



Speech Bernadette van Buchem
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More state influence for the enforcement of consumer law? The path the Netherlands has taken.

Dear colleagues, dear ladies and gentlemen,

I would like to start by thanking the organisers for this interesting symposium. The Bundesamt für Verbraucherschutz und Lebensmittelsicherheit, The President Herr Dr. Tschiersky-Schöneburg and his colleagues I thank you for your hospitality and the invitation to speak. I consider this a great honour.

I stand before you in the function of Netherlands Consumer Authority. Five years ago this function did not exist. Very much like the system of our German hosts, the enforcement of consumer protection legislation in The Netherlands was predominantly of a private character, actually our system was entirely private in nature.

The key private organisation representing Dutch consumers was - and still is - the Consumentenbond - the Dutch Consumer Association, which was founded in 1953. The Dutch Consumer Association is a well-established and well-organised member-based organisation. With membership numbers slightly in decline today, it represents about 500.000 members (on a population of around 16 million). I am told the Dutch Consumer Association still is one of the best organised and most influential consumer associations worldwide.

Alongside the Dutch Consumer Association the Netherlands has had a well developed system of alternative dispute resolution – to which I will further refer as the ADR-system. It exists since the nineteen seventies. Currently there are 50 ADR-committees, organised per economic sector covering all the major economic sectors such as banking, energy, telecommunications, online shopping and travelling. The ADR-committees are in fact a form of self-regulation complemented by government approved procedures. Consumers have direct access to these committees and in principle their advice is binding on both parties. Uniquely, the fifty committees reside under the umbrella of one single federation, De Stichting Geschillencommissies – the Dutch Foundation of ADR-committees. The foundation is administered by a board of nine consisting of three representatives from consumer organisations, three from the branch organisations and three independent members appointed by the Ministry of Security and Justice.

Why do I tell you this? Why bother you with Dutch details while in Germany. I do so because I have been asked to shed light on the reasons for, the characteristics of and the effects of the introduction of public consumer enforcement in The Netherlands. The Dutch details form the background to which the Netherlands Consumer Authority was set up. During the next fifteen minutes I will guide you through three aspects of the set up of the NCA in The Netherlands: 'why', 'how' and 'with what result'. In doing so I will focus on the relation between the public and private consumer protection mechanisms. In conclusion I intend to provide you with thoughts and insights on the co-existence of private and public consumer enforcement that may be beneficial to developments in other jurisdictions.

To start at the beginning: what were the reasons for a shift towards more public consumer protection in The Netherlands?

Two developments at the early stages of the current millennium triggered the political urge to adapt the system of consumer protection.

In 2004 a strategic policy program at the Ministry of Economic Affairs lead to two important conclusions. The first was a political one: "strong markets deserve a strong government". In other words: strong markets need to be balanced by a strong government, including robust enforcement.

This principle, voiced by Minister Brinkhorst, perfectly reflected the political climate at the time.

The second conclusion stemming from quite extensive market research was that the existing consumer protection had multiple blind spots. One of the main findings was that, although consumers often go back to suppliers to report problems, less than half of the consumers was satisfied with the solutions offered. Very few consumers undertook further action in these cases. In other words: consumers often took their losses and the countervailing power from consumers was not optimal.

The recommendation based on these findings was to consider the question to what extent government has a desire or a responsibility to protect consumers, or whether it will leave the solution of consumer problems to the free market. My presence here is a reminder to the outcome of the debate.

The second development which encouraged the thinking in The Netherlands will be very familiar to most of you. The negotiations about the establishment of European Regulation 2004/2006 made clear that some form of public consumer protection - for cross-border cases - was going to be required by European law. The European perspective reduced the step to expand the powers of the envisaged agency to national cases also. And this is exactly what happened.

It is interesting to mention that during the entire political process the Dutch Consumer Association has been a particularly strong supporter of the establishment of a public consumer enforcement agency, as it considered the future Consumer Authority a potent ally in solving consumer problems.

