest, from industry works councils (Betriebsräte), or from other product testing laboratories.⁵²⁷ The Stiftung Warentest and product testing organizations such as those that grant the GS accreditation are required by law to refer non-conforming products to the Trade Supervisory Offices for further testing.

If the danger of a product is deemed particularly acute, the GSG does permit the use of a prohibition decree (Untersagungsverfügung). These notifications, however, are only published in the GSG's own technical journal, which has a circulation of only 500 copies. Since 1981 they have been allowed to distribute these notifications more widely, but have done so in only about 10 cases each year.⁵²⁸ Moreover, the GSG has no authority to force companies to recall products. Indeed when a Directive on product recall was proposed at the European level, the idea was quickly quashed by Germany. This kind of recall action has been forcefully opposed by industry and labor alike on the grounds

⁵²⁷ Josef Falke, "Post Market Control of Technical Consumer Goods in the Federal Republic of Germany," in *Post Market Control of Consumer Goods*, ed. Hans-Wolfgang Micklitz (Baden-Baden: Nomos Verlagsgesellschaft, 1990), pp 359-369.

that the process of safety evaluation necessary to product recall, currently managed by technical experts in standard setting organizations and the Gewerbeaufsichtämter, would become politicized and transferred to experts in other fields.⁵²⁹

⁵²⁸ Christian Joerges, Josef Falke, Hans-Wolfgang Micklitz, and Gert Brüggemeier, *Die Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft* (Baden-Baden: Nomos, 1989), pp 161-167.

⁵²⁹ Micklitz, Hans-Wolfgang, "Comparative Analysis of the National Country Reports on Post Market Control and Perspectives for a European Setting of Post Market Control," in *Post Market Control of Consumer Goods*, ed. Hans-Wolfgang Micklitz. Schriftenreihe des Zentrums für Europäische Rechtspolitik an der Universität Bremen (ZERP), Band 11 (Baden-Baden: Nomos, 1990), pp 415-8.

Chapter 8. Consumer Protection Through Direct Product Regulation

Governments in France and Germany were not satisfied merely to set the information and risk context in which consumer purchases occurred. For many areas of the economy they actively intervened to set specific features of products on the market in a way that would be more friendly to consumers. France and Germany both have attempted, for example, to incorporate consumer interests into the design standards for particular kinds of products. Product price was another area of potential intervention. In price policy, France intervened strongly to set product prices for a broad range of goods, while Germany granted a high degree of pricing prerogative to producers. Finally, governments in both countries intervened to place restrictions on the terms of sale for products in the marketplace, thereby standardizing the contractual terms of consumer purchases.

One of the striking findings from these cases of direct product regulation is that Germany has proven surprisingly willing to infringe on private contractual and economic autonomy when such intervention was felt to work in the interest both of consumers and of Germany's industrial producers. The surprise in the French case is not that the government has been willing to intervene in the economy on behalf of consumers—a deep *étatist* tradition has made such intervention a hallmark of French industrial policy—but that this intervention has reflected a specific strategy of consumer protection. Whereas Germany has proved more willing to interfere in restricting the terms of sale for products, France has shown a far greater willingness to interfere in the realm of product pricing. In the area of product design, Germany has forced industry to accept consumer

input into design specifications for consumer products, while the French government has merely encouraged discussions among consumers and producers concerning product design. These cases suggest that French and German approaches to direct product regulation cannot be understood by reference to national traditions of state intervention in the economy. Rather, French and German approaches to direct product regulation must be understood in terms of their national conceptions of the consumer interest and the institutional context in which the issues of consumer protection first arose.

In Germany, where the consumer was perceived primarily as an economic actor, direct product regulations sought both to overcome market failures and to improve the quality of products available in the marketplace. In the area of product design, for example, consumers were granted a consultative role in setting industry technical standards for consumer products. Strict limitation on the terms of sale in Germany also ensured that consumers would not be surprised by the terms of their purchases. Finally, regulations focusing on product pricing had the central goal of maintaining price transparency for consumers so that they might more easily compare product prices.

In France, by contrast, the consumer was perceived more as a political actor. Direct product regulations thus sought to protect the consumer against industry malfeasance. In product design, consumer groups were empowered to negotiate product standards directly with producers. Terms of sale in France were regulated directly by the government. While this approach ensured that consumers retained their rights to legal recourse against producers, the regulatory approach failed to establish a high standard for consumer contracts. Finally, regulation of product price were designed specifically to protect consumers against "unjust" pricing practices. In this sense, the French approach to

direct product regulation was consumer-oriented, while the German approach was really industry-oriented.

Consumer Participation in Product Design

Beyond simply informing consumers about product quality and distributing product-related risk, politicians in both France and Germany also pushed for greater consumer participation in the product design process. Germany did so by introducing consumer representatives into its organization for technical standards formation, Deutsche Industrie Normung (DIN). France, by contrast, attempted to promote collective accords between consumer associations and producer interest groups in which acceptable standards of quality and design were negotiated. In the end, Germany's system succeeded because it drew on the capabilities embodied in Germany's production institutions. France's approach, by contrast, created an entirely new forum for negotiating product quality, but one in which producers were extremely hesitant to participate.

In Germany, where standard-setting was highly centralized in the DIN, consumer representatives were able to participate in product standard-setting through the creation of a consumer advisory council within the DIN. This kind of participation was possible in part due to the high level of technical competency among German consumer representatives, which allowed them to engage usefully in technical committee meetings for products of particular relevance to consumers. In France, by contrast, consumer organizations were encouraged by the government to negotiate directly with the sectoral business groups, and later with companies individually. This approach was necessary in part due to the weaker position of the French standard setting organization, AFNOR. It was also better suited to the capacities of consumer organizations in France, as their wide

grass-roots support gave them a claim to negotiate legitimately on behalf of all consumers.

German Consumers in Industry Standard Setting

On 8 October 1974, the German Standards Association (DNA)⁵³⁰ decided in an agreement with the Economics Ministry to accept public funds to create a Consumer Council (Verbraucherrat, or VR) within DNA to represent consumer interests. While industry, lead by its peak trade association, the Bund Deutscher Industrie (BDI), opposed this so-called “partnership in-house solution”⁵³¹ to the problem of consumer access to setting standards, the decision was reached as part of a larger negotiation between DNA and the government. Beginning at the end of 1973, the government had approached the DNA for an agreement to provide significant federal funding in exchange for taking on duties that the government felt were central to the standardization process. One of these, as affirmed in the governments *First Consumer Report* of 1971, was to incorporate consumer interests into the standard-setting process.⁵³² As a result of these negotiations, on 1 September 1975, DNA signed an agreement with the government making it the exclusive standard setting organization in Germany. It also changed its name to the current German Institute for Standards (Deutsches Institut für Normung, or DIN).

According to the terms of this agreement, set out in DIN standard 820, which governs the

⁵³⁰ Renamed DIN in 1974.

⁵³¹ “partnerschaftliche Im-Hause-Lösung”; Christian Joerges, Josef Falke, Hans-Wolfgang Micklitz, and Gert Brüggemeier, *Die Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft* (Baden-Baden: Nomos, 1989), p 186.

⁵³² *Verbraucherbericht*. Bundestagsdrucksache VI/2724, 1971.

operations of the organization itself, consumers would sit on an equal footing with producers on the Consumer Council.⁵³³

The new Consumer Council had three goals: to oversee the standards process, to help select cases of interest to consumers for standardization, and to organize consumer representation on relevant DIN technical committees. The five members of the Consumer Council were selected, each for a term of three years, by the president of the DIN in consultation with the peak consumer association (AgV) and the Economics Minister. The Council then appoints individual consumer representatives to sit on standard-setting committees for products of particular interest to consumers. The work of the consumer council has been very successful. Government financial support grew from 328,000 DM in 1975 to 451,000 DM in 1980, while the number of consumer representatives participating in DIN technical committees grew from 370 in 1976 to over 600 in 1980.⁵³⁴ In 1982, 1,884 of 21,400 standards issued by DIN were found to be relevant to consumers according to Consumer Council criteria.⁵³⁵ By 1989, about 2,400 of DIN's 25,700 standards were found by the Consumer Council to be relevant to consumers.⁵³⁶ Consumer-relevant technical standards have consistently accounted for 9 percent of all

⁵³³ In 1962 the DNA established a committee for product usefulness (Ausschuß Gebrauchstauglichkeit, or AGt) on which consumer representatives held four seats, but their influence was little, and the committee was eliminated after the formation of the VR.

⁵³⁴ Bopp-Schmehl, et al., p 214.

⁵³⁵ Annemarie Bopp-Schmehl, Uwe Heibült, and Ulrich Kypke, *Technische Normung und Verbraucherinteressen im gesellschaftlichen Wandel* (Frankfurt am Main: Haag & Herchen Verlag, 1984), p 216.

⁵³⁶ Christian Joerges, Josef Falke, Hans-Wolfgang Micklitz, and Gert Brüggemeier, *Die Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft* (Baden-Baden: Nomos, 1989), p 187; Jérôme Darigny, *Normalisation-certification-essais: leur devenir, leurs enjeux industriels dans l'Europe du marché unique* (Paris: University of Paris I (Sorbonne) Thesis, November, 1989), p 16.

technical standards issued by DIN. Germany's "partnership in-house solution" has proved itself an effective tool for promoting the consumer interest in product design.

French Consumer Accords with Industry Associations

The third Barre government, inaugurated in 1978, pursued a different strategy for involving consumers in the process of product design. Rather than trying to pursue the consumer interest through standard setting, the Economics Minister René Monory called instead for consumer associations to function as an equal counter-force to industry.⁵³⁷ To this end he called for the quadrupling of State funding to consumer associations, from 1 million francs in 1978 to 4 million francs in 1979.⁵³⁸ He also eliminated the position of Secretary of Consumption, which under the previous government had focused administrative intervention on information strategies of consumer protection. While Monory liked to call himself the "Minister of Consumption," the actual administration of consumer affairs was taken up instead by a newly created 'Mission consommation', lead by Danièle Achach, of the newly renamed Direction de la concurrence et de la consommation (formerly the Direction de la concurrence et des prix) in the Economics Ministry.⁵³⁹ This shift emphasized Monory's view that product specifications should be set through a process of negotiations between representatives of producers and their consumer counterparts.

⁵³⁷ René Monory, *Inauguration des Locaux de L'institut national de la consommation* (Paris: Ministre de l'economie, Service de l'information, March 1979), p 3.

⁵³⁸ "René Monory: davantage de moyens pour informer les consommateurs," *Démocratie Moderne*, 22 Nov 1979.

⁵³⁹ Jean Marchand, "Une 'mission consommation' au ministère de l'Economie," *La Croix*, 17 Jun 1978.

The idea of negotiating directly with consumer groups had long been favored by much of French industry as an alternative to direct government intervention. In 1975 the CNPF appointed Paul Simonet head of a new Committee on Industry, Commerce, and Consumption (Comité industrie commerce consommateur, or CICC) with the goal of presenting a united front to consumer organizations. The CNPF was, in the words of Simonet, "...very open to all forms of concertation, especially in the domain of information..."⁵⁴⁰ The Consumption Committee of the Seventh French Plan in 1976 advocated just such a dialogue between consumers and producers, although members of the business contingent noted a 'certain climate of hostility' among the consumer representatives.⁵⁴¹ The director of customer relations at Air France, Jean-Georges Marais, echoed in 1977 that such a concertation was indispensable.⁵⁴² And a survey conducted by the École supérieure de commerce of Lyons in 1976 found that 24 percent of French companies had already engaged in dialogues with consumer associations.⁵⁴³

The effect of the 1978 Monory program on these earlier efforts was to encourage collaboration on all aspects of the production process, something that the CNPF had long opposed. Monory charged the formerly neutral National Consumption Institute (INC) to support consumer associations in cultivating a "consumer counter-force to counterbalance

⁵⁴⁰ "...nous sommes tres ouverts a toute forme de concertation, plus particulierement dans le domaine de l'information..."; "Opinions sur la fonction consommation et la libre entreprise," *Humanisme et Entreprise* 102 (April 1977), p 16.

⁵⁴¹ Commissariat General du Plan, *Rapport du comité Consommation: Préparation du 7e plan* (Paris: Documentation Française, 1976), p 16; Jacques Dubois, "Les consommateurs dans le 7ème plan," *Information Consommation OR-GE-CO* 15 (March-April 1976), pp 1-2.

⁵⁴² "Je voudrais affirmer qu'une concertation est indispensable." Jean-Georges Marais, "Le consommateur, cet inconnu?" *Humanisme et Entreprise* 102 (April 1977), p 69.

⁵⁴³ "Le Consumerisme," *Libre Service Actualités* 632 (30 June 1977), p 134.

the technical advantage of producers and the effects of advertising.”⁵⁴⁴ The CNPF’s Committee on Industry, Commerce, and Consumption) CICC held regular meetings with consumer associations from November 1979 to March 1981.⁵⁴⁵ In the context of these meetings, consumer representatives met with representatives of industry sectors to negotiate standards of quality and use that were felt to suit consumer needs in that field. While such partnerships were voluntary, companies that accepted negotiated standards could advertise this as a selling point. By 1989, 49 voluntary accords had been signed between consumer associations and professional associations. Of these, 36 percent treated house construction, 20 percent used car sales, 18 percent small retailing, 8 percent furniture, and 6 percent dry cleaning.⁵⁴⁶

One such voluntary agreement was signed between consumer associations and France’s largest retail store association (UDAC). According to the agreement, retailers following a set of negotiated guidelines would be allowed to post in their store-front a sticker of a blue, white, and red fleur-de-lis that read: “I adhere to the retail agreement.”⁵⁴⁷ The guidelines included marking rebates as a percentage of the proper price, indicating prices including services and other charges “tout compris,” posting clear information about service after sale, and a guarantee to replace goods that did not function properly or were damaged in delivery. Like many such accords, the program was

⁵⁴⁴ “pouvoir consommateur [pour] contrebalancer la technicité des producteurs et l’action de la publicité.”; Gisèle Prevost, “Consommation: l’agressivité de l’INC préoccupe de plus en plus le CNPF,” *Les Echos*, 28 May 1979.

⁵⁴⁵ Jean Marchand, “M. Monory veut des consommateurs puissants,” *La Croix*, 28 September 1979.

⁵⁴⁶ “Accords négociés entre associations de consommateurs et professionnels,” *INC Hebdo* 624 (3 February 1989), p 14.

