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Consumer interest representation in the Netherlands

Workshop ‘Consumer interest representation in international comparison’

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Ladies and gentlemen,

I would like to start by thanking the organizers for inviting me to speak here. ACM is very pleased to have this opportunity to contribute to the design-process of consumer interest representation in your country.

As a Board member of the Netherlands Authority for Consumers and Markets (ACM), I hold the consumer portfolio. I am also in charge of legal affairs and corporate management. My two fellow board members deal with competition and regulation respectively. The three of us head up the Authority for Consumers and Markets, which was created on 1 April 2013. ACM is a merger of the Consumer Authority (CA), the Independent Post and Telecommunications Authority (OPTA) and the Netherlands Competition Authority (NMa). So alongside all the powers and duties that ACM took over from the Consumer Authority, we are also responsible for competition and regulation enforcement (tasks that in Germany are enforced by the Bundeskartellamt and the Bundesnetzagentur).

Before I begin I should make it clear that I am not here to advocate that Germany should necessarily create a multi-functional public authority to protect consumers. The appropriateness of a multi-functional authority depends on the State and perhaps even the individual authorities involved. However, I would like to advocate a holistic and problem-solving approach to consumer issues on the market. And I would stress, that the success or failure of the design you choose depends on having good links between the various authorities

charged with consumer protection. They can be single-function public authorities, or a variety of private authorities or a combination thereof, but they must talk to one another. They must have firm and effective links, if they are to tackle consumer problems in a holistic and an effective manner.

My presentation will include the following elements:

- The new Authority for Consumers and Markets combining Competition, Regulation and Consumer Protection Authorities (April 1st, 2013)
- The landscape of consumer protection in the Netherlands
 - o Why public enforcement of private consumer law?
 - o Responsibilities and legal powers
 - o Relationships
- Finally, I will address some of the advantages of the Dutch system

The newly created Netherlands Authority for Consumers & Markets (ACM) is a single authority for consumer protection and market oversight. As I said, it took over the existing powers of the Consumer Authority (among the other authorities). The rationale underlying the merger is to cut costs, but also to promote a more effective and efficient approach to consumer protection and market oversight.

ACM has its mission - promoting opportunities and options for businesses and consumers. Creating this new authority gave us the opportunity to find a common denominator on which we could focus our market oversight, and not surprisingly, we came up with the consumer. In fact we want to make the consumer central to every action we take at ACM. We have published a strategy document in which we explain that increasing consumer welfare is ACM's primary goal. ACM wishes to see markets in which consumers have an actual choice, and in which businesses can compete freely for the favor of consumers. The desired result is sustainable welfare growth in the broader

sense of the word. It includes welfare growth as a result of financial and qualitative effects for consumers, in the short run and in the long run.

ACM has 550 employees. The new authority continues to enforce the existing legislation of its predecessors. We see possible synergies in combined enforcement, in terms of the choice of tools and remedies used by ACM to tackle market problems. For example, social media and communication tools can be put to innovative use to develop competition in newly liberalized markets, such as an energy coach, which helps consumers through the process of switching energy suppliers, in a market where new players have difficulty getting off the ground.

And there are other examples - ACM helps consumers actively exercise their rights (through consumer empowerment), not just by pointing out to consumers what their rights are, but also by explaining how they can make well-informed decisions. ConsuWijzer, the consumer information website now operated by ACM, plays a crucial role in that context. In addition, the consumers' signals and questions received through this online portal *generate valuable intelligence* for ACM about what the biggest market problems are in terms of market failure and/or collective infringements of consumer law.

ACM is unique in Europe in combining sector-specific regulation, consumer protection and competition oversight in a single authority. Traditionally, there have often been differences in culture between consumer protection, sector-specific regulators and competition authorities. However, over the last decade, there has been a shift in focus, to an effects-based, market approach which emphasizes the impact on consumer welfare, and a shift away from ad-hoc intervention to a principle-based approach. All market authorities are aware of the importance of being grounded in the reality of public policy and of consumers' concerns and needs. The core principle of the sovereignty of individual consumers is of great importance.

A lot has been gained by combining the cultures of the three organizations. We are using our combined knowledge, experience and wisdom to keep a close eye on the balance between consumer protection and competition. We are using behavioral-economics perspectives also for competition cases to learn about consumers irrational behavior patterns or important drives for consumers behavior. We are raising an awareness on the market effects of ill-conceived regulation in consumer protection cases.

A seemingly simple, but in practice more complicated step, that we hope to realize is to coordinate our work. So that, when we impose a competition-law fine, it is coupled with an empowerment drive from the consumer department. We did this in the Summer when our Consumer Department alerted consumers to the existence of a fraudulent telephone number, set up to extract money from consumers, and our Telecommunications Department removed the number from of the system at the same time.

Also interesting is the use of voluntary solutions, business and consumer education, and using economic assessments to give body to advocacy and prioritization decisions. Increasing the level of quantification assessment and analysis takes us to a sharper type of decision-making and a deeper level of problem analysis.