These developments culminated in the establishment of the NCA on 1 January 2007. In this setting it is inevitable to mention that one of the first cases taken up by the NCA concerned a German company by the mysterious name of UFO-flug. With its online ticket sales being as illusive as the company name suggested, the NCA and the BVL together ended its activities by having its website taken down, thus preventing further consumer harm.

After having elaborated on the reasons 'why' the NCA was established, I would like to briefly dwell on the 'how' of the establishment. What did the new authority look like? And more specifically, what features of the set up of the NCA point to the already existing private system? I would like to single out four features.

Feature one. The legislator honoured the existing private system by taking as a principle that the NCA will only interfere in consumer law infringements if consumers and/or the market themselves are not capable of ending those infringements effectively. With this priority-rule, the legislator shaped a system in which the NCA can have a rather limited capacity because of its secondary role. The NCA has the task to continuously safeguard the proper functioning of the private system in terms of checking self-regulatory schemes. Besides that it has the task to guarantee the pursuit of the most detrimental consumer problems that are not solved by the private system. In short: the NCA seeks to balance investing in guidance about self-regulation versus conducting hard-core enforcement; To check the effectiveness of the private system's consumer protection and decide when to interfere.

Allow me to discuss a second feature of the Dutch consumer system, which follows from the first one. Since the private system – i.e. civil litigation and ADR-committees – is primarily responsible for solving consumer problems, it was not deemed necessary to bestow upon the NCA the task of solving individual consumer complaints. This has been explicitly laid down in our law, which stipulates that the authority deals with collective consumers' interests only. From the point of view of effective enforcement I dare say I consider this principle a blessing. This principle enables the NCA to prioritise. It allows us to pursue those consumer problems that are (one) the most harmful to economic interests of consumers (two) affect consumer confidence the most (and three) have the most negative impact on the proper functioning of markets.

This 'collective interest principle' guarantees the most optimal deployment of the scarce public resources available for enforcement. In other words: it allows us to deal with high-impact cases as much as possible.

The third feature of the embedment of public enforcement in the pre-existing private system is the way in which the law foresees in multilateral meetings between the main institutions representing both systems. Multiple consumer associations, employers organisations, the Netherlands

Consumer Authority and other national market authorities are present at the meetings. The NCA chairs these meetings and invites the members at least twice a year for a formal meeting during which views are exchanged on topics like the NCA's envisaged priority areas for the next year. The formalised multilateral contact between the NCA and its stakeholders provides the NCA with valuable input and it contributes to the important basis of support for the NCA in society. Therefore the NCA acknowledges the added value of the multilateral "Maatschappelijk Overleg" or "Social Dialogue".

This brings me to the fourth feature. Besides the clean cut task to enforce consumer legislation, the NCA was given the task to make individual consumers aware of their rights and encourage them to actually claim their rights. This is what we mean by consumer empowerment. This characteristic ties in to the first one, the priority-rule which I just discussed. For only a strong private system actually alleviates the burden for the public agency. The legislator acknowledged the important role of individual consumers in enforcing consumer rights and also it acknowledged the improvements that could be made in this respect. For this reason, also the NCA was given a role in strengthening the private system by empowering consumers. Internally we have translated this task into the following mission: creating 16 million enforcers in The Netherlands instead of one. The NCA really treats these two tasks – empowerment and enforcement - on an equal footing. I consider them equally important to the success of the organisation.

In my experience empowering consumers does not just yields for consumers but also for the NCA itself - and thus for consumers indirectly. The contacts with consumers for empowerment reasons, offer the NCA large amounts of invaluable information, which it turns into enforcement intelligence. Furthermore, having strong consumers should also be an objective of the business community. Making consumers able to discern between genuine business – the vast majority – and the less sincere ones, offers the honest businesses better opportunities.

After having discussed the second question concerning the particular shape and form of the NCA as resulting from the private system already in place, I would like to look a little closer at the effects of the adoption of public enforcement in The Netherlands. Again with special attention to the interplay between the private and public systems.