⁵⁴⁷ “Engagement du commerce, j’adhère.” “La charte 92,” *50 Millions de Consommateurs* 122 (February 1981).

well received but not very widely employed. A 1981 survey of 663 stores in Marseilles found that only 27 (4 percent) had placed the 'fleur tricolore' in their windows.⁵⁴⁸

France's Corporatist Gambit

The victory of Mitterrand's socialist party in 1981 put a new emphasis on such collective agreements. Their goal was to make agreements negotiated between consumer and professional groups legally binding. The Socialists signaled the importance of this initiative by creating a Ministry of Consumption, to which it appointed Christine Lalumière as minister.⁵⁴⁹ The project was explicitly modeled on the 1936 labor law, which had granted labor unions the right to negotiate contract terms at the sectoral level. Moreover, because a corporatist strategy of this kind would have ramifications for many other areas of consumer regulation, Lalumière created a committee to rewrite the full body of consumer law in France. It was headed by the lawyer and consumer advocate Jean Calais-Auloy. Significantly, no representatives of industry were included on the committee.⁵⁵⁰

This corporatist agenda was strongly supported by consumer associations, which by 1981 had become so frustrated with the imbalance in their discussions with industry that they were boycotting further talks until the government intervened in the negotiation process. They felt that only binding sectoral agreements would give them sufficient influence.⁵⁵¹ Jacques Ghestin, a lawyer and spokesman for consumer groups, argued that

⁵⁴⁸ *Consommateurs Actualité* 282 (3 April 1981).

⁵⁴⁹ Created by decree 81-704 of 16 July 1981.

⁵⁵⁰ Chambre de commerce et d'industrie de Paris, *La Politique de la Consommation*, rapport présenté au nom de la Commission du Commerce Intérieur par Messieurs Lefeuvre et Blat (adopted 14 January and 11 March 1982).

⁵⁵¹ Didier Ferrier, *La Protection des Consommateurs* (Paris: Dalloz, 1996), p 80.

the government should assign authority over product quality, including the terms of consumer contracts, to professional associations. "In reality," he argues, "I don't see why professional organizations that are able to speak legitimately for their members about work conditions could not do the same in relation to sales conditions."⁵⁵²

But this move toward a corporatist solution to consumer demands was opposed both by the business community and by the Ministry of Justice. The business community argued that the analogy with labor contracts was a false one. They felt, first, that consumers were not dependent on producers in the same way that employees were dependent on their employers, since consumers face few obstacles to shopping around.⁵⁵³ Second, the Paris Chamber of Commerce and Industry argued that the variety of interests in the professional community, which encompassed producers, wholesalers, retailers, and service providers, would put them at a disadvantage in negotiating binding agreements with consumers.⁵⁵⁴ Jean Levy, who succeeded Paul Simonet in 1982 as head of the CICC, felt that binding collective conventions of this kind could only hurt production. In response to a proposal that retailers post the price-per-kilo and price-per-liter for foods, for example, he argued that this would hurt the quality of products in the market by

⁵⁵² "En réalité on ne voit pas pourquoi les organisations patronales qui peuvent engager valablement leurs adhérents quant aux conditions de travail, ne pourraient pas le faire quant à leurs conditions de vente." "Négociation collective: le point de vue des juristes," *Que Savoir* 43-44 (June-July 1982), p 53.

⁵⁵³ Josée Doyère, "Des 'conventions collectives' de la consommation rendront obligatoires les engagements des professionnels," *Le Monde*, 5 December 1981.

⁵⁵⁴ Chambre de commerce et d'industrie de Paris, *La Création du Conseil National de la Consommation*, rapport présenté au nom de la Commission du Commerce Intérieur par M. Gaucher (adopted 19 May 1983), p 10.

focusing consumer attention on price. The result, he argued, “would be an invasion of mediocre and low quality products.”⁵⁵⁵

The Ministry of Justice also opposed a corporatist approach to consumer regulation. While it felt that agreements between consumer groups and professional associations should be encouraged, it emphasized that these must remain voluntary. Consumer groups, it argued, were not adequately similar to trade unions. Whereas workers had a “unity of life, unity of training, class consciousness, and direct impact on their work environment,” consumers remained necessarily dispersed and disunited.⁵⁵⁶ Furthermore, corporatist devolution of control would undermine existing administrative authorities such as the Commission on Abusive Clauses, which regulated retail contracts. Instead of a corporatist devolution of authority, the Ministry of Justice advocated non-legal means of enforcement such as labeling and advertising. They argued that consumer-friendly brands such as FNAC and Leclerc, for example, had done very well in the marketplace.

In 1983, under mounting fiscal pressure, the government underwent a radical change of orientation towards business that caused it to dismiss the Calais-Auloy committee that had been created to rewrite the consumer law. It opted instead for a middle way, creating a forum in which consumer and professional groups could meet in the presence of the government administration, but without making agreements binding on producers. In 12 July 1983 the government transformed the National Consumption

⁵⁵⁵ “Ce serait l’envahissement par des produits médiocres et de mauvaise qualité”; Elisabeth Rochard, “Le CNPF ne veut pas de conventions collectives de la consommation,” *Le Matin*, 19 February 1982.

⁵⁵⁶ Ministère de la Justice, “Observations sur l’éventualité de conventions collectives entre les organisations de consommateurs et les professionnels,” (Paris, 14 March 1980), p 2.

Committee (Comité national de la Consommation, or CNC), which had been created in 1960 as a forum for consumer associations to express their interests to the government, into the National Consumption Council (Conseil national de la consommation, also CNC), a body in which professional associations would participate on an equal footing with consumer groups. The body's new goal was "...to permit the confrontation and the concertation among the representatives of professionals, the public services, and the public powers." Composed of a consumer and a producer college, the body meets four times per year.⁵⁵⁷

Quality Contracts

In December 1982 the newly created Minister of Consumption under the Socialist government, perceiving the probable failure of binding consumer accords, initiated a program to improve product quality by encouraging individual companies and consumer groups to enter into "contracts for the improvement of quality" ("contrat pour l'amélioration de la qualité"). Unlike consumer accords, these quality contracts were negotiated for a short time and on a company-by-company basis, and were considered binding on participating companies. Products or services that had been approved in a set of contract negotiations with officially recognized consumer groups could be indicated with the mark "Approved" ("marque 'approuvé'").⁵⁵⁸

⁵⁵⁷ The producer college had been moved from the board of directors of the INC, where they had been before, facilitating the more confrontational role of the INC. Chambre de commerce et d'industrie de Paris, *La Creation du Conseil National de la Consommation*, rapport présenté au nom de la Commission du Commerce Intérieur par M. Gaucher (adopted 19 May 1983), pp 4-5.

⁵⁵⁸ Jean Calais-Auloy, *Droit de la Consommation* (Paris: Editions Dalloz-Sirey, 1992), pp 49-50.

These quality contracts had a mixed reception among consumer groups. The socialist and communist consumer groups strongly favored quality agreements, and some companies even negotiated them through their own labor unions. The Communist consumer group INDECOSA-CGT even complained that the government was not applying sufficient pressure on the large nationalized companies to sign quality agreements with consumer associations.⁵⁵⁹ The independent consumer group UFC, on the other hand, remained critical of the 'approuvé' program because they felt that it produced few results for consumers and had supplanted the more effective 'Quality Certificates' program attempted by the previous government.

By 1985, 59 companies had signed quality contracts with consumer associations for a duration of one or two years.⁵⁶⁰ Of these, 33 companies signed contracts to improve the quality of services, and 26 companies signed quality contracts on a total of 305 different products. By 1986, 134 quality contracts had been signed.⁵⁶¹ But a survey in 1986 also showed that only 16 percent of the population recognized the 'approuvé' certification.⁵⁶² In hindsight, this system of quality contracts appears to have been largely ineffectual.⁵⁶³

In sum, while France and Germany both attempted to introduce consumer interests into the product-design phase of production, the solutions they chose were very

⁵⁵⁹ "Contrats de qualité," *Consommateurs Actualités* 498 (28 February 1986), p 17.

⁵⁶⁰ "Contrats d'amélioration de la qualité," *Consommateurs Actualités* 501 (21 March 1986), p 17-19.

⁵⁶¹ "Contrats de qualité, quatre ans apres...", *Consommateurs Actualités* 530 (5 December 1986), p 17.

⁵⁶² "Qualité: les consommateurs veulent un label unique européen," *Consommateurs Actualités* 604 (9 September 1988), p 20.

⁵⁶³ Jean Calais- Auloy, *Droit de la Consommation* (Paris: Editions Dalloz-Sirey, 1992), pp 49-50.

different, as were the levels of success they achieved. Their divergent approaches were driven primarily by the capacities of the producer and consumer groups involved. In Germany, product standards were widely promulgated and accepted by producers, and consumer groups embodied a high degree of technical competence. In France, by contrast, consumer groups had a broad legitimacy but little specific technical expertise, and negotiated product standards were not used by a sufficient number of producers to be an attractive target for asserting consumer interests. The German strategy appears to have been both simpler and more effective than the elaborate collaborative efforts attempted in France.

Terms of Sale

Terms of sale specify the conditions to which shoppers assent when they purchase products or services. They generally cover terms of warranty, conditions that affect the liability of the producer, guarantees as to product price and conditions of delivery, the cost and availability of repairs, and many other post-purchase eventualities.⁵⁶⁴ When the terms of sale are prepared in advance by a producer or retailer – often with the help of a lawyer – they are called standard form contracts. Standard form contracts that cannot be renegotiated by the consumer at the point of purchase are called adhesion contracts. Adhesion contracts have become the norm for most product sales. Printed unobtrusively on sales slips or accompanying documents, they constitute the fine print of any purchase. While many countries now subject terms of sale to a standard of clear writing, a recent survey of adhesion contracts in Germany found that they require an average of seventeen

⁵⁶⁴ Erika Schork, “Geschäft mit den Geschäftsbedingungen,” *Süddeutsche Zeitung*, 13 July 1972.

minutes to read. In practice, consumers commonly do not learn the implications of the terms they agree to until long after they have purchased a product.

Use of standard term and adhesion contracts burgeoned in the 1960s as a counterpart to the growth of mass production in manufacturing. Just as rational manufacturing depended on standardized parts and worker functions, rational financial management of the large firm also required standardized contractual relationships with both suppliers and consumers. Adhesion contracts offered three specific advantages over ad-hoc contracts or those negotiated at the point of sale. First, pre-written contracts reduced the costs of individual contract negotiations and subsequent legal fees. Second, companies using standard term contracts could accurately evaluate and control their risk exposure. Third, standard contracts could also work to the advantage of consumers, who could purchase branded products with the certainty of finding the same contract conditions everywhere. This meant that manufacturers and distributors that could provide this kind of contractual uniformity were likely to be favored by consumers. Companies today still commonly employ standard form contracts in their relations both with consumers and with suppliers. This paper focuses exclusively on the use of adhesion contracts in sales to the final consumer.⁵⁶⁵

In the context of growing competition among producers, many companies increasingly looked to standard term contract as a means of increasing their price competitiveness. By rewriting adhesion contracts so as to limit risk exposure, a company could reduce the unit sales price of products without making any changes to production.

⁵⁶⁵ Standard form contracts have also played an important role in distributing contractual responsibilities between producers and their suppliers. See Steve Casper, *Reconfiguring*

This strategy should not have posed a problem for consumers, as they could in principle shop around for the combination of product quality and contractual terms that best fit their needs. So long as an industry did not suffer from monopoly, market forces would create competition for an appropriate level of contractual security.

Two parallel developments, however, made this sort of market competition for contract terms infeasible. First, an extraordinary growth in the number and complexity of products in the 1970s meant that consumers often did not know enough about them to be able to judge the value of the sales terms that accompanied them. What was the likely lifetime and repair schedule for a microwave oven, for example? In many cases not just consumers but also producers themselves did not know what to expect from new kinds of products. Second, the parallel growth in self-service shopping made it difficult for consumers to seek professional sales advice.⁵⁶⁶ Sales staff who might have been able to share customer experiences with different contract kinds were giving less and less advice. Taken together, these two trends meant that companies could dilute their contractual responsibilities without consumers being able to detect the difference. This prospect was particularly worrisome because of its distributional implications: those consumers less capable of discerning often complicated differences among competing contract terms were more likely to be hurt by the practice.

By the mid 1970s, political pressure to regulate the terms of consumer contracts had risen all over Europe. Sweden had already made provisions for its Consumer

Institutions: The Political Economy of Legal Development in Germany and the US. Ph.D. Dissertation, Cornell University, 1997.

⁵⁶⁶ Michel Trochu, Yannick Tremorin, and Pierre Berchon, "La protection des consommateurs contre les clauses abusives: étude de la législation française du 10-1-1978," *D.P.C.I.* 7/1 (March 1981), pp 37-38.

Ombudsman to negotiate consumer contracts in 1971. Germany's Justice Minister suggested the need for analogous regulation in Germany in 1972.⁵⁶⁷ France advocated similar regulation in its Seventh Plan beginning in 1974.⁵⁶⁸ Britain disallowed personal injury exemptions in consumer contracts in 1973. By 1975, the topic had become so pervasive that the European Economic Community proposed a directive for a Europe-wide approach to regulating consumer contracts.

This move to regulate cannot be understood exclusively as an outpouring of government compassion for a dispossessed consumer, although this was also a factor. Policy-makers also believed that regulating the content of consumer contracts could improve the knowledge with which consumers shopped and thereby introduce greater efficiency into the larger economy. So long as consumers did not fully understand what they were buying, the argument went, they were likely to make inefficient purchases. Indeed the greater their uncertainty about the quality of a product, and in particular about the services that accompanied the product, the less likely they were to attempt to purchase high quality goods.⁵⁶⁹ This shift in demand would, in turn, have an effect on company product strategies. In 1976 Germany's Justice Minister Held of Bavaria, in advocating contract regulation, stressed the economic benefit of greater contractual clarity: "Under somewhat more honest, more comparable, and more transparent sales conditions market transparency will be improved; better application of legitimate consumer interests can

⁵⁶⁷ "Die Parteien entdecken die Verbraucher," *Süddeutsche Zeitung*, 31 October 1972.

⁵⁶⁸ Jacques Dubois, "Les consommateurs dans le 7ème plan," *Information Consommation OR-GE-CO* 15 (March-April 1976), pp 1-2.

⁵⁶⁹ Joachim Beimowski, *Zur ökonomischen Analyse Allgemeiner Geschäftsbedingungen* (Munich: Verlag V. Florenz, 1989), p 18-19.

lead to greater quality competition.”⁵⁷⁰ This might, he warned, generate higher prices, especially in cases where previous warrantee exclusions are eliminated, but it would be accompanied by an increased consumer confidence in what they were getting for their money.