One way we are becoming more effective is by tackling harmful market developments from a broader perspective. As well as tracking down and penalizing illegal activities, we are looking at questions such as whether established unwanted market behavior is perhaps a symptom of a larger, underlying problem in the market. We are taking advantage of the fact that we have multi-disciplinary teams, composed of experts in regulation, in competition and in consumer protection. So we have integrated teams working on the most important cases.

Being a single authority allows us to pursue those consumer problems that are (one) the most harmful to economic interests of consumers, (two) that affect

consumer confidence the most, and (three) that have the most negative impact on the proper functioning of markets.

That's where we are at present with ACM. But how did we get here?

LANDSCAPE

Public and private

Well, seven years ago, prior to 2007 the consumer protection system in the Netherlands was very much like the system in Germany. In those days, the enforcement of consumer protection legislation had a predominantly private character. There was simply no public enforcement of private consumer protection law.

The key private organization representing our consumers was - and still is - the Consumentenbond - the Netherlands Consumer Association. The Consumentenbond:

- is 100% financed by its members and
- carries out project-based activities commissioned by government or trade organizations, like negotiations about the general terms and conditions in different industries and easy switching services for consumers in energy and healthcare.

In addition, there were also several private, sectoral consumer organizations, like in the car/ tourist industry (ANWB), the housing/real estate industry (Vereniging Eigen Huis), for elderly people (ANBO) and in health care. These organisations still exist, and some of them are partially financed by the government such as several patient organizations in the health care industry.

The system of alternative dispute resolution – to which I will refer to as the ADR-system - has existed since the '70s. At the moment there are over 50 ADR-committees, organized per economic sector covering 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 the committees, and, in principle, the advice is binding for both parties.

Finally the consumer could and can use the civil courts to uphold his rights.

Then on 1 January 2007, the Netherlands Consumer Authority was created. That marked a change in the Dutch consumer protection landscape because for the first time, there was public enforcement of private consumer law.

The reasons for setting up the Consumer Authority were two-fold; a national reason, and a European reason.

Firstly, there was a call at national level for a strengthening of enforcement. The political climate called for strong government to balance strong markets. Also a 2004 report from the Ministry of Economic Affairs showed on the basis of quite extensive market studies, that the then consumer protection system had multiple blind spots. Consumers were simply absorbing their losses rather than taking advantage of private remedies, and the power of consumers to discipline the market was seen as insufficient.

The second development, was at European level. 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.

These developments culminated in the creation of the Consumer Authority on 1 January 2007. The Dutch Consumentenbond, the private enforcement body was fully supportive of the creation of a public consumer-enforcement agency, seeing it as a useful and powerful ally in solving consumer problems.

Responsibilities and legal powers

Our main responsibilities and legal powers are twofold.

First is the enforcement of general consumer-protection laws, like the recent Consumers Rights Directive and the Unfair Commercial Practices Act. Almost every consumer protection law in the Netherlands is based on EU-legislation. In this context, we cover all economic sectors except the financial sector, which is the responsibility of the Netherlands Authority for Financial Markets (AFM). Enforcement of consumer protection laws serves the protection of consumers as well as maintaining a level playing field for businesses.

Second is the empowerment of consumers through information and practical tools. Our online consumer information portal, ConsuWijzer aims to *empower* consumers to solve their own problems with suppliers. At the same time consumers' signals and questions *generate valuable intelligence* for the enforcer about what the biggest market problems are. We really treat these two tasks of consumer protection – empowerment and enforcement - on an equal footing. The interaction with consumers for empowerment reasons offers the enforcer large amounts of information, which we turn into enforcement intelligence. Furthermore, having strong consumers should also be an objective of the business community. Enabling consumers to discern between genuine businesses and the less sincere ones, offers the honest businesses better opportunities.

One major feature of public enforcement is that it provides us with legal powers that facilitate detection and termination of behavior that cause collective infringements of consumer law. For example: the powers to impose fines, orders subject to penalty payments, 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. The power to fine is a crucial factor behind the successes of 85% of cases in which enforcement is done informally. The deterrent effect of a potential fine enhances the rate of spontaneous compliance.

Last but not least, the law allows us to publish all formal decisions concerning consumer protection and until now all decisions have been published. The main objectives behind publication are to act as a deterrent for market parties that do not comply with the laws, inform consumers and make them more aware of certain market situations.

An important feature of the Dutch consumer protection landscape is that the Dutch legislature honored the existing private system by taking as a principle that public enforcement will only interfere in consumer law violations if consumers and/or the markets themselves are unable to terminate such violations effectively. So the focus is on

- tracking down the most harmful collective consumer problems that are not solved by the private system and
- safeguarding the proper functioning of the private system in terms of checking self-regulatory schemes.
- dealing only with *collective* consumer interests. Individual consumer problems should be solved within the private system

Relationships

So far I have pointed out various aspects of our present and past landscape. Now I would like to turn to the important issue of the interactions between the authority and its stakeholders and consumers. In ACM's strategy this is referred to as 'bringing the outside in', and this aspect is crucial to the success of our institutional design.