A good way to start the assessment is to look at the results of the recent Parliamentary review of the NCA. Since the results of the review have become public as recent as last week, you are among the first to be informed.

The review was conducted in the spring of this year. In the process 42 parties – among which some of you present here and of course the partners in the "Social Dialogue" - were interviewed on the functioning of the NCA over the first four years of its existence.

I will refer to the conclusions made in relation to the criterion 'Utilisation of the private system by the NCA' as they will most directly relate to the interplay between private and public enforcement. The first conclusion of the reviewers is that the NCA has succeeded well in equipping consumers to claim their rights by providing information and practical tools, such as sample letters and checklists. In other words the NCA successfully supports the private system.

Furthermore, it is concluded that the NCA makes efficient use of information and intelligence available in the private system as the NCA frequently exchanges information with institutions like the Dutch Consumer Association. Also, it is positively valued that the NCA engages in joint initiatives with the members of the private system such as branch organisations, aiming at increased norm awareness and norm acceptance in the business community. An example is the elearning course created together with the Dutch National Board for Retail Trade. The course allows employers to train their retail staff on consumer rights in relation to product guarantees.

Lastly, the report concludes that the business community feels the desire for further guidance from the NCA on the interpretation of some of the norms as laid down in the relevant legislation. Without compromising its policy not to provide individual guidance to companies, the NCA will, over the next period, investigate the possibilities to cooperate with branch organisations in order to meet the expressed desire.

In general the verdict of the reviewers on the "NCA's utilisation of the private system" is positive. It justifies the conclusion that the private and public systems are perceived to be mutually supportive by the NCA's stakeholders. This conclusion is supported by the results of the review in relation to the criterion 'Prioritisation and High Trust'. The conclusions of the report are that the NCA

generates an impressive harvest in terms of consumer signals via its consumer website ConsuWijzer. The conclusion is supported by the interviewed stakeholders. Furthermore, it finds that the stakeholders support and recognise the priorities set by the NCA in its bi-annual agenda. The reviewers conclude that the NCA is well aware of what happens in the market and takes on the right issues. These conclusions reflect the mutual benefits of the mixed private and public enforcement system. The private system creates the space for public enforcement to reach solutions to consumer issues where the private system cannot.

A second way to assess the effects of the NCA is to look at its output. For the statistics on consumer empowerment I would like to refer to the slide behind me. Let me draw your specific attention to the 8 million visits to the ConsuWijzer website and to the fact that the website was elected Government website of the year 2010. Also from the statistics the conclusion that the NCA enhances the private system seems justified.

Over the last four years the NCA also managed to close over 300 cases. That counts to 75 closed cases a year with an enforcement division staffing 11 people. Undoubtedly, part of the success is the mix of enforcement tools the NCA applies. The NCA deals with around 85% of its cases informally. No formal or legal sanction is imposed. Infringements are terminated by for example warning companies and accepting undertakings. These methods require much less capacity and stop consumer harm more quickly. Sanctions are imposed when other means fail. The NCA speaks softly but carries a big stick!

As a third perspective on the functioning of the mixed private public system, I would like to add some observations of my own. As a result of the invitation to speak here, and from looking at the current German system, I asked myself the question: "Would consumer protection have looked different in The Netherlands had the NCA not been established?" Followed by the second question: "Why would it have been different?"

To answer my first question. Yes, I do think consumer protection would have looked differently, not only in form but also in effect. I will explain this by answering my second question: "Why would it have been different?"

One major feature of the NCA – and I think this counts for many public enforcers – is that it possesses legal powers that facilitate the detection and termination of behaviour which harms consumers. For example: the NCA has the power to request documents, enter business premises, seize information in both physical and digital form and to take statements from employees and managers of companies. Also the authority has powers to impose fines and orders combined with incremental penalty payments. These powers have been essential in proving and terminating almost all the NCA's cases. The power to fine is also essential in the success of the 85% of cases in which the NCA enforces informally. The deterrent effect of a potential fine enhances rates of spontaneous compliance, as it is formulated in politically correct terms.