Although the move to regulate consumer contracts became politically popular, it was not necessarily easy. First, regulating something so numerous and diverse as consumer contracts was a daunting task for even the most accomplished government administration. Regulation applied in an arbitrary way could hurt business by creating uncertainty about enforcement. Conversely, too much surveillance was likely to be oppressive to business. Second, most European countries held the sanctity of contracts as the core principle of their legal doctrine. In France, for example, Article 1134 of the Code Civile states explicitly that “legally formed conventions take the place of law for those who have made them.”⁵⁷¹ Regulating contracts was therefore inimical to the legal principles of most countries’ basic law. Of course, this sanctity of contract had already been abrogated in the case of labor contracts, first regulated at the turn of the century. French advocates of consumer protection drew extensive analogies between labor contract reform and consumer contract reform. But sales contracts were also palpably different from labor contracts, and any move to regulate them was constrained by the need to establish a clear legal basis for government interference.

⁵⁷⁰ “Unter etwas redlicheren, gleichmäßigeren und durchsichtigeren Rahmenbedingungen wird die Markttransparenz eher verbessert werden; bessere Durchsetzbarkeit berechtigter Verbraucherinteressen kann den Qualitätswettbewerb stärken.” Johann Georg Helm, “Privatautonomie und zivilrechtlicher Verbraucherschutz,” *Verbraucherschutz in der Marktwirtschaft*, ed. Erwin Dichtl (Berlin: Duncker & Humblot, 1976), p 79.

⁵⁷¹ “Les conventions legalement formees tiennent lieu de loi a ceux qui les ont faites.”

Conceptually, three kinds of solutions seemed feasible given these problems. The first solution, modeled on the Scandinavian experience, was to encourage negotiated agreements between sectoral professional associations and consumer associations regarding the content of standard adhesion contracts in that sector. Such agreements could be mandatory, as in Sweden, or adopted as professional norms, as was done for several service sectors in England.⁵⁷² In the Netherlands, such accords could be enforced by royal decree (according to Article 6.5.1.2 of book 6 of the civil code) at the request of a joint committee of consumers and professionals.⁵⁷³ Such negotiated agreements had the dual advantage both of facilitating enforcement and of side-stepping the problem of contractual regulation. Enforcement was relatively easy because the number of negotiated contracts would be low. Sweden, for example, had by 1982 negotiated standard consumer contracts covering 50 different sectors.⁵⁷⁴ And because companies were free to deviate from the negotiated agreements when they were contracting on a one-on-one basis, this approach avoided the legal problem of restricting contractual rights.

The second solution was to enact legislation placing specific restrictions on the content of standard form contracts. Germany, Belgium, the Netherlands, and later Spain

⁵⁷² Thomas Wilhelmsson, "Control of Unfair Contract Terms and Social Values: EC and Nordic Approaches," in *European Consumer Policy after Maastricht*, ed. Norbert Reich and Geoffrey Woodroffe (Dordrecht, The Netherlands: Kluwer Academic Publishers, 1994).

⁵⁷³ Thierry Bourgoignie and Jean Gillardin, *Droit des Consommateurs: Clauses abusives, pratiques du commerce et réglementation des prix* (Brussels: Facultés universitaires Saint-Louis, 1982), p 129.

⁵⁷⁴ Elisabeth Maillot Bouvier, "L'Ombudsman dans la Politique de Concurrence et de consommation en Suède," *Revue de la concurrence et de la consommation* 17 (1982), pp 40-42.

and Portugal, have used this approach.⁵⁷⁵ The goal of these provisions was to ensure that the party initiating the contract did not do so to the disadvantage of the contractee. Like the negotiated approach, this legislative answer avoided problems of contractual sovereignty because it did not apply to non-adhesion contracts negotiated freely between individuals. Whereas negotiated contracts offered a positive description of contracts, the negative prescriptions employed by the legislative approach left room for a much larger variety of contracts that would have to be policed. It has been estimated, for example, that 200,000 to 300,000 such contracts were in use in Germany in 1984.⁵⁷⁶

The third kind of approach, used in France, Luxembourg and Scandinavia, relied on administrative oversight. This approach, because it functioned largely outside of the legal system, did not have a legal reason to draw a distinction between standard form and individually negotiated contracts. This freedom from legal formalism gave administrative regulation two apparent advantages. First, it seemed to offer a stronger kind of protection for consumers by emphasizing the fairness of all contracts rather than focusing exclusively on those employing standard terms. Second, it appeared to offer a more flexible response to what was after all a very new kind of regulation. The problem remained, however, that the enormous number of contracts to be policed – including adhesion and individual contracts – would severely tax administrative capabilities.

⁵⁷⁵ European countries have often employed more than one strategy to regulate consumer contract terms. The Netherlands attempted both negotiated and legislative regulations. Scandinavian countries employed both administrative and negotiated approaches. Indeed, it appears that the highest level of protection may require overlapping regulatory regimes.

⁵⁷⁶ *Les clauses abusives dans les contrats conclus avec des consommateurs*, Bulletin des Communautés européennes, Supplément 1/84 (Luxembourg: Office des publications officielles des Communautés européennes, 1984), p 14.

Germany adopted the legislative approach, in the form of the 1976 Law on General Business Conditions (*Allgemeingeschäftsbedingungen Gesetz* or *AGB-Gesetz*). France adopted the administrative approach, in the form of the Second Scrivener Law ('*deuxième lois Scrivener*') of 10 January 1978. This paper analyzes the political forces behind French and German moves to regulate consumer contracts in the late 1970s in order to understand their divergent policy decisions.

French and German approaches to regulating consumer contracts differ in four important ways. First, the German law regulating consumer contracts was written to apply only to adhesion contracts (standard form contracts) whereas the French law targeted all contracts whether individually negotiated or based on standard terms. Second, the German law was extremely detailed, providing, in addition to a general statement of principle, a black list of 17 terms that could never be used in contracts and a gray list of 23 terms that had to be specifically justified. In France, by contrast, the law regulating consumer contracts was extremely general. It created an administration to make decisions about what kinds of contracts should be legitimate. Third, the German law applied to contracts between all parties, whether end consumers or not, whereas the French law applied only to end-user contracts. Finally, the German law was enforced primarily by legal action of producer and consumer associations, both of which had the right to file legal suits against companies employing illegal contract terms. The French law by contrast was enforced by government decree, a power that the government in fact rarely used.⁵⁷⁷

⁵⁷⁷ Gilles Paisant, "Le point sur les clauses abusives des contrats," in *Après le Code de la consommation, grands problèmes choisis: Actes du colloque du 24 février 1994 de l'Université de Rheims*, ed. Jean Calais-Auloy and Hervé Causse (Paris: Litec, 1995).

When the European Economic Community convened an expert committee in 1976 to discuss a Europe-wide standard for terms of sale, the schism between the French and German approaches was already apparent. Germany, along with Ireland and the Netherlands, argued that contractual restrictions should be limited to adhesion contracts. France, along with Belgium and Luxembourg, argued for the need to regulate the terms of all consumer contracts.⁵⁷⁸ Why did France and Germany, confronted with the same problem at roughly the same time, advocate such different regulatory approaches? In order to answer the question we need first trace the historical development of the policy debate in the two countries.

The French experience

France's 'Loi Scrivener', named after the newly appointed Secretary of Consumption (Secrétaire d'Etat à la Consommation) Christiane Scrivener, took shape after two years of negotiation between the Ministry of Economics and Finance and the professional associations. By the end of 1977, Scrivener had formulated and submitted for parliamentary discussion a proposal for the creation of an administrative commission to evaluate and control the use of abusive contract clauses in consumer sales. This "Improper Clauses Commission," created 31 January 1978 and installed in February, had 15 members, each named for three years, including 3 magistrates, 3 legal consultants, 3 representatives of the administration, plus 3 representatives each from professional and

⁵⁷⁸ "Compte rendu de la réunion concernant les 'clauses abusives des contrats conclus avec les consommateurs'." (held in brussels 27 and 28 Sept 1976. ENV/569/76-F.) Brussels: Service de l'environnement et de la protection des consommateurs, Division 'Protection des consommateurs,' November 1976.

consumer associations.⁵⁷⁹ The group went to work quickly, and in March 1978 recommended that four kinds of contract clauses be prohibited immediately: limitations on product warranties (defined by articles 1641 and 1645 of the civil code protecting against *vices cachés*), changes in price between the time of sale and the time of delivery, the use of open delivery dates, and restrictions on access to justice.

One problem of the French legislation, however, was that it gave the Commission itself little power. Clauses that the commission found to be unfair could be found null and void (*'réputée non écrite'*) in court, but this provided no basis to have them removed from contracts. Only the government had the right, based on a recommendation of the Conseil d'Etat, to prohibit the use of certain kinds of clauses by companies. Indeed, on 23 March 1978 the Conseil d'Etat issued a decree targeting three of the four kinds of contract terms recommended by the Commission.⁵⁸⁰ After this first move, however, the government was, in the words of Jean Calais-Auloy, "extremely hesitant to use this regulatory power."⁵⁸¹ Only one other decree was issued in the next ten years, targeting warranties accompanying white goods (22 December 1987).⁵⁸² Efforts by the Commission to call for penal sanctions against professionals who continued to use contract terms that they had declared abusive were not successful.⁵⁸³ Because the Commission on abusive clauses was not successful in having its recommendations turned into executive decrees, most of the clauses that they recommended against could still legally be included in contracts. Only

⁵⁷⁹ Jean Marchand, "Le consommateur mieux protégé contre les pièges des contrats," *La Croix*, 1 Feb 1978.

⁵⁸⁰ Jean Marchand, "Contrats commerciaux: La Commission demande des sanctions pénales contre les clauses abusives," *La Croix*, 15 Jun 1979.

⁵⁸¹ Jean Calais-Auloy, "Towards New Laws for Consumer Protection: Proposals of the French Reform Commission," *Journal of Consumer Policy* 8 (1985), p 63.

⁵⁸² "La Commission de clauses abusives a dix ans," *INC Hebdo* 597 (10 June 1988), p 4.

in particular cases of consumer grievance could the consumer have such clauses, on evidence of the commission's recommendations, voided. Given the government's unwillingness to decree particular clauses illegal, pressure mounted for the Commission's recommendations to be applied directly through the courts.

Consumer groups also had little ability to fight against abusive standard contract terms. In principle, article 46 of the "loi Royer" of 27 December 1973 introduced "actions in the consumer interest" ("action d'intérêt collectif"), granting registered consumer associations the right to take civil action in all jurisdictions against activities that prejudice, directly or indirectly, the collective interests of consumers. Associations that wished to bring legal suit required a special accreditation, as defined by the regulation of 17 May 1974, which required that the organization be oriented toward consumers and have an active membership of at least 10,000 members. By 1978, 9 national organizations and over 50 departmental organizations were registered.⁵⁸⁴ The problem was that the collective interest provisions of the loi Royer limited their right to recover claims only to the collective interests of consumer organizations, not those of consumers.⁵⁸⁵ Hence consumer associations could bring suit in support of individual claims of abusive contract terms, but could not bring a suit on behalf of all consumers injured by a particular kind of standard contract. This meant that abusive contract terms could not be eliminated in all of their occurrences, only nullified one at a time.

⁵⁸³ Josée Doyère, "Les clauses abusives dans les contrats," *Le Monde*, 21 Jun 1979.

⁵⁸⁴ Rosemonde Pujol, "Securite, protection, information: depuis 1970 une nouvelle legislation et nee," *Le Figaro*, 1 December 1978.

⁵⁸⁵ Jean Calais-Auloy, "Towards New Laws for Consumer Protection: Proposals of the French Reform Commission," *Journal of Consumer Policy* 8 (1985), p 65.

By the mid-1980s the failure of the French approach had become evident. The limitations of the system as originally conceived were highlighted by the commission established in 1987 to systematize and rewrite the French consumption law (Commission de Refonte du droit de la consommation). They recognized the failures of the regulatory approach, but feared the arbitrary aspects of separate judicial decisions. They therefore proposed to create a red and a pink list similar to the black and gray list that Germany had adopted in 1976. The red list would specify clauses that were absolutely forbidden, whereas the pink list would include clauses that must be explicitly justified before the judge as not abusive.⁵⁸⁶

The government disbanded the commission to rewrite consumer law in 1988 without implementing their proposals, and the red and pink list proposals were dropped. In their place the legislature passed a law of 5 January 1988 (translated as articles L. 421-1 to 421-9 of the new Code de la consommation) which extended the rights of consumer associations to take civil action to have abusive retail clauses suppressed, even if consumers have not themselves brought a complaint. The law also specified that contract terms not brought to the attention of the consumer at the time of signing would be considered invalid. Clauses cannot be written on the back of the contract, for example, or on a sign, in a brochure, or unsigned annex documents.⁵⁸⁷ The law did not, however, specify whether the courts had the right to interpret article 35 of the law of 10 January 1978 that laid out the principles by which abusive clauses should be judged. Some judges began doing so without specific reference to the recommendations of the Commission on

⁵⁸⁶ Jean-Michel Rothmann, "Clauses abusives: a revoir..." *Consommateurs Actualités* 543 (20 March 1987), p 14.

Abusive Clauses. In the absence of legislative opinion on this point, the French Appellate Court (*Cour de cassation*) affirmed in the Lorthoir case, of 14 May 1991, the right of a judge to autonomously declare a consumer contract clause abusive.⁵⁸⁸ A subsequent government decree of 10 March 1993 affirmed this decision, although not explicitly, in granting judges the right to seek advice from the Improper Clauses Commission, including expert testimony in court.⁵⁸⁹

The final transition in French law came as law 95-96 of 1 February 1995 that brought French law into compliance with the EU Directive on Consumer Contracts. This modification extended the scope of legal suits to include professional associations that promulgate standard terms, and requires that all users of these terms retract them if they are found to be abusive. The law explicitly recognizes the autonomy of judges in applying standards of abusiveness to consumer contracts, although it still retains the possibility of interdiction by decree. Absent from the new legislation is a definitive list of proscribed clauses, whether adapted from the recommendations of the Improper Clauses Commission or taking over the German approach which has been included as a 'provisional gray list' in the EU directive.⁵⁹⁰

⁵⁸⁷ Jean Beauchard, *Droit de la distribution et de la consommation* (Paris: Presses Universitaires de France, 1996), p 325.

⁵⁸⁸ "Les clauses abusives et la présentation des contrats dans la loi n° 95-96 du 1er février 1995," *Receuil dalloz Sirez* 14 (1995), pp 99-108.

⁵⁸⁹ OECD, *Consumer Policy in OECD Countries: 1991-1992* (Paris: OECD, 1995), pp 101-102.

