Enforcing the Unfair Commercial Practices Directive: the enforcement model of the Netherlands