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***Public Enforcement of Consumer Law on Top of a Private Foundation***

*International Association of Consumer Law Conference  
University of Amsterdam, Amsterdam, The Netherlands, 29 June  
2015*

**Ladies and gentlemen,**

We have a consumer information portal called ConsuWijzer. Let me share with you a real-life example of a consumer-rights question we received last year. This particular consumer had used a premium telephone service to find out what the future had in store for her. Unfortunately, the predictions she had received turned out to be incorrect, as she had been able to verify that in the meantime. She had paid the fortune-teller thousands of euros, and her question to us was: did she have the right to claim back her money?

Good morning everyone,

I would like to extend my warmest thanks to Marco Loos, and his team for organising this impressive conference.

Thank you for inviting the Netherlands Authority for Consumers and Markets to speak in the very first panel.

My name is Anita Vegter, and I am a member of the Board of ACM. I hold the Consumer portfolio and the Legal Affairs portfolio. I am also responsible for Corporate Services, including Human Resources and Finance.

**What are the benefits of a public market authority protecting consumers on top of the private foundation?** This is the main question of my contribution. First, I would like to paint a picture of the consumer protection landscape in the Netherlands. Then I will introduce ACM to you as a unique authority. Finally I will explain how ACM performs its role as public consumer authority.

### **1. The consumer protection landscape in the Netherlands**

The consumer protection system in the Netherlands is based on the principle that consumers know what their rights are. Well-informed consumers are confident about making a choice between the different offers at hand. Businesses compete with each other to gain the consumer's favour. They have to invest and innovate to stand out. This system contributes to consumer welfare.

If a consumer is not satisfied with the product or service, he can go back to the company where the product or service was bought. The company is supposed to handle the complaint of the consumer. If no solution is found acceptable for both consumer and trader, the consumer can ultimately file a lawsuit. However, we see in practice that individual consumers find this quite burdensome. Therefore it is very valuable to have the private foundation in place to support both consumers and traders.

### What is the private foundation?

The private foundation is a collective term for self-regulation, consumer organisations and complaint boards.

If trade organisations themselves take the responsibility to define, execute or enforce rules, we call that **self-regulation**. There are different instruments that are used for that purpose. You could think of informative means, such as certifications or quality marks. Parties could define rules in a code of conduct or a covenant. This could include alternative dispute resolution.

The next speaker, Bart Combée, represents a very important player within the private foundation, the Dutch Consumers' Association, *de Consumentenbond*. It is one of the biggest organisations that represents consumers and serves consumer interests.

Another important part of the private foundation is the Dutch Foundation for Consumer Complaints Boards. Consumers can formally complain about a trader with one of the complaints boards. There are more than 50 complaints boards for different sectors. These boards address individual consumer complaints.

During the parliamentary debate on the Consumer Protection Enforcement Act (“Whc”), the legislature explicitly took as a starting point that the Consumer Authority was only to act against infringements if the market was insufficiently capable of effectively ending the infringement itself. The market in this case was defined as forms of self-regulation, created by consumers and the trade and industry, such as the Consumer Complaints Boards.

### The Consumer Authority

Following this parliamentary debate, The Netherlands Consumer Authority was created in 2007: a public body that enforced consumer protection laws.

Why were there calls for a strengthening of enforcement? A 2004 report from the Ministry of Economic Affairs showed that the consumer protection system at that point had multiple blind spots. Consumers were simply taking their losses rather than taking advantage of private remedies. It was concluded in the report that the power of consumers to discipline the market was insufficient.

Another development took place at the European level in 2004. The negotiations about the establishment of the European Regulation on Consumer Protection Cooperation made clear that, in all Member States, some form of public consumer protection was going to be required by European law. At the time there was no general public enforcer of consumer protection laws in The Netherlands.

Both of these developments thus culminated in the creation of The Netherlands Consumer Authority on 1 January 2007 for cross-border cases as well as domestic cases. The Consumer Authority became part of ACM in 2013. ACM can publicly enforce consumer protection laws, and ACM can take actions against companies that do not play by the rules.

But ACM only takes action if consumer problems cannot be solved by the market itself and only in case of a so-called 'collective violation'. Under the Dutch Consumer Protection Enforcement Act ("Whc"), a collective violation is a violation of a statutory provision falling under this Act "which causes or may cause damage to collective consumer interests".

Obviously we find it important to be in touch with the parties of the private foundation. ACM has bilateral contacts and regularly speaks with parties of the private foundation in a semiannual national forum (we call it *Maatschappelijk Overleg* in Dutch).