⁵⁹⁰ "Les clauses abusives et la présentation des contrats dans la loi n° 95-96 du 1er février 1995," *Receuil dalloz Sirez* 14 (1995), pp 99-108.

German Intervention in Consumer Terms of Sale

In contrast to France's progressive policy modifications, Germany's Unfair Contract Terms Act (*Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen*, or AGB-Gesetz) sprang full formed from legislation passed on 9 December 1976, and became binding on 1 April 1977. Its general goal was to ensure that information and power asymmetries between contracting parties would not cause them to reach agreements that represented the interests of one side more than the other. This goal was implemented in two ways. On the one hand, the AGB-Gesetz imposes a requirement of clarity in standard contracts that rules out surprising conditions that are not immediately obvious from the text of the contract (AGB-Gesetz §3). On the other hand the AGB imposes a standard of appropriate content matter to which standard contracts must conform. As expressed in the General Clause (AGB-Gesetz §9), standard contract terms are inappropriate if they unreasonably prejudice the contracting party against the command of good faith. The AGB-Gesetz goes further, however, listing in a so-called 'black list' of 17 specific kinds of contract clauses that are expressly forbidden (AGB-Gesetz §11). A second list contains 23 kinds of contracts that are provisionally forbidden unless the consumer explicitly agrees to them (AGB-Gesetz §10). Most of these terms are designed to ensure that contract terms are not used to reduce rights ensured by other provisions of the Germany Civil Code. The most common of these exclusions include reduction of the GBG right to warranty, reduction in liability, freedom of delivery, and specification of location for legal justice (*Gerichtsstand*).⁵⁹¹

⁵⁹¹ Erika Schork, "Geschäft mit den Geschäftsbedingungen," *Süddeutsche Zeitung*, 13 July 1972.

The scope of application of these restrictions is different from that in France. The AGB-Gesetz applies only to so-called 'adhesion' or standard form contracts, meaning those that have been formulated in advance of the sale and are not negotiable as a part of the sale. This means that individual agreements struck between a buyer and seller are not subject to AGB-Gesetz control. Moreover, the AGB-Gesetz applies equally to consumer as well as to professional contracts. Indeed 30 percent of AGB-Gesetz litigation is between professionals.⁵⁹² There are also some sectoral exclusions from the AGB-Gesetz. It applies only in limited cases to contracts with the administration or state owned industries such as transportation.⁵⁹³ The German automobile industry has been granted an exemption in order to be able to negotiate contract terms with consumer associations.⁵⁹⁴

The method of enforcement of the German law is also very different from the administrative approach adopted in France. The primary form of enforcement is by legal suits filed by consumer associations, although the anti-trust commission (*Bundeskartellamt*) also retains this right. Section 13 of the AGB-Gesetz grants consumer associations with more than 75 members the right to file such law suits. Cases are brought not on behalf of a single consumer but in the collective consumer interest. Companies found guilty are required to modify or stop using the offending adhesion contract, and face fines of DM 5,000 per offending clause, DM 10,000 for super-regional

⁵⁹² Anne Fily, and Philippe Guillermin, "Les politiques de la consommation dans les États membres de la CEE," *Revue de la concurrence et de la consommation* 70 (November-December 1992), pp 43-50.

⁵⁹³ "Jetzt wird 'Kleingedrucktes' der Verwaltung überprüft," *Der Tagesspiegel*, 13 September 1977.

⁵⁹⁴ *Les clauses abusives dans les contrats conclus avec des consommateurs*, Bulletin des Communautés européennes, Supplément 1/84 (Luxembourg: Office des publications officielles des Communautés européennes, 1984), p 8.

firms, and DM 20,000 for particularly important infractions.⁵⁹⁵ Most contraventions of the AGB-Gesetz do not result in court cases, however, because consumer associations are able to negotiate with the offending company to make appropriate modifications. A 1979 study of 98 cases in Baden-Württemberg and Stuttgart, for example, revealed that only 27 went to a law suit. The remaining cases were resolved out of court when the offending companies were given notice by consumer associations.⁵⁹⁶

One reason why Germany focused specifically on adhesion contracts rather than all consumer contracts is that such contracts had long been a matter of scrutiny on anti-competitive grounds. Until the legislation of 1976, they had been regulated primarily as impediments to fair competition under Article 3 of the law of 1909 prohibiting unfair competition (Gesetz gegen Unlauteren Wettbewerb, or UWG). This treatment of standard contracts as a competition policy under control of the Cartel Office was premised on the idea that large companies with strong market power were imposing contractual terms on consumers without the threat of competition to hold them in check. In the 1960s, however, there was a gradual transformation from this competition view of standard contracts and toward a contractual view.⁵⁹⁷ The shift was driven by the growing perception that smaller firms, who did not enjoy the economies of scale of large companies, were increasingly resorting to restrictive standard terms as a means of reducing their responsibility so as to lower their overall product costs. The problem, on

⁵⁹⁵ Walter Stillner, "Praktische Erfahrungen mit dem AGB-Gesetz," *Zeitschrift für Verbraucherpolitik* 4/2 (1980), p 148.

⁵⁹⁶ Walter Stillner, "Praktische Erfahrungen mit dem AGB-Gesetz," *Zeitschrift für Verbraucherpolitik* 4/2 (1980), p 143.

⁵⁹⁷ Christoph Hebestreit, *Transparenz im AGB-Recht der Bundesrepublik Deutschland? Allgemeine Geschäftsbedingungen im Spannungsfeld zwischen Vertrag, Delikt und Markt* (Frankfurt am Main: Peter Lang, 1995), p 35.

this view, was that the variety and complication of modern goods created an information asymmetry that rendered consumers effectively incapable of judging the real qualities and problems with what they purchase. The 1976 AGB-Gesetz was grounded in this new analysis. Not only did this make shopping less of a science, it also risked to lower the overall quality of goods on the market over time.⁵⁹⁸ This concern about information asymmetry in contracting became the basis for a contractual treatment of adhesion contracts, grounded in Germany's Roman Law provision that contractual risk must be divided equally between contracting parties.

The Policy Process

The first effort at restricting the contents of contract terms in France came not from the government but from its leading business association, the Conseil National du Patronat Français (CNPF). A study commissioned on the topic by the CNPF's Working Group on "Enterprise and Consumerism" proposed on May 6 1976 that the CNPF work together with France's largest consumer organization, the National Institute of Consumption (INC), to study contracts between professionals and consumers. One goal of the project was to help to restore consumer confidence in the wake of the first oil shock. "Even if, with rediscovered growth," the president of the CNPF wrote, "the French have returned for a time to their old habits, producers and distributors should not be deceived. The consumer in crisis is the consumer of tomorrow."⁵⁹⁹ Such a discussion of terms of sale was also felt to be good for businessmen, who would profit from a

⁵⁹⁸ Joachim Beimowski, *Zur ökonomischen Analyse Allgemeiner Geschäftsbedingungen* (Munich: Verlag V. Florenz, 1989), p 15.

⁵⁹⁹ "Accord Patrons-Consommateurs," *Information Consommation OR-GE-CO* 16 (May-June 1976), p 6.

clarification of what they could and could not do. Hence in 1977 five professionals and five representatives of consumer groups met under the auspices of the CNPF to put together a list of abusive clauses that the CNPF distributed to its members. Paul Simonet, president of the CNPF's Commission on Industry, Trade, and Consumption, wrote that "for the present, concertation offers the best hope of solution."⁶⁰⁰ The goal appears to have been to demonstrate that industry was capable of regulating itself without government interference.

Most economic interest groups also appear to have favored the strategy adopted by the CNPF. Consumer associations argued that all contracts should contain clauses guaranteeing consumer rights, but felt that this could be achieved through negotiations between industry and consumer associations. Even the communist consumer association Indecosa-CGT argued that contracts should be negotiated in this way.⁶⁰¹ The Paris Chamber of Commerce and Industry also supported negotiated contracts, arguing against government intervention on the grounds that it was likely to be incomplete, and against court enforcement as adopted by Germany on the grounds that it would result in arbitrary treatment. They felt that consumer groups and sectoral industry associations could draw up model contracts that, although optional for businesses, could be advertised to consumers by a special label.⁶⁰²

⁶⁰⁰ Paul Simonet, "La Commission des Clauses Abusives." Position paper (1976), p 11.

⁶⁰¹ "39 clauses abusives à éliminer," *Informations Indecosa-CGT* 12 (January 1986), p 2.

⁶⁰² Chambre de commerce et d'industrie de Paris. "Les clauses abusives dans les contrats de consommation," rapport présenté au nom de la Commission du Commerce Intérieur par M. Gibergues (adopted 8 April 1976), pp 7-11.

How did direct government regulation arise if, as it seems, it was contrary to the interests of most parties involved, including both manufacturers and consumers?⁶⁰³ One explanation is that, following a deep French tradition, the legislative branch was unable to make a decisions and so handed over responsibility to the executive.⁶⁰⁴ The administrative approach did have arguments in its favor. It was felt to be faster than legal treatment, it would permit a uniformity of application not possible through the courts, and it was hoped that this would give the administration proficiency in developing regulation in a new area of law. Its problems were also great, however. Underfunding made for slow response times, which in turn gave the impression that the administration was acting in bad faith and favoring industry interests over those of consumers.⁶⁰⁵ But the more fundamental problem was that individual companies were simply not committed to a high standard of consumer contracts. The French approach required that government ministries ban consumer contract clauses one at a time. Yet individual companies were able to wage a campaign effectively to oppose new bans. Whereas German industry saw rigorous contract terms as a form of protection against low-quality competitors, French industry felt that similarly rigorous terms of contract would disadvantage France's own producers.

Germany's regulatory strategy emerged from a protracted debate on standard contract terms. Political support for a regulation of standard contract terms in Germany was bipartisan, and crystallized in 1972, when Bavarian Minister of Justice Held (CDU)

⁶⁰³ Michel Trochu, Yannick Tremorin, and Pierre Berchon, "La protection des consommateurs contre les clauses abusives: étude de la législation française du 10-1-1978." *D.P.C.I.* 7/1 (March 1981), pp 37-76.

⁶⁰⁴ Maurice Prelle, "Libre propos sur la défense du consommateur contre les clauses abusives," *Gazette du Palais* (22-23 September, 1978), p 3.

proposed to the Federal Justice Ministry a legal protection of consumers against adhesion contracts.⁶⁰⁶ Held's concern was that court treatment of adhesion contracts was so diverse within Germany as to create uncertainty that could be damaging to the economy. He wrote in May 1972: "We can say without exaggeration that standard form contracts have threatened both legal security and legal equality. I have no doubt that, in view of this situation, lawmakers must take action."⁶⁰⁷ In 1974 the Economics Minister concurred that "Freedom is the choice among alternatives. When I do not or cannot know the alternatives, then the room for freedom becomes limited. Freedom is even further restricted, when anti-competitive sales practices attempt to push the choice of consumers in a particular direction."⁶⁰⁸ Trade and labor associations also recognized the value of reducing the legal uncertainty associated with adhesion contracts.⁶⁰⁹ But different policy actors had very different ideas about what such regulation might look like.

The ruling Social Democratic Party (SPD) decided at a legal-political congress of their party in 1972 that the best solution would be a government-run administrative office

⁶⁰⁵ Frédéric Jenny, "Les Commissions Spécialisées et le droit de la consommation," in *Communication aux journées nationales de la consommation*, December 1981. (draft) pp 3-8.

⁶⁰⁶ "Die Parteien entdecken die Verbraucher," *Süddeutsche Zeitung*, 31 October 1972.

⁶⁰⁷ Cited in "Die Parteien entdecken das 'Kleingedruckte,'" *Süddeutsche Zeitung*, 24 May 1972.

⁶⁰⁸ "Freiheit ist die Wahl unter Alternativen. Wenn ich die Alternativen nicht kenne oder nicht kennen kann, verkürzt schon den Freiheitsspielraum. Und er wird noch stärker eingengt, wenn unlautere Geschäftspraktiken die Wahl des Verbrauchers in bestimmter Weise festzulegen suchen." Dr. Hans Friderichs (Bundesminister für Wirtschaft), "Aufgaben der Verbraucherpolitik," in *Bulletin des Presse- und Informationsamtes der Bundesregierung* 146 (5 December 1974), p 1465.

⁶⁰⁹ Marianne Schatz-Bergfeld, *Verbraucherinteressen im politischen Proze: das AGB-Gesetz* (Frankfurt am Main: Haag und Herchen, 1984), p49.

to certify adhesion contracts before they were promulgated.⁶¹⁰ Labor unions affirmed the need to certify contracts, but called instead for an independent association (Bundesanstalt für Verbraucherschutz) to certify standard form contracts. The SPD coalition partner, the Free Democratic Party (FDP), did not agree with this approach. In March 1974 the Economic Committee (Bundesfachausschuss für Wirtschaftspolitik) of the FDP opposed the idea of contract certification. In October 1973, the Consumer Committee in the Economics Ministry (Verbraucherbeirat beim Bundesminister für Wirtschaft) also rejected the SPD proposal. They proposed instead a strengthened judicial control of the contents of AGBs, and a new right for consumer groups to bring law suits against unfair contract clauses. In response, on March 1975, the Committee of the SPD Legal Working Group (Bundesausschuss der Arbeitsgemeinschaft Sozialdemokratischer Juristen, or ASJ) proposed that the certification process should be undertaken instead by the Kartellamt, with the help of consumer associations.⁶¹¹

The opposition Christian Democratic Union (CDU) also opposed the idea of a certification office because they felt it was incompatible with the precepts of a social market economy. Their fear was that regulation would lead to a form of price control, as companies were increasingly monitored to ensure that they indeed offered reduced prices for any reduction of their liability through adhesion contracting.⁶¹² The Technical Commission on Consumer Protection of the Legal Working Group of the CDU (Fachkommission Verbraucherschutz des Bundesarbeitskreises Christlich-

⁶¹⁰ Gerd Rinck, "Die Empfehlung Allgemeiner Geschäftsbedingungen, deren Kontrolle und Registrierung," *Wirtschaft und Wettbewerb* 5 (1974), p 293.

⁶¹¹ Schatz-Bergfeld, pp 65-71.

⁶¹² Gerd Rinck, "Die Empfehlung Allgemeiner Geschäftsbedingungen, deren Kontrolle und Registrierung," *Wirtschaft und Wettbewerb* 5 (1974), p 293.

Demokratischer Juristen, or BACDJ) proposed, at their meeting at of the end of 1973, seven “Theses on the reform of standard term contracts” (“Thesen zur Reform des Rechts der Allgemeinen Geschäftsbedingungen”) in which they argued for a general legislative clause to nullify AGBs in which the drafter abuses his freedom of contract to the disadvantage of the buyer. Enforcement of this legal formulation would be through granting the right to legal suits to consumer associations.