In fact, our institutional law concerning the enforcement of consumer laws provides for multilateral meetings between the main institutions representing consumers and businesses.

We chair meetings twice a year, to which we invite, multiple consumer associations, employer organizations, and other national market authorities. Views are exchanged on topics like the ACM's chosen focus areas for the next

two years and the way we have carried out our duties in the previous period. The formalized multilateral contacts with our stakeholders provide us with valuable input and it contributes to the important basis of support for our activities in society. ACM acknowledges the added value of the multilateral 'Maatschappelijk Overleg' or 'Social Dialogue'.

We collaborate with our fellow authorities on the basis of cooperation protocols, with, for example, the Dutch central bank, the Netherlands Authority for Financial Markets, the Netherlands Food and Consumer Product Safety Authority, and the Dutch Healthcare Authority. In those protocols, we agree on the way we deal with overlapping responsibilities, exchange information – on a legal basis – co-operation during investigations, and the handing over of cases.

From detection to finding solutions to market and consumer problems, oversight is strongly influenced by the quality and intensity of our relationship with the rest of society. That is why we want to firmly embed external orientation in our organization and operations. We are doing so, for example, by creating detection teams in the oversight enforcement and regulation departments. These teams form the ACM's radar and are constantly on the lookout for the most important consumer and market problems. Also ConsuWijzer, our consumer information desk, plays a crucial role. It provides ACM with real-time information about the markets we oversee. In addition, we engage in a dialog with stakeholders by sitting down with them on a regular basis, discussing important and current topics. Our concept of 'looking from the outside in' is a guiding principle for our employees in all the areas we operate in.

Our international network covers: competition, consumer protection and regulation. Concerning consumer protection we participate, like Germany, in the European Consumer Protection and Cooperation Network (CPC) and the International Consumer Protection and Enforcement Network (ICPEN).

Also, as a multi-functional authority, we are in a position to encourage other international bodies, of which ACM is a member, to take an interest in consumer

protection and enforcement. There are other fora such as the International Competition Network, the OECD, BEREC, the international Telecommunications forum for Telecom regulators, the ACER and CEER that deal with Energy issues. We are in a prime position to set consumer issues on the agenda in all of those fora, in order to optimize enforcement across the regulatory board.

The last issue I want to address here is to spend some time on the advantages of our system. I will do this based on some personal observations. But before I get to that, I would like to stress that there is no one way to do this, much less a right way. As I said earlier, I am not here to advocate that every Consumer protection agency should rush off to merge with its counterparts in other sectors. The added value of multi-sectoral authorities is state-specific. In the Netherlands we already had energy regulation under the Competition Authority, but operating as a distinct entity. We already had a considerable degree of cooperation with the Consumer Authority at a facilities level. We were located in neighboring buildings. What is more important is that whatever form of authority you create, that you maximize the benefits and the possibility for increasing synergies in working more closely together.

The way a legal system, or more specifically an enforcement system, is successfully shaped depends on many factors. It probably depends more on factors like culture, psychology, historic background and public acceptance, than on scientifically proven success of a certain method. Nevertheless, I will offer you my thoughts.

Advantages

I strongly believe that our main principle to put consumer interests and welfare central in all our duties is the future. The merger on April 1st, 2013 gave a perfect opportunity to reconsider previous strategies and put consumer interests and welfare central in all our work. The combination of consumer protection, competition and regulation also offers opportunities to create a consistent line of

enforcement and regulation and gives an general overview about consumer interests. The advantage for consumers is to have a single information and contact point (via ConsuWijzer).

This principle applies to all of ACM's departments, from the execution of specific consumer-protection tasks to the application of competition rules (sector-specific or general ones). In its choice of making the interests of consumers central to its philosophy, ACM believes that consumers themselves generally know best what their interests are and how these can be best served. One of our core principles is the sovereignty of individual consumers. This idea dovetails with European and international views on consumers. If this sovereignty is jeopardized, consumer welfare may be affected, in particular vulnerable, consumer groups. ACM has been given power that enables us to prevent or address behavior that harms consumer welfare.

Another strong point of our system of consumer protection is that it acknowledges the strength of market parties to solve their own problems. It seems justified to conclude that private and public consumer protection can be mutually supportive. The private system is able to prevent and terminate detrimental consumer-law violations by engaging in self-regulation, Alternative Dispute Resolutions and civil litigation. The public body interferes (with fining powers) when consumers and/or markets themselves are unable to terminate collective consumer-law violations. The public body is also able to mobilize consumers by empowering them. And last but not least let me stress that honest businesses, also, benefit from strong public enforcement as it creates a level playing field, not distorted by non-law abiding competitors.

To conclude, my advice to you would be that you focus on creating a system that will tackle consumer problems, taking as a broad a perspective as possible. Ensure that whatever institution you create is able to identify serious and harmful market problems through co-operation with stakeholders and intelligence gathering. That may be through an online tool such as a consumer

information portal. It may be through cooperation protocols and information sharing platforms. This is of crucial importance to the creation of a strong system for consumer protection that is effective for the German government, its external stakeholders, and most of all, for German consumers.