Let me illustrate the added value of the investigatory powers on the basis of a recent NCA case. An entering energy supplier caused a considerable number of complaints at ConsuWijzer. These complaints clearly hinted on misleading conduct by the company during a telemarketing campaign which lasted nine months and showed an average of 1,5 million calls per month. Using the content of complaints as proof in these cases is not an easy matter. Often it will be the word of the consumer against the word of the company, with little objective proof available.

The investigatory powers enabled the NCA to visit the premises of both the energy company as well as of the call centres it had contracted to make the actual phone calls. The NCA ordered the callscripts and made forensic copies from the digitally stored recordings of the phone calls. The information received was key to proving the following infringements:

- Not notifying a consumer about the identity of the company and the commercial goal of the call. Consumers often assumed to be talking to their current energy supplier;
- Providing misleading information about costs and potential price advantages;
- Breaching the Code of Conduct of the Energy Suppliers by targeting groups of vulnerable consumers;

The company was fined over 1 million euros. Already during the investigation the company aborted the telemarketing campaign.

The second finding in relation to my observations is the fact that the imminent publication of a fine often has increased deterrent effect. For obvious reasons companies do not like government to

communicate to its customers that it does a poor job in respecting consumer rights. Be it that this already counts for publicity by private consumer organisations, the effect can be multiplied for publicity by a public body. A simple indicator for this effect is the rate of injunction procedures against decisions by the NCA to publish fines: in almost 100% of the decisions to publish.

I go back to the question I posed myself as to why consumer protection would have been different today without public enforcement. The answer is that clearly the legal investigatory powers, the possibility to impose fines and the deterrent effect of publicity enhance the termination and sanctioning of consumer law infringements. I am quite certain that without those powers and characteristics of public enforcement a decision would not have been easily made in the example of the energy supplier, if made at all. And the same counts for many other cases that the NCA concluded such as on sms-services and on online ticket sales. This leads to the conclusion that consumers are better off, as a result of the existence of public enforcement as it complements the private system.

Ladies and gentlemen, I have tried to enlighten you on the path The Netherlands has taken towards more public consumer protection. In the last couple of minutes of my time I would like to turn your attention to the lessons that we have learned from our Dutch experiment. For your benefit I will try to make them generally applicable to the extend possible. But prior to that, I would like to stress that no one way is the only way, much less the right way. The way a legal system, or more specifically an enforcement system, is successfully shaped depends on many factors. It probably depends on factors like culture, psychology, historic background and public acceptance, than on scientifically proven success of a certain method. This notwithstanding I will offer you my not scientifically proven thoughts.

First and most importantly it seems justified to conclude that private and public consumer protection can be mutually supportive. The private system is able of preventing and terminating easy and nevertheless detrimental consumer infringements by engaging in self-regulation and civil litigation and ADR. This clears the path for the public authority to deal with the complex cases that require the deployment of investigatory and fining powers. The public body in its turn is able to mobilise the countervailing power of consumers by empowering them. Simultaneously the NCA hugely benefits from the influx of valuable intelligence which springs the direct contacts with consumer. And let me stress that also genuine business benefits from strong public enforcement as it creates a level playing field, not distorted by non law abiding competitors.

Wrapping up: The discussion should not be whether consumer protection should be public or private in form, but rather on how the mutual supportive effects can be optimised and maintained. This brings me to my second conclusion. Having both systems of consumer protection – private and public - on board puts forward the question as to how to balance the vessel. Having too much of either, might topple the boat with drowning consumers a the main result. Balancing the vessel is a continuous challenge also in The Netherlands. Sometimes it does lead to friction between the players of the two systems. However, I tend to believe that friction creates a gloss. And because I am not sure whether this translates well I will put it in plain words: the friction between the private and public system forces us both to make clear cut and well-reasoned decisions on what we do and how we do it. I can only applaud that outcome.

I thank you for you attention and open the floor to questions.

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