Economic interest groups in Germany also opposed the SPD project. The leading industry group, Bund Deutscher Industrie (BDI), proposed a system for industry self-control, and created to this end an Oversight Committee for adhesion contracts (Gutachterausschusses fuer AGB) in December 1973 that would help to resolve consumer disputes. The Association of German Retailers (Hauptverband Deutscher Einzelhandel, or HDE) was concerned that regulations focused solely on consumer contracts would hurt retailers, who would be placed at a disadvantage in relation to consumers but be given no advantage in relation to manufacturers. The HDE proposed that each consumer center should simply be given a lawyer in order to help settle consumer claims.⁶¹³ Industry associations (BDI and DIHT), predictably, favored restricting contract regulation to relations with consumers.⁶¹⁴ Even the central consumer association, the AgV, opposed the SPD plan of a certification office in favor of greater legal rights to consumer associations to pursue companies using unfair adhesion contracts, including the right to sue companies that did not comply.⁶¹⁵

⁶¹³ Heribert Schatz, *Verbraucherinteressen im politischen Entscheidungsproze* (Frankfurt: Campus Verlag, 1984), p 66.

⁶¹⁴ Schatz-Bergfeld, p92.

⁶¹⁵ Erika Schork, “Geschäft mit den Geschäftsbedingungen,” *Süddeutsche Zeitung*, Thursday, 13 July 1972.

<i>group</i>	<i>France</i>	<i>Germany</i>
Business	negotiated contracts	self-regulation
Government	administrative review (right)	administrative certification (left)
Opposition	negotiated contracts (left)	legal enforcement (right)
Trade unions	negotiated contracts	administrative certification
Chamber of industry	negotiated contracts (CCIP)	negotiated contracts (DIHT)
Consumer Groups	negotiated contracts	legal enforcement
Outcome:	administrative review	legal enforcement

Figure 24. Interest group preference for consumer contract regulation in France and Germany.

Policy formation for consumer contracts offers a microcosm of consumer interest representation in France in Germany. Figure 24 above summarizes the preferences of different interest groups in France and Germany on approaches to consumer contract regulation. The most striking finding is that German economic actors were able to come to a solution that was much closer to their own interests than were French economic actors. The French case demonstrates the extraordinary degree of independence that the Economics Ministry enjoyed in consumer policy formation, and the relative impotence of producers. Even though all other interest groups agreed that negotiated contract terms would be the best strategy, nonetheless the government proceeded with an administrative solution.

Product Pricing

The oil embargo in 1973 caused the French and German governments to rethink the way in which consumer prices were set. The French government responded by increasing the level of administrative regulation of product prices. The German government, by contrast, left price setting largely in the hand of producers. And whereas both governments also attempted to initiate programs to better inform consumers about price, only France was able to mobilize political and social actors to pursue this goal forcefully. The result has been a high level of administrative intervention in price formation in France, and relatively great producer autonomy in Germany.

French price fixing

France has a long history of government price regulation. Authority for government intervention in price setting is grounded in ordinances 45-1483 and 45-1484 of June 1945, which were themselves restatements of the Code of Prices (“Code des prix”) established under the occupying government in October 1940.⁶¹⁶ These ordinances were unusual in that they placed absolute authority over prices in the hands of the administration, as well as full authority to deploy police or military forces to apply any price restrictions. In principle, at least, the government could even have enforced prices far below production costs. Although the scope of administrative prerogative in France is uncommon, the use of price controls is by no means unusual. Sweden has applied

⁶¹⁶ Hervé Dumez, and Alain Jeunemaître, *Diriger l'économie: L'Etat et les prix en France, 1936-1986* (Paris: Harmattan, 1989).

extensive price restrictions over much of the postwar period, and even the United States experimented with a price freeze under the Nixon administration in 1974.⁶¹⁷

Price regulation in France began in earnest with the first burst of inflation in 1957, and ended in 1986. During this time, two major shifts were made in the nature of price regulation, resulting in three distinct approaches to price control. In the first period, from 1957 to September 1974, price regulation imposed a minimal burden on producers. While the price of products already on the market could only be increased subject to direct approval from the Ministry of Economy and Finance's Office on Competition and Price (Direction de la concurrence et des prix), new products, by contrast, could be priced at the discretion of the producer and required no justification based on the actual costs of production. Producers of new products had simply to register their intended price list with the government at least two weeks before actually putting their goods up for sale. This permissive stance towards new products, designed to promote innovation, also had the effect of encouraging companies to drop traditional products and reintroduce them under new names and with slight modifications in order to be able freely to increase their prices.

Under pressure of high inflation, new legislation in 1974 sought to fill this innovation loophole by requiring that all new products be registered with the Office on Competition and Price, including a justification for the proposed price. The Office then had one month to object to the proposed price. If the company heard nothing within one month of submission, it was free to proceed with its proposed pricing. The problem was that the 1970s saw an extraordinary growth in product kind and number, and it quickly

⁶¹⁷ Lars Jonung, *The Political Economy of Price Controls: The Swedish Experience 1970-*

became clear that the administrative burden of this new approach was overwhelming to both companies and the government. The government simply could not evaluate enough proposals to have an over-all impact on inflation.

A final change was made in December 1976.⁶¹⁸ According to the new scheme, producers could sign a moderation agreement (“engagement de modération”) consenting to price ceilings that had been previously negotiated between trade associations and the government. These ceilings were set based on sectoral growth rates determined by the Office on Competition and Price from production information provided by companies in the sector. In more concentrated sectors, companies were commonly able to negotiate price ceilings individually with the government.⁶¹⁹ These agreements were not legally binding, in the sense that companies were free to sell products above the negotiated ceiling, but in this case they needed to apply for permission for their proposed price with the Office on Competition and Price, as they had done before the 1976 reform. As an increasing number of sectors agreed to moderation agreements, the total volume of price regulations issued by the administration declined, from 137,000 in 1978, to 91,500 in 1979, to 61,300 in 1980.⁶²⁰

The French embrace of price control signaled a clear superposition of popular interest over the interests of the business community. France’s largest business association, the Conseil national du patronat français (CNPF) had long called for the

1987 (Aldershot: Avebury, 1990).

⁶¹⁸ Reinhard Angelmar, and Bernard Yon, “New Product Price Controls in France” in *Journal of Consumer Policy* 2/1 (1978), pp 43-49.

⁶¹⁹ How this information should be used in setting price levels was evidently problematic, and higher officials in the Office on Competition and Price reportedly watched Germany price levels closely. Jeunmaitre, pp 53-54.

abolition of administered prices. They also opposed the negotiated ceilings introduced by the Barre government in 1976, which they felt gave government control of prices the spurious legitimacy of contractual consent. French unions, represented by their consumer association OR-GE-CO, also felt that free competition rather than price restraints was the appropriate response to rising prices: "We insist at least that the conditions of free competition be saved, because they are, in the current state of things, the only guarantee of the consumer."⁶²¹ In their view, French companies were simply not price competitive. In a trade union survey conducted in 1969 they had found that of 8,000 companies operating in France, only 500 had competitive prices. The rest were, in their words, "deplorably organized."⁶²² In 1976 they approved of the Barre plan to create negotiated ceilings, which at least permitted limited competition below the negotiated level. But they also stressed the need to attack the structural causes of inflation, which they felt meant establishing true competition in distribution and price formation.⁶²³

Given that labor and management both opposed administered prices, why did successive governments, first on the right, then on the left, support the policy? The legitimacy of price controls derived, in part, from popular support for their use. A series of public surveys on inflation conducted in the 1970s showed that support for price controls increased with the growth in inflation. In 1970, 27 percent of the population supported price controls as a means of protecting the value of the franc. Support rose to

⁶²⁰ "L'activité de la Direction Générale de la concurrence et de la consommation en 1980," *Revue de la concurrence et de la consommation* 15 (1981), p 4.

⁶²¹ "Nous insistons pour que soient au moins sauvegardées les conditions d'une libre concurrence qui reste, dans l'état actuel des choses, la seule garantie du consommateur." Jacques Dubois, "Reparlons des prix....," *Information Consommateur* 1 (1971), p 3.

⁶²² "Editorial," *Information Consommateur* 69/2 (1969), p 2.

35 percent in 1974, 47 percent in 1976, and a peak of 76 percent in 1982. Their continued use was also grounded, however, in a French intellectual tradition of just prices ('prix juste'), and the economic entitlement that this implied. Price increases in 1911, for example, led to consumer boycotts that resulted in three deaths, 136 injuries, and 396 arrests.⁶²⁴ History showed that price increases in France were likely to be attributed to a lack of government action rather than to shifting conditions of supply and demand.

German Price Maintenance

Unlike France, Germany has traditionally granted producers extraordinary powers to set the retail sales prices of their goods. The core of this tradition was resale price maintenance (Preisbindung), a practice permitted in Germany until 1973, that allowed producers to stipulate in their distribution contracts the final sales price of branded goods. Because resale price maintenance effectively eliminated price competition among retailers, it helped producers to establish and maintain a stable level of profitability, both for themselves and for their distributors. While in principal such vertical collusion fell under the scrutiny of the Cartel Office (Bundeskartellamt, or BKA), with whom companies were required to register resale price maintenance contracts, the practice was in fact rarely restricted.⁶²⁵

With the threat of price increases from the first oil shock in 1973, the Bundestag amended Germany's competition law (Gesetz gegen Wettbewerbsbeschränkungen, or

⁶²³ Jacques Dubois, "Le plan Barre et le consommation," *Information Consommation OR-GE-CO* 18 (September-October 1976), p 1.

⁶²⁴ Luc Bihl, *Une histoire du mouvement consommateur* (Paris: Editions Aubier Montaigne, 1984), pp 214-216.

⁶²⁵ Norbert Reich, "Neue Tendenzen des kartellrechtlichen Verbraucherschutzes in der BRD," *Zeitschrift für Verbraucherpolitik* 1/3 (1977), p 236.

GWB) to prohibit resale price maintenance. This move was particularly championed by the Ministry of Youth, Family, and Health in the expectation that retail competition would help to hold down prices for consumer products.⁶²⁶ A similar effort had been made in France twenty years before, in 1953, when resale price maintenance was proscribed in conjunction with the Pinay stabilization plan to hold down consumer and industry costs. French producers quickly found that they could effectively control resale prices, even without resale price maintenance, through selective distribution practices. In France, the 'Fontanet' circular of March 1960 responded to this problem by advocating that companies be prohibited from taking punitive actions, such as refusing distribution (*refus de vente*), against retailers wishing to offer discounts on their products. Enforcing vertical contractual freedom of this kind has remained a mainstay of French competition policy.⁶²⁷

In Germany, by contrast, the government has retained a variety of legal provisions that continue to assist companies in influencing the sales price of their goods in the absence of resale price maintenance. First, the 1973 amendment to the GWB amendment did not explicitly prohibit the use of recommended prices (*unverbindliche Preisempfehlungen*) as labor unions and consumer groups had called for. Two kinds of recommended prices are still commonly used in Germany: those printed onto product packaging (*Verbraucherpreisempfehlungen*), and those presented in the form of a list for exclusive use by the retailer (*Händlerpreisempfehlungen*). While prices printed on

⁶²⁶ Katherina Focke, (Bundesminister für Jugend, Familie und Gesundheit), "Verbraucherpolitik in der Marktwirtschaft," *Bulletin des Presse- und Informationsamtes der Bundesregierung* 65 (30 May 1973), p 643.

⁶²⁷ F. D. Boggis, "The European Economic Community," in *Resale Price Maintenance*, ed. B. S. Yamey (London: Weidenfeld and Nicolson, 1966).

packaging could arguably help consumers to compare prices for the same product among several retailers, unions and consumer organizations argued that prices presented in the form of price lists that are not seen by consumers do not offer this benefit, and instead abet price collusion.⁶²⁸

This assessment is reinforced by producer reactions to the banning of resale price maintenance. Between 1973 and 1975, retailers report that while the overall use of recommended prices remained nearly the same, the use of retailer price lists grew from 22 to 37 percent of their total stock, while the use of recommended prices targeted at the consumer fell from 30 to 14 percent. The shift was most dramatic for small shops (those with annual sales below 250,000 DM) for whom the use of retailer price lists nearly doubled, from 22 to 42 percent of their inventory, while consumer price recommendations fell by half, from 45 to 22 percent of inventory.⁶²⁹ Unable to stipulate sales prices in their contracts, manufacturers appear to have moved to a less direct means of enforcing price levels. Indeed the Cartel Office (Bundeskartellamt, or BKA), which tracks the use of recommended prices, has essentially recognized that retail list recommendations are tantamount to resale price maintenance.⁶³⁰ But legal provisions for restriction of effective resale price maintenance (GWB §18 and §26 II) have been interpreted by the BKA largely to the advantage of branded goods producers: “Protection

⁶²⁸ Verbraucherbeirat Jahresbericht, 1977.

⁶²⁹ Erich Batzer, Erich Greipl, Eugen Singer, *Handhabung und Wirkung der unverbindlichen Preisempfehlung* (Berlin: Duncker & Humblot, 1976), p 121.

⁶³⁰ Kartellamt Jahresbericht, 1975.

of brands and distribution, not protection of the consumer, is...still the predominant criterion for interpreting GWB regulation."⁶³¹

A second group of laws restricting retail sales practice has also worked to reduce retailers' ability to exert downward price pressure on producers. Typical of these is the Discount Law (Rabattgesetz), enacted first in 1933, which prohibits discounts or in-kind gifts of value greater than 5 percent of the cost of the product. The law does not prohibit sales on, for example, over-stocked or seasonal goods—these are regulated by another restrictive law, the Zugabeverordnung—but it does require that retailers sell goods for no less than 95 percent of their labeled value. Practices not permissible for German retailers under the Rabattgesetz include volume or loyalty discounts, sales inducements, coupons, or inflated price labeling.⁶³² The original goal of the law appears to have been to discourage the cooperative movement and repress immigrant shop-keepers who were willing to compete on narrow profit margins.⁶³³ More recently the law has been upheld as a protection for consumers who might otherwise face price discrimination because they were less able or willing to haggle with sales staff for better prices.⁶³⁴

The effect of the Rabattgesetz on retail pricing is two-fold. First, the Rabattgesetz makes it easy for distributors to monitor the actual retail sales prices retailers are using.