ACM is statutorily obliged to organise this national forum in order to ensure that its actions are aligned with private initiatives to protect the consumer.

## **2. What is ACM?**

ACM was established in April 2013 through the merger of three authorities in the Netherlands: the Consumer Authority, the Independent Post and Telecoms Authority and the Competition Authority (Establishment Act of the Netherlands Authority for Consumers and Markets).

The tasks of ACM encompass:

- general competition oversight;
- sector-specific regulation of the energy, telecommunication, postal services and transport markets;
- and consumer protection.

ACM is a unique regulator in the sense that it is one of the very few authorities worldwide that houses all these activities in a single independent authority.

The legal objectives behind those activities are to ensure

- that markets function well;
- that market processes are orderly and transparent;
- and that consumers are treated with due care.

To that end, ACM keeps guard over, promotes and protects effective competition and a level playing field, and removes any impediment to these goals.

It is ACM's mission to create 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 consumers central to every action we take at ACM. Increasing consumer welfare is ACM's primary goal.

In its oversight style, ACM focuses on the impact, and instruments follow. Enforcement is one of ACM's core tasks. However, ACM does not want to enforce just for the sake of enforcement. The impact of our actions is central. ACM therefore looks at the broader context when carrying out its statutory tasks. For example, we explore the question whether an observed violation is an isolated incident or a symptom of a larger, underlying market problem. The objective is to solve market and consumer problems.

ACM subsequently selects the instrument, or a selection of instruments that offers the highest probability of producing a structural solution to the problem. Imposing sanctions is an important instrument, and ACM will not hesitate to use it in case of violations. In addition, ACM uses, amongst other instruments, norm-transmitting discussions, commitment decisions, informal opinions, monitoring, market scans and strategic communication. We seek to find customised solutions based on sound problem analyses. Being a multi-sector regulator, combined with competition and consumer protection, places a responsibility on ACM for finding synergies within the organisation itself, next to coordinating the actions between the different departments of ACM. ACM is ambitious, and wants to make effective use of the synergies between the different departments.

This is ACM in general. Now I would like to tell you more about ACM's approach as a public enforcer of private consumer rights.



### **3. How does ACM play its role as public enforcer of private consumer rights?**

ACM does not take its role as public consumer enforcer lightly. It is there on top of the private foundation. When the market itself does not solve consumer problems, and collective consumers interests are at stake, ACM takes action.

ACM has a 3-step approach when it comes to consumer protection. The first step is to inform consumers and to be informed by consumers. The second step is to make the rules clear to businesses. And the final step is to take enforcement actions against companies that do not play by the rules.

#### Step 1: informing consumers

In my introduction, I mentioned ConsuWijzer. Consumer education became a statutory task of ACM when the Streamlining Act entered into force on August 1, 2014. To ACM, it is crucial to have its own information desk to inform consumers. The key to the whole system is that consumers are well-informed, and are therefore confident to consume.

Conversely, consumers use ConsuWijzer to inform ACM. This enables ACM to know quickly about a new specific consumer problem.

ACM uses a creative approach to stop harmful behaviour by businesses towards consumers as swiftly as possible.

Sometimes, just a phone call is enough. According to the Consumer Protection Enforcement Act, ACM also has the power to issue a public warning to consumers against the practices of a specific company. ACM can issue a public warning if it suspects a violation of a consumer protection law falling under the Consumer Protection Enforcement Act provided it is reasonably necessary to inform consumers swiftly and effectively to prevent any further damage resulting from harmful behaviour of a company. ACM can even mention the name of this specific company in its public warning, but only if there is a real and direct risk for consumer harm and if a violation is reasonably suspected.

ACM runs awareness campaigns to inform consumers about a specific topic even better. In the recent past, ACM ran campaigns such as

- “*Consumers are the champions*”, to make consumers aware of the new consumer protection rules that came into force in June 2014 and
- “*If you snooze, you lose*”, to make consumers aware of the option of switching providers. ACM looked into consumers’ switching behaviour in energy and health insurances. It turned out that many consumers are satisfied with their current plans.

That is why they do not consider switching. However, by not switching, consumers may actually be worse off in the end. ACM therefore used this campaign to stimulate consumers to at least find out what plan meets their current needs.

### Step 2: clarify the rules to businesses

This brings me to the second step: clarify the rules to businesses. The number of signals from ConsuWijzer sometimes shows that there may be a specific sector that requires special attention. In such cases, ACM may take action by clarifying the rules to businesses.