⁶³¹ "Schutz der Marke und des Vertriebsweges, nicht Schutz der Verbraucher ist, wie in vielen Vorschriften des UWG immer noch 'vorverstandenes' Auslegungskriterium für diese Vorschriften des GWB"; Norbert Reich, "Der Schutz des Verbrauchers vor überhöhten Preisen und einseitigen Preiserhöhungen – das GWB als Verbrauchergesetz," in *Verbraucher und Recht*, ed. Norbert Reich, Klaus Tonner, and Hartmut Wegener (Göttingen: Verlag Otto Schwartz & Co., 1976), pp 73-74.

⁶³² Georg Klauer, and Helmut Seydel, *Zugabeverordnung und Rabattgesetz Kommentar* (München: Verlag Franz Vahlen, 1993), pp 100-103.

⁶³³ Reuters New Service, Western Europe, March 2 1994.

Second, producers cannot use volume or loyalty discounts to reward their good customers—tactics that have helped retailers in other countries to consolidate their customer base, giving them greater power in negotiating contracts with producers.

Germany's policy of industry price setting, deployed through recommended prices and retail restrictions, was grounded in an apparent consensus of industry and consumers. Industry, not surprisingly, strongly favored recommended prices. But consumers, too, found them useful. A 1973 survey found that 87 percent of men and 82 percent of women favored recommended prices printed on packaging. Those who favored it felt that it helped them to compare product prices and that it protected them against over-reaching by retailers.⁶³⁵ Moreover, the peak association of German retailers (Hauptgemeinschaft des deutschen Einzelhandels, or HDE) has argued that list recommendations, which are not made public to consumers, assist retailers in calculating what prices they should charge.⁶³⁶ The German parliament, in a move to appease all parties, permitted recommended prices of both kinds.

Why, however, has the Cartel Office acquiesced to what amount to collusive practices? A second source of legitimacy for these pricing policies derives from Germany's dominant model of consumer protection through information. The goal of government regulation, on this view, was to optimize economic transactions by balancing

⁶³⁴ Olaf Sosnitza, *Wettbewerbsbeschränkungen durch die Rechtsprechung: Erscheinungsformen und Ursachen auf dem Gebiet des Lauterkeitsrecht* (Baden-Baden: Nomos Verlagsgesellschaft, 1995), p 144.

⁶³⁵ "Einstellung der Verbraucher zur Preisempfehlung," *Wirtschaft und Wettbewerb* (May 1973), p 325.

⁶³⁶ The HDE also opposed recommended prices printed on packaging on the grounds that they were damaging to retailers because they restricted their freedom. Norbert Reich, "Neue Tendenzen des kartellrechtlichen Verbraucherschutzes in der BRD," *Zeitschrift für Verbraucherpolitik* 1/3 (1977), pp 237-241.

the position of market actors through increased transparency.⁶³⁷ Consistent with this view, the central concern of the BKA in respect both to recommended prices and to the Rabattgesetz has been price transparency. Their concern with recommended prices was primarily been manufacturers would label product packaging with artificially elevated recommendations ('Mondpreisen'), thereby permitting retailers to offer apparently attractive reductions from the manufacturer's price.⁶³⁸ The confusion that this would cause for consumers was seen as dangerously misleading for consumers.

Similarly, the predominant argument in favor of the Rabattgesetz was that without it, retailers would increase products' labeled prices so that they could offer consumers greater nominal discounts without affecting their profitability. Even the peak consumer association, the AgV, which might normally be expected to oppose the restrictive Rabattgesetz, argued that its elimination could result in an 20-30 percent increase in consumer prices. In the words of the head of Germany's peak consumer association (Arbeitsgemeinschaft der Verbraucher, or AgV) Helmut Lenders, "that would be totally impenetrable for the consumer."⁶³⁹ Arguments for the consumer interest in Germany were grounded on the concept that market transparency was the best means to secure consumer protection.

Consumer Activism over Product Price

France and Germany both imposed regulations in the 1970s to ensure that all consumer products were displayed with their prices in order to facilitate comparative

⁶³⁷ François Souty, *La Politique de la concurrence en Allemagne Fédérale* (Paris: Presses Universitaires de France, 1996), pp 110-115.

⁶³⁸ "Verbraucherpolitik nicht nur als 'Feuerwehr'," *Süddeutsche Zeitung*, 13 March 1973.

shopping. In Germany, the 1973 Price Information Act (Preisangabenverordnung) accompanied the prohibition on resale price maintenance, as retailers were in principle allowed to offer the same goods for different prices. In France, product labeling was required by administrative decree in 1971 and reinforced through supporting regulation in 1976. In both countries, clear price labeling was seen to be a key in holding down retail prices. But whereas in France this new emphasis on comparative price shopping enjoyed enthusiastic endorsement from both government and consumer organizations, similar efforts by consumer organizations and the government in Germany were quickly faltered.

Price Activism in France—In France, the move in 1976 to a system of free price competition below negotiated price ceilings opened the way for greater price competition between companies operating below those ceilings. To emphasize this, the government of Raymond Barre undertook a number of projects to ensure that consumers had access to adequate information about product prices. In November 1977, for example, Barre announced a four-month series of state-sponsored radio shows that would provide a forum for callers to report on their strategies for finding inexpensive products. The goal was to help consumers shop more wisely in order to put a check on abusive increases in prices. In the words of the newly-appointed Secretary of Consumption: "Every idea helps us to better defend your budget."⁶⁴⁰ The theme was repeated in 1979 when the Economics Minister, Michel Monory, called on consumers to compare prices before buying in order to help hold down inflation.⁶⁴¹

⁶³⁹ "Das wird für den Verbraucher völlig undurchsichtig." Wulf Petzoldt, "'Mondpreise' mit schwindelerregenden Rabatten," *Vorwärts* 13, 22 March 1984.

⁶⁴⁰ Rosemonde Pujol, "Campagne d'information: "Acheter mieux - déposer moins," *Figaro*, 15 Nov 1977.

⁶⁴¹ Luc Bihl, "Le contre-pouvoir des consommateurs," *Le Monde*, 5 Dec 1979.

Consumer groups in France were enthusiastic supporters of price labeling and comparative price shopping, and they frequently mobilized their participants to visit stores in order to evaluate the extent to which the pricing regulations were being heeded. A study conducted in Paris in June 1976 found that 28 percent of retailers and 30 percent of service providers failed to display the price of their goods or services. The worst offenders included furniture stores (52 %), florists (56 %), and pharmacies (74 %).⁶⁴² The scale of these price surveys ('relevés de prix') could be enormous. During the week beginning on 20 November 1979, for example, 110 local affiliates of the Federal Consumers Union (Union fédérale des consommateurs, or UFC) surveyed 27,735 stores in 160 cities in France. Mobilized under the slogan 'not seen not bought' ("Pas vu pas pris"), they found that 38 percent of the stores they visited had not displayed prices on their products.⁶⁴³

Unsatisfied with the level of consumer awareness of product price, the Ministry of Consumption under the new Socialist government in 1983 initiated a pilot project in the Region Nord-Pas de Calais to offer consumers objective comparative information on product prices. Cooperating with the Regional Council on Consumption (Conseil régional de la consommation, or CRC) in Lille, they established 100 computer terminals accessible to the public on which product price information was made available to consumers. These local centers for price information (Centres locaux d'information sur les prix, or CLIP) accounted for 60 percent of the Ministry of Consumption's yearly budget. They were also relatively well received by consumers. A survey conducted in

⁶⁴² "La publicité des prix a l'égard des consommateurs," *Note Documentaire*, Direction générale de la concurrence et des prix, 4 June 1976.

⁶⁴³ "Une enquête de l'Union fédérale des consommateurs," *Le Monde*, 12 Dec 1979.

1986 by the CRC of Lille found that 85 percent of the population of the region knew of the program, compared with only 30 percent in 1984. Of those, 40 percent stated that they used the information for purchases (33.6 percent of the total population). Furthermore, 22 percent of the users reported shifting to products that were less expensive, and 18 percent reported shifting to retailers that were reported to be less expensive.⁶⁴⁴ A survey of retailers found that 64 percent favored the program, 54 percent felt the price information was useful for their business, and 13 percent reported using CLIP information to set their own sales prices. Over half of the retailers felt that CLIP had an impact on their consumers, although only 34 percent reported that consumers used this information directly in their product choice.⁶⁴⁵ Five new CLIP regions were included in France's five year plan of 1984, with each of these sites offered a grant of 5 million francs from the federal government to be matched by an equal contribution from the regional governments.⁶⁴⁶ These centers still function today.

German Consumer Education – Germany in 1973 saw the beginnings of a similar collaboration between the government and consumer groups to raise public awareness about price, but unlike France this effort quickly faltered. In one such effort, in the summer of 1973, Germany's Social-Democratic Party (SPD) launched a program for consumer education ("Verbraucheraufklärung") with the goal of better informing citizens about prices and price formation. As a part of this program Germany's peak consumer association (Arbeitsgemeinschaft der Verbraucher, or AgV) sponsored two busses to travel to sixty cities in Germany under the slogan "Together for Reasonable Prices." They

⁶⁴⁴ "CLIP de Lille," *Consommateurs Actualités* 523 (17 October 1986): 16.

⁶⁴⁵ "CLIP: Impact sur les commerçants," *Consommateurs Actualités* 538 (13 February 1987), p 25.

handed out brochures, showed films, and offered computerized tests that measured consumers' knowledge of prices.

More controversial was the project "Aktion gelber Punkt" (yellow dot protest) which was initiated by the publicity department of the SPD and pursued most enthusiastically by the SPD's Young Socialists faction.⁶⁴⁷ The yellow dot referred to yellow stickers that were attached, as a call to boycott, to the display windows of stores that offered particularly high prices. The program had been modeled on the "Rote-Punkt-Aktionen" of the late 1960, in which leftist community organizations used red labels to protest price increases in local transportation. Memory of these "Rote-Punkt-Aktionen," which had called out the first consumer boycotts in post-war Germany, lent a radical tone to the SPD's new project.⁶⁴⁸

This attempt to create a politics of price in Germany was supported by labor but strongly opposed by business. Retailers felt particularly threatened by the SPD action, and in what was called the "greatest ever sign of retail solidarity" launched a counter-campaign against the government's program. Retailers carried posters that read, "Retailers also oppose rising prices. We favor stability!"⁶⁴⁹ The association of branded products called the Aktion Gelber Punkt "Consumer politics in the mode of class conflict" ("Verbraucherpolitik in Klassenkampfmanier"). The peak employers association (Bundesvereinigung der Deutschen Arbeitgeberverbände, or BDA) launched a campaign against the SPD program under the slogan "Gelber Punkt – roter Markt – toter Markt"

⁶⁴⁶ "Le prix de l'information," *Consommateurs Actualités* 517 (5 September 1986), p 4.

⁶⁴⁷ Herbert Kremp, "Zielpunkt Unternehmer," *Die Welt*, 11 October 1973.

⁶⁴⁸ "Autofahrer gegen ölkonzerne -- Boykott letzte Waffe der Konsumenten," *Frankfurter Rundschau*, 24 July 1982.

(“Yellow dot – red mark – dead market”), in which they claimed that the goal of the SPD was to dismantle the free market altogether: “The goal of the yellow dot is apparently to eliminate the market economy.”⁶⁵⁰

By the fall of 1973, under strong business attack, the SPD began drawing away from price as a political issue. In October 1973, SPD leader Holger Börner assured the Chamber of Commerce and Industry (Deutsche Industrie- und Handelstag, or DIHT) that the “Aktion Gelber Punkt” was not an attack on the market system. He explain that the party had switched from wage formation as the cause of inflation and towards price formation because they felt that companies had increased prices more than was required by wage increases.⁶⁵¹ At the same time, Martin Grüner, the Parliamentary State Secretary for the Economics Ministry, confirmed that price controls were not compatible with Germany’s market economy. He did, however, affirm the usefulness of protests that have the goal of informing consumers about price increases and alternative product choices.⁶⁵² Nonetheless SPD support for price boycotts ended with the start of 1974.

Why did price politics flourish in France but miscarry in Germany? The explanation lies in part in the different strategies of consumer organizations in the two countries. Whereas French consumer groups enjoyed a broad and activist local membership, the key German consumer groups had, and continue to have, only a token number of individual members. French groups, therefore, were able to mobilize an

⁶⁴⁹ “Auch der Einzelhandel ist gegen steigende Preise Wir sind für Stabilität!” Wolfgang H. Glöckner, “Aktion ‘Gelber Punkt’ – Ins Rote verfälscht,” *Vorwärts*, 18 October 1973.

⁶⁵⁰ “Der Gelbe Punkt jedoch will offenbar weg von dieser Marktwirtschaft, will sie umstrukturieren, aushohlen, verplanen!” “SPD beschwichtigt Unternehmer,” *Süddeutsche Zeitung*, 13 October 1973.

⁶⁵¹ *Ibid.*

enormous membership to undertake the daunting task of price surveys. German consumer groups, because they could not hope to mobilize consumers on this scale, quickly found that the politics of price lay outside of their organizational capacities.⁶⁵³

For the governments, the difference appears to stem most strikingly from different conceptions about the role of the government in securing low prices for consumers. In France, governments on both the right and left were willing to inform consumers about price with the idea that consumers themselves could play a role in holding down inflation. Since price had always been an arena of government action in France, providing comparative price information was seen merely as an extension of this responsibility. In Germany, by contrast, the goal of the SPD in launching their Consumer Education campaign appears to have been to convince the general public that prices were being set by business and not by the government. Rather than trying to control price increases, in other words, the SPD was trying to distance itself from blame for growing inflation. An internal document of the SPD made this argument clearly: "The state does not create prices. Industry decides about at least 80 percent of price creation. In addition we must consider the multiple anti-competitive practices, that have been common up until now. Both of these facts should make it clear, who really sets prices."⁶⁵⁴ Prices in Germany, in

⁶⁵² "Auch Verbraucher können Stabilitätsbeitrag leisten," *Süddeutsche Zeitung*, 9 October 1973.

⁶⁵³ Hartwig Piepenbrock, "Die Legitimation der Verbraucherverbände zur Wahrnehmung von Verbraucherinteressen," in *Verbraucherpolitik Kontrovers*, ed. Hartwig Piepenbrock and Conrad Schroeder (Köln: Deutscher Instituts-Verlag, 1987), p 101.

⁶⁵⁴ "Der Staat macht im wesentlichen die Preise nicht. Die Unternehmer entscheiden über mindestens 80 Prozent der Preisentwicklung. Zusätzlich hat man dabei die Vielzahl von wettbewerbsfeindlichen Praktiken zu bedenken, die bisher üblich sind. Beides sollte endgültig klarmachen, wer die Preise wirklich macht." "SPD bereitet eine Kampagne gegen Unternehmer vor," *Die Welt*, 7 September 1973.

other words, were set in the production sphere, through the process of wage negotiation and concerted action, not through any policy under control of the government.

Conclusion. The Political Economy of Consumption

This research has explored a large and growing body of regulation that governs the consumer marketplace for products. These regulations set the terms on which product information and risk are distributed between producer and consumer. They also impose standards for specific aspects of consumer products such as design, pricing, and the terms of retail sale. This research, which focused on eight kinds of product market regulation in France and Germany, has found that these countries have adopted coherent but distinctive national strategies for regulating product markets. France has adopted a strategy of insulating consumers from product market risk that corresponds to the legal principle of *caveat venditor*, let the seller beware. Germany has adopted a strategy of providing consumers with highly accurate information in order better to protect themselves in the marketplace. This approach corresponds to the legal principle of *caveat emptor*, let the buyer beware. These systematic approaches to product market regulation constitute national consumption regimes.

French and German approaches to regulating the consumer marketplace have been driven in turn by ideas that emerged in both countries in the 1970s about the role of consumers in society. In Germany consumers were perceived primarily as economic actors, on a par with producers and suppliers in the marketplace. This view of the consumer identity led Germany to pursue the consumer interest by working to eliminate market failures. To this end they increased consumer information, imposed fair conditions of market exchange, and ensured an equal distribution of market risk. In France consumers were perceived primarily as political actors, enjoying political rights

on a par with worker rights. This view of consumer identity led France to pursue the consumer interest by creating and enforcing new political rights, encouraging the mobilization of consumers, and intervening to protect consumers from market externalities. For Germany, the consumer was perceived essentially as another producer; for France, the consumer was perceived as a new political constituency.

These conceptions of the consumer identity and role in society did not emerge from deep national traditions, but instead had their origins in the political debate that arose beginning in the early 1970s around consumer protection policies. At this time, three different ideas about the role of the consumer in society contended for control of the policy discourse in each country. One model, based roughly on the experience of the United States, saw the consumer as citizen with strong political rights to protection against the negative consequences of modern products and production. This protection model came to dominate in France. A second model, based roughly on the Swedish experience with consumer protection in the 1960s, saw consumers as a new interest group in society that could negotiate on its own behalf with industry. This negotiation model was considered as a policy model in both France and Germany but was eventually rejected by each. The third model, based roughly on the British experience in the 1960s, saw the consumer as an economic actor whose problems emerged from market failures. This information model emphasized the need to better inform consumers so that they could act knowledgeably in the consumer marketplace. In the initial stages of the consumer protection movements in France and Germany, all three of these policy models were in play.

Which policy model came to dominate in France and in Germany depended on the organization and interplay of consumer and producer interests. In France, where consumer groups were highly mobilized and industry interests were poorly coordinated, consumers enjoyed greater political leverage than producers. They were in general able to push for their preferred protection policy against the interests of industry. In Germany, by contrast, consumer groups did not cultivate a strong grass-roots mobilization, and industry was extremely well organized to pursue its policy interests. Hence German industry was able to push its preferred policy model over the policy preferences of consumer groups. In the ensuing struggle over which policy model would dominate product market regulation, French consumer groups and German industry organizations came to dominate the debate in their respective countries.

The different national consumption regimes that emerged from these political struggles are likely to have an enduring impact, not only on consumers but also on producers. Germany's strategy of emphasizing accurate consumer information, for example, gives consumers the capability to purchase higher quality goods. France's strategy of insulating consumers from the risks inherent in consumer product markets has diminished the need of consumers to purchase high quality goods, while increasing their willingness to experiment with radically new kinds of products. Furthermore, because producers look to the nature of consumer demand in making decisions about product development, the difference in consumption regimes in France and Germany places a pressure on producers in each country to pursue differing product strategies. The result has been to push French producers towards lower quality but more innovative products, while pushing German producers towards higher quality but less innovative products.

Implications for Public Policy and Comparative Politics Research

The distinctiveness of national patterns of product market regulation suggests a significant departure from conventional thinking in contemporary political economy in three respects. First, industry decisions that had previously resided entirely in the private sphere, including strategies of innovation and product quality, have now come under the indirect influence of government regulation. This finding is at odds with conventional accounts of the deregulation of industry. Indeed what we see as deregulation might more accurately be interpreted as a shift in regulation away from the conditions of labor and capital markets and towards the conditions of products and product markets. Far from retracting, political intervention in the economy may, from this perspective, actually be growing. Industries that we commonly consider to be dynamic and competitive, such as the automobile or drug industries, in fact work within a dense system of product market regulations that shape and stabilize the domestic markets for their goods.

A second implication of this research is the growing impact of national product market regulations on the trade of goods and the flow of capital. Nationally distinctive product market regulations pose significant non-tariff barriers to trade. Their distinctiveness arises primarily from domestic economic and political concerns rather than from a specific effort to block trade. This means that even countries intent on free trade are likely to face difficulties in harmonizing their consumption regimes. This poses a particular challenge for the European Union, which has attempted to harmonize national product market regulations through a panoply of directives. To date, domestic constituencies of European Union member states have generally proved unwilling to alter significantly the nature of product market regulations within their countries.

Finally, because the politics of product market regulation is overwhelmingly a domestic issue, the distinctive national consumption regimes that emerge within each national regulatory framework will probably continue to drive a wedge between national strategies of production. Producers' priorities are increasingly set by the customers they serve. Most companies still design and market their products overwhelmingly for domestic consumers. And the market behavior of domestic consumers is shaped by the regulatory framework in which they function. This means that increasingly global trade in goods and services will not necessarily entail a convergence in production strategies across countries. Each country may rather come to specialize in the kind of production favored by the conditions of its local markets, as distinctive domestic demand conditions become the source of comparative advantage for producers in that country. Not only can distinctive national consumption regimes be expected to impede globalization by posing enduring non-tariff barriers to trade, but they also may tend to perpetuate the distinctiveness of national production strategies in the face of more fluid labor and capital markets.

Beyond its relevance for our understanding of business-government relations in an age of globalization, this project also suggests some important research possibilities for the study of comparative politics in general. First, for researchers studying national industrial strategy and national varieties of capitalism, my findings emphasize the need to focus not only on the supply side of production, including the institutions of labor and capital provision, but also to look more closely at the channels and regulatory form of retailing and consumption. The distinctive form of post-production regulations in any sector may play a contributory or even decisive role in setting the strategic priorities of

producers. The independent impact of demand-side regulatory institutions will be especially important as the distinctiveness of national supply-side features (labor and capital) erode under the homogenizing pressures of globalization.

This suggests at least three potentially fruitful directions for future study. First, research into national consumption regimes might usefully incorporate other institutions that help to structure national consumption, including consumer payment and borrowing systems, and a more detailed analysis of product distribution channels. Second, because economically powerful industrial sectors such as automobiles and pharmaceuticals have typically been able to create their own dedicated regulatory frameworks, research into the regulation of these specific product markets could help to deepen our understanding of the coherency and potential variation within national consumption regimes. Finally, European efforts to harmonize a wide range of product market regulations in the context of the European Union offer a natural experiment to test the rigidity or plasticity of national consumption regimes.

The second contribution of this research to the study of comparative politics more broadly is the emphasis it places on the mechanisms of radical policy change rather than on the mechanisms of policy continuity. Through analysis of the emergence of product market regulations beginning in the 1970s, this research proposes a methodological counterpoint to the emphasis of conventional institutional analysis on explaining continuity. It posits that some—although certainly not all—kinds of policy change occur in a discontinuous way, and that in radically new areas of policy ideas become politically contested. This kind of radical policy change has been noted in past research by Anne Swidler, Hugh Hecllo, Stephen Krasner, and others, but these authors have taken it as a

justification for discarding, rather than extending, institutional analysis. My research finds that institutions and interests continue to play a formative role even in instances of radical policy innovation. In cases of radically new policy, competing ideas about how the new policy area should be regulated become politically contested. Interest groups then compete over which idea will come to dominate policy formation. Thus in new areas of policy, conflicting interests focus on which policy model will come to dominate the regulatory discourse once the period of radical innovation has passed.

This contested ideas approach to comparative policy analysis captures the political dynamics of radical policy change more faithfully than do traditional interest-based or institutional explanations. First, by focusing on the role of ideas, this approach underscores the extraordinary capacity for creativity in the implementation of new policies. Innovative thinkers can play a central role in pushing for policy change. The ideas they generate about possible avenues of change can convince other social actors that constructive change is possible or necessary. Second, however, this approach emphasizes the institutional limits on what ideas for policy change are likely to succeed within a given national context. This means that good policy ideas are highly contextual, and depend on the interplay of domestic interests and institutions. Ideas for policy change that work well in one country may fail in another, not because they are misunderstood, but rather because they do not conform to the play of organized preferences in the new institutional context.

The Impact of Product Market Regulation on Traditional Production

This dissertation has documented a rapid growth in government creation of product market regulations in France and Germany. Such regulations have become a

pervasive and apparently permanent feature of the production environment in which companies operate. Moreover, these new regulations are likely to have an economic impact, both on trade—in the form of non-tariff barriers to trade—and on production strategies—through their impact on the market choices of consumers. The growth of product market regulation thereby poses significant obstacles to what Konichi Omae has described as the “borderless world” of global capitalism.⁶⁵⁵ But what does the growth and persistence of product market regulation mean for industrial production?

One possibility is that it signals an entirely novel mode of production, one characterized by a growing emphasis on consumers as a source of product design and innovation and a corresponding decline in attention to managerial or technology-driven production strategies. One sign of this change is that industries oriented towards consumer markets—retailing, advertising, marketing—have become increasingly important and powerful in the modern product value chain.⁶⁵⁶ Ben Fine, for example, has argued that the knowledge and experience that consumers bring to the marketplace should be considered a central component of the production process. This consumer input to the production process he labels “consumer capital,” putting it on a par with labor capital and investment capital as an input to production.⁶⁵⁷ Wesley Cohen, in a 1995 survey of innovation in US companies, found that over 70 percent of product design departments identified consumers, usually end consumers, as the single most important

⁶⁵⁵ Kenichi Ohmae, *The Borderless World: Power and Strategy in the Interlinked Economy* (New York: Harper Business, 1990).

⁶⁵⁶ Frank Mort, “The Politics of Consumption,” in *New Times: The Changing Face of Politics in the 1990s*, ed. Stuart Hall and Martin Jacques (London: Lawrence and Wishart, 1989), p 166.

⁶⁵⁷ Ben Fine, “From Political Economy to Consumption,” in *Acknowledging Consumption*, ed. Daniel Miller (London: Routledge, 1995), pp 131-139.

source of new product ideas.⁶⁵⁸ The implication is that consumer demand, like labor and capital, has become an important factor of production.

As corporate strategies have gradually refocused on consumer preferences, actual product manufacturing has increasingly been outsourced to manufacturing specialists. Michael Borrus and John Zysman have found that high technology firms increasingly contract out the entire product design and manufacturing function, relying for their competitive advantage on “open-but-owned” product standards. In their view, manufacturing has become a turn-key operation that can be hired out by any firm, since competitive advantage lies in product standards.⁶⁵⁹ Similar trends have been observed in lower technology industries such as clothing and food, where management policies are increasingly dictated by retailers and marketers, whose authority derives from their proximity to the consumer.⁶⁶⁰ Bennett Harrison notes that such corporations typically adopt a two-tier system of production in which small sub-contractors in low wage countries undertake actual manufacturing, while high-paid managers in global companies manage design, distribution, and innovation—i.e., those functions relating to consumer market creation and maintenance.⁶⁶¹

This integration of consumer markets into production itself suggests a broader historical interpretation of the role of product market regulations addressed in this

⁶⁵⁸ Wesley Cohen, Presentation at the Faculty Seminar Series of the Industrial Performance Center, MIT, Spring 1996.

⁶⁵⁹ Michael Borrus, and John Zysman, "'Wintelism' and the Changing terms of Global Competition: Prototype of the Future," BRIE working paper (February, 1997).

⁶⁶⁰ Frank Mort, "The Politics of Consumption," *New Times: The Changing Face of Politics in the 1990s*, Stuart Hall and Martin Jacques eds. (London: Lawrence and Wishart, 1989), p 166.

⁶⁶¹ Bennett Harrison, *Lean and Mean: The Changing Landscape of Corporate Power in the Age of Flexibility* (Basic Books, New York, 1994).

research. In *The Great Transformation*, Karl Polanyi argued that the notion of free markets for the factors of production—labor, capital, and raw materials—rested on the fiction that these inputs to production were commodities.⁶⁶² Because the idea of treating labor or capital as a commodity rested on a social fiction (labor was never *really* a commodity) Polanyi argued that the creation of free labor and capital markets also necessarily evoked a counter-movement in favor of re-regulation. My research suggests that a similar analysis may hold true for product markets. From this perspective, the attempt to create free product markets in the immediate post-World War II period appears to have evoked a regulatory counter-movement intended to protect consumers and producers against the adverse consequences of treating consumer products as simple commodities. The resulting growth in government regulation of product markets, and the national consumption regimes that these regulations have created, have helped to structure and stabilize product markets while also protecting consumers from the dangers of unregulated markets for goods.

This shifting conception of the consumer in the marketplace emerges clearly from the intellectual tradition of post-war consumption. Prior to the 1970s, consumers were seen to play a largely passive role as receptacles of production.⁶⁶³ John Kenneth Galbraith warned that as consumers became more wealthy, and therefore more removed from

⁶⁶² Karl Polanyi, *The Great Transformation* (New York: Rinehart & Co., 1944), pp 130-162.

⁶⁶³ See for example: Max Horkheimer and Theodor Adorno, “The culture industry: enlightenment as mass deception” in *Dialectic of Enlightenment* (New York: Continuum, 1944), p 142. “What is decisive today is...the necessity inherent in the system not to leave the customer alone, not for a moment to allow him any suspicion that resistance is possible. The principle dictates that he should be shown all his needs as capable of fulfillment, but that those needs should be so predetermined that he feels himself to be the eternal consumer, the object of the culture industry.”

physical need, they would also become more susceptible to management through advertising and marketing by producers. Faced with saturated markets and falling demand, Galbraith argued that companies could create new “false needs” that would serve to maintain a stable level of consumer demand. Indeed he saw advertising as a useful method of market control, a sort of privately managed Keynesianism. “The consequence [of advertising and marketing] is that while goods become ever more abundant, they do not seem to be any less important.”⁶⁶⁴ Keynesian demand management itself was grounded on the premise that consumer demand was manipulable, not only by companies but also by the government.