We did that recently in the energy sector. ACM is not only responsible for consumer protection, but also for energy regulation. Consumer rights follow from generic consumer protection laws, but also from specific energy regulation. Energy companies found it confusing what information requirements they have to comply with. ACM therefore published a document 'Provision of information in the consumer energy market'. This explains exactly what information must be given to consumers, based on

- the Gas Act
- the Electricity Act
- the Directive concerning unfair business-to-consumer commercial practices (2005/29/EG)
- the Directive on consumer rights (2011/83/EU and 93/13/EEC)

- the Electronic Commerce Directive (2000/31/EC)

In terms of transparency companies are statutorily obliged to be open about what products they offer for what tariff. All offers must be easy-to-understand, and consumers must be able to compare these with other offers. Only then will they be able to choose the offer that best meets their needs. It is now completely clear to providers in the energy industry what information requirements they must comply with.

Compliance with the information requirements is enforced by ACM.

This approach contributes to well-functioning markets, to orderly and transparent market processes and to fair treatment of consumers.

### Step 3: ACM takes enforcement action against companies that still do not play by the rules

The final step of ACM's approach is to enforce. I would like to illustrate this by using the travel industry as an example.

When booking a travel, consumers have to be clearly informed about prices, based on the Dutch Unfair Commercial Practices Act (Wet OHP). This used not to be the case.

That is why the Consumer Authority, shortly before the merger, issued fines against an airline company that violated the rules. These measures generated a lot of publicity and were followed by the publication of several key principles for the travel industry by ACM in May 2013. Such as the price in the advertisement has actually to be the price at which the booking can be made, and all unavoidable costs are to be included.

After that publication, ACM approached numerous businesses, informing them that their prices were displayed incorrectly and demanding an adjustment of the prices on their websites. As a consequence, more of these businesses adjusted their practices.

In 2014, ACM took action against companies that had failed to adjust the prices on their websites in a timely manner.

ACM imposed fines on two travel organisations for displaying prices incorrectly on their websites. Both companies adjusted their websites.

With this step-by-step approach, ACM's actions contribute to a level playing field in the travel industry. Companies can compete fairly, and consumers can actually compare offers and make a well-informed decision.

## **ACM beyond the Netherlands**

EU policy strongly supports the development of the single market. Because of innovative developments such as digitalisation, our consumers buy products and services more and more internationally. Market problems and consumer harm do not stop at national borders. International co-operation is essential in order to be effective. ACM, like many of you present, actively participates in European Union bodies, such as the Consumer Protection Cooperation, but also in bodies for telecommunication and energy and the competition network. And at a global level, ACM works together with other regulators in the International Consumer Protection and Enforcement Network (ICPEN).

Within the EU Consumer Protection Cooperation, consumer authorities work closely together in dealing with consumer problems that occur widely in Europe. This cooperation is based on Regulation (EC)2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection law. Our experiences so far have been positive. The CPC network helps in solving cross-border and/or EU-wide collective problems. However we do see room for improvement in all the fields where ACM is active.

These are the common threads we see within the EU:

- A. For the same violation, national legal systems have different systems of enforcement. There are differences when it comes to investigative powers and to sanctions. As a result, the effects of enforcement actions for similar violations may vary among EU Member States;
- B. EU rules are not always applied in a uniform way in the Member States;
- C. There is quite a big difference in the division of tasks between Member States and the European Commission in the various fields falling under ACM's oversight. In some fields, such as competition and telecommunication, the Commission has substantive tasks to ensure harmonisation. However, when it comes to consumer protection (CPC Regulation), the role of the Commission is limited to coordination and support. This places a heavy burden on the Member States. A greater role of the Commission would facilitate the efficiency and the effectiveness of the CPC network.

EU-wide problems require an EU-wide approach. This is exactly what should be the drive in the evaluation process which is currently going on regarding Regulation (EC)2006/2004.

## **Conclusion**

In conclusion, I would like to answer the main question I raised at the beginning: What are the benefits of a public market authority protecting consumers on top of the private foundation?

The benefits of the Dutch system are:

- Consumers and companies take their responsibilities, supported by the private foundation. Only if there is a collective violation which cannot be solved by the private foundation, ACM as the public authority is there to act swiftly and firmly;
- ACM targets problems from a broader perspective: the effect is central, the instruments follow. This way, ACM's actions have the most impact.

## **Final word**

Just like the fortune-teller in my introductory example, ACM, too, cannot predict the future or prevent all consumer problems. Nor are we there to solve individual problems of consumers. In a healthy market, we rely on consumers and businesses to take their responsibilities, supported by the private foundation.

However, we do listen to consumers and businesses, and if necessary, we are there to respond quickly and firmly.