Beginning in the 1970s, however, the work of neo-classical economists led by Gary Becker had begun to unravel Galbraith’s image of the docile consumer. Instead of treating consumers as the receptacles of industrial production, Becker reconceived consumer decisions as analogous to production decisions. In the same way that companies made strategic choices about the optimal combination of labor and capital necessary for each product, so did the consumer, in Becker’s view, make strategic choices about how to dispose of his or her own basic resources of money and time.⁶⁶⁵ This view implied that consumer decisions about products were not simple reflections of advertised goods, but resulted instead from an effort by consumers to maximize basic values such as happiness and prosperity given their personal resource constraints.

Michel de Certeau has suggested that consumers may be able to subvert the goals of producers even in the case of mass-marketed goods through creative approaches to

⁶⁶⁴ John Kenneth Galbraith, *The New Industrial State* (Boston: Houghton Mifflin Company, 1985), pp 210, 218.

everyday practice. The central insight for de Certeau, similar to Gary Becker's reconception of the consumption function in economics, is that the consumer undertakes an activity of clandestine production in the creative use of a product that is distinct from, but identical in its social meaning to, the construction of the product and its market space by industry.⁶⁶⁶ His argument suggests that the consumer space can never be fully mapped, and therefore never dominated by producers. Consumers subvert the structure and power of the productive economy by a strategic, interpretive use of everyday products. The French baguette, to take only one example, appeared first only in the 1950s in response to consumer protest against manufactured foods and a growing consumer taste for crusty breads. Product market regulations have in many cases helped to make this kind of experimentation possible. French product safety regulations, for example, require producers to ensure the safety of their products under *any* foreseeable use of the product.

This new focus on the productive role of consumers has generated an academic cottage industry for re-evaluating traditional productionist arguments in terms of consumer innovations. Colin Campbell revisits Max Weber's analysis of the Protestant ethic to ask who purchased the goods that were produced by early Calvinists. He finds that the ascetic revolution caused by the Protestant ethic that Weber describes was accompanied by a romantic revolution in tastes that helped to drive consumer demand for ostentatious goods. The roots of industrialization, in other words, must be understood not only as a fundamental shift in attitudes toward production, but also as a similarly

⁶⁶⁵ Gary S. Becker, *The Economic Approach to Human Behavior* (Chicago: University of Chicago Press, 1976).

⁶⁶⁶ Michel de Certeau, *The Practice of Everyday Life*, translated by Steven Rendall (Berkeley: University of California Press, 1984), p 31.

fundamental shift in attitudes toward consumption.⁶⁶⁷ Grant McKracken has argued that an influx of consumer goods in the 16th century created an inflation in consumption that was analogous to the monetary inflation caused by the influx of gold from the Americas.⁶⁶⁸ Rosalind Williams, in her study of 19th Century France, has argued that the picturesque expositions, department stores, colonial displays, and other forms of exoticism all stimulated consumer demand for new kinds of products.⁶⁶⁹

What these accounts share is a vision of the consumer as an active participant in economic life, one whose actions can neither be imputed to outside causes nor understood simply as the receptacle of industrial commodities. Like labor and capital, they add value to production through creative or informed decisions about product choice. Moreover, like the market for labor and capital, the market for consumer goods is also only apparently a free market. So long as demand for consumer goods remained high and consumers were relatively indiscriminating, consumer products could be traded as if they were commodities in a genuinely free marketplace. Yet growing market saturation combined with an increasing apprehension about the safety and utility of new products revealed the risks of treating consumer products merely as commodities. Consumers could simply refuse to purchase new products, or alternatively purchase products from foreign manufacturers.

⁶⁶⁷ Colin Campbell, *The Romantic Ethic and the Spirit of Modern Consumerism* (New York: Basil Blackwell, 1987), p 130.

⁶⁶⁸ Grant McKracken, *Culture and Consumption: New Approaches to the Symbolic Character of Consumer Goods and Activities* (Bloomington: Indiana University Press, 1988), p 5.

⁶⁶⁹ Rosalind Williams, "The Dream World of Mass Consumption," in *Rethinking Popular Culture: Contemporary Perspectives in Cultural Studies*, ed. Chandra Mukerji and Michael Schudson (Berkeley, California: University of California Press, 1991), pp 204-205.

From this perspective, the growing importance of consumers to the continued profitability of industry worked to increase the political weight behind the consumer movement. On the one hand, producers in the 1970s came to realize that if consumer demand for new kinds of products was to be sustained, it had to be regulated in some way. On the other hand, consumer groups, especially in the wake of the first oil shock, came to be regarded as critical participants in the industrial economy. Industries that had previously created their own rules now faced growing political pressure to conform to new legal standards of consumer protection and information. In this sense, national product market regulations emerged as the logical counterpart to the increasingly important role of consumers in production.

Product market regulation might therefore be understood as a set of neo-Keynesian mechanisms of demand manipulation. Relying on micro-institutions rather than macro-economic controls, these new forms of demand management exert an unprecedented level of government control over industry decisions in strategic areas such as product design, labor practices, and innovation. As this research has shown, the nature of these product market institutions has, to date, been dictated largely by country-specific conceptions of the consumer identity that grew in turn out of the organization of consumer and producer interests in the country. Yet the growing impact that these product market regulations have on production strategies suggests at least the possibility that they could be employed to serve as delicate tools of a new demand management at the sectoral level. Any step in this direction must begin with the understanding that product market regulations are nationally distinctive, economically powerful, and politically constructed.

Appendices

Appendix 1. Timeline of Events

Year Date	Country	Event
1891	Germany	First Sunday and Holiday prohibition on store opening
1896	Germany	Gesetz zur Bekämpfung des unlauteren Wettbewerbs
1905 1 Aug	France	Act of 1905 on fraud and falsification
1919	Germany	Stores open Mon - Sat until 7pm
1935	France	founding of the Bureau de Vérification de la Publicité (BVP)
1936	US	Consumer Union created
1953 Sep	Germany	Verbraucherzentrale created under name 'Neue Hauswirtschaft'
1956 28 Nov	Germany	Ladenschlussgesetz enacted
1959	France	opening of the first supermarkets
1960 Mar	France	'fontanet' circular proposes interdiction of refus de vente
1962	US	President Kennedy's speech
1963 Apr	France	prices fixed on 80 industrial and food products
1964	UK	abolition of Resale Price Maintenance
1964 4 Dec	Germany	Warentest Stiftung Created
1964	France	opening of first hypermarket (2600 m2)
1965	Germany	consumer associations given Klagerecht to enforce the UWG
1966	US	<i>Restatement (Second) of Torts</i> , Sect 402 A - strict liability under tort law
1966 22 Nov	Germany	Verbraucherschutzverein e.V. founded
1968 9 Feb	Germany	Deutsche Normungsausschuss (DNA) created
1968	Germany	Gerätesicherheitsgesetz (Equipment Safety Act)
1968 Jan	France	value added tax extended to commerce
1971	France	BVP board of directors broadened
1972	Germany	Deutscher Werberat created
1972 27 Oct	US	Consumer Product Safety Act
1972	US	U.S. Uniform Commercial Code
1972 Feb	France	product prices must be posted in stores
1972 22 Dec	France	loi de démarchage et falsification
1973	Japan	Consumer Product Safety Law
1973	UK	Supply of Goods (Implied Terms) Act
1973 3 Aug	Germany	Novellierung des Kartellrechtes
1973 10 May	Germany	Verordnung über Preisangaben
1973 27 Dec	France	Royer Law on Consumer Protection and Information, including art. 44 on publicité trompeuse

1973	EU	International Chamber of Commerce (ICC) created the International Code of Advertising Practice
1974	Germany	Lebensmittel- und Bedarfgegenstände-Gesetz (Statute concerning food and other goods of general use)
1974	Germany	Abzahlungsgesetz (allows consumers to return products)
1974 Sep	Germany	Textilkennzeichnungsgesetz - clothes labeled by content
1975	US	Consumer Goods Pricing Act signed by Ford
1975 9 Dec	Germany	Bundesgerichtshof decides for Warentest in Ski binding evaluation
1976 24 Aug	Germany	Gesetz zur Neuordnung des Arzneimittelrechts
1976	France	development of distributor brands in hypermarkets
1976 16 Sep	France	prices of all products and services fixed, to fight inflation (plus salary limits)
1977	UK	Unfair Contract Terms Act
1977 Feb	France	Group Interministériel de la Consommation formed
1977 1 Apr	Germany	AGB in force
1977 Nov	France	Price controls placed on Croissants
1978	Germany	Deutsche Gesellschaft für Produktinformation, DPGI
1978	UK	Consumer Safety Act
1978 10 Jan	France	lois 'Scrivener': 78-22 on consumer credit; 78-23 on clauses abusives
1978 23 Mar	France	Decree making illegal 4 abusive contract terms
1978 Jun	France	almost total liberalization of the price of industrial and food products
1978	France	opening of first 'maxidiscomte' (hard discount) stores
1980 Jun	France	creation of the Commission de Concertation Consommateurs/CNP by the CNP
1980	France	boycott of 'viande de veau' led by l'Union Française des Consommateurs (UFC)
1981	EU	Second Consumer Action Program
1981 Aug	France	loi "Lang" instituant un prix unique pour le vente des livres
1983 21 Jul	France	loi on sécurité des consommateurs
1984	France	French bank networks sign accord launching the Carte Bleue
1985 25 Jul	EU	Product Liability Directive (95/374/EEC)
1986 1 Dec	France	abrogation of 1945 ordonnances, price freedom confirmed
1988 5 Jan	France	law on the actions of consumer associations
1989 Oct	EU	EC Commission Proposal for a Directive on General Product Safety
1990 1 Jan	Germany	German Product Liability Act (Dec 1989, passed)
1993 Apr	EU	EC Directive on Unfair Terms in Consumer Contracts adopted
1993 26 Jul	France	Code de la consommation
1994 1 Jul	Japan	Product Liability Law enacted (1 July 1995 in force)

Appendix 2. French Consumer Publications and their Circulation, 1972-1980.

(thousands)

group	journal name	1972 ⁶⁷⁰	1974 ⁶⁷¹	1980 ⁶⁷²
AFOC	<i>Les cahiers de l'AFOC</i>	-	-	750
APF syndicale				20
CNAPF	<i>Combat familial fiches</i>	3	35	
CNFR	<i>Familles rurales</i>		5	
CSCV	<i>Cadre de Vie</i>	-	-	60
CSF	<i>Nous</i>	20	20	22
FFF	<i>Familles de France</i>	40	40	54
FNCC	<i>Le cooperateur de France</i>	400	1,500	800
FNAFR	<i>Flash</i>	-	-	40
INC	<i>50 millions de consommateurs</i>	250	280	350
Labocoop	<i>Bulletin d'information du labo-coop</i>	7.5	12	15
ORGECO	<i>Objectif mieux vivre</i> ⁶⁷³	6	8	-
	<i>Information Consommateur</i>	30		
UFC	<i>Que Choisir?</i>	100	200	300*
UFCS	<i>Dialoguer</i>	15	15	15
UNAF	<i>Bulletin de liaison mensuel</i>	6	8	10
<i>total</i>		772.5	2,123	2136

(* 1979)

⁶⁷⁰ Dominique Pons, *Consomme et tais-toi* (Paris: Epi, 1972), pp 119-123.

⁶⁷¹ Michel Bernard, and Jacqueline Quentin, *L'avant-garde des consommateurs: Luttes et organisations en France et a l'étranger* (Paris: Editions ouvrières, 1975), p 87-91.

⁶⁷² *Un monde en mouvement: les organisations de consommation* (Paris: Ministère de l'économie -- comité national de la consommation, September, 1980), pp 16-71.

⁶⁷³ Formerly Information-Consommation.

**Appendix 3. Federal and State Support for Consumer Centers
(Verbraucherzentrale) in Germany, 1981.**

	Founding date	Advisory sites	Federal support (millions DM)	State support (millions DM)	Expenditure per resident (DM)
Baden Württemberg	1958	7	0.96	1.04	0.24
Bayern	1959	14	0.98	1.03	0.19
Berlin	1953	1	0.56	0.63	0.67
Bremen	1964	2	0.46	0.47	1.28
Hamburg	1949	1	0.51	0.61	0.90
Hessen	1958	9	0.88	1.08	0.37
Niedersachsen	1958	17	1.08	1.18	0.42
Nordrhein- Westfalen	1958	36	1.30	7.46	0.59
Rheinland-Pfalz	1960	8	0.60	0.75	0.39
Saarland	1961	6	.043	0.05	0.49
Schleswig- Holstein	1959	20	0.57	0.83	0.52
Total		121	7.943	15.13	0.55 (mean)

(source: Handbuch der Verbraucherinstitutionen.)

Appendix 4. Government Support to Consumer Groups in France, 1974-1987.

(thousands of francs)

(thousand francs)	1974 ⁶⁷⁴	1979 ⁶⁷⁵	1980 ⁶⁷⁶	1981	1982 ⁶⁷⁷	1983	1984	1985	1986	1987
<i>consumer groups</i>										
ADEIC-FEN							100	102	225	157
ANC		155	248	214	-	200	210	214	648	518
LEO LAGRANGE							80	82	204	143
UFC	80	237	377	438	530	572	620	633	775	582
CSCV		182	280	341	480	550	620	633	879	659
<i>union groups</i>										
ORGECO	35	142	248	226	260	280	294	300	654	523
AFOC		187	377	438	525	567	595	608	952	714
INDECOSA- CGT			-	150	335	400	458	468	773	541
ASSECO- CFDT			-	150	225	400	458	468	713	570
<i>family groups</i>										
CGL		152	280	300	335	362	380	388	687	515
CNAFAL							150	153	276	193
CNAPF	48	125	288	335	410	442	465	475	515	361
CNL				70	335	362	380	388	687	515
CSF	35	182	296	345	480	530	600	613	931	698
FFF	42	142	287	316	390	421	442	452	623	467

⁶⁷⁴ Michel Bernard, and Jacqueline Quentin, *L'avant-garde des consommateurs: Luttes et organisations en France et à l'étranger* (Paris: Editions ouvrières, 1975), pp 78-91.

⁶⁷⁵ Marie-Elisabeth Bordes, and Sylvie George, *Politique de la Consommation dans la Communauté Européenne* (Memoire, Université de Droit, d'Économie et de Sciences Sociales de Paris, 1982), p 101.

⁶⁷⁶ Noëlle Marotte, *Bilan et perspectives de la politique française à l'égard des consommateurs* (Paris: Conseil Economique et Social, 1984), p 20.

⁶⁷⁷ *Inc Hebdo* 574 (18 December 1987), p 2.

FNAFR		182	305	353	430	464	488	498	807	565
UFCS	50	162	272	304	370	400	419	429	731	585
UNAF									133	106
<i>cooperative</i>										
Labo Coop (FNCC)	15	87	284	330	400	432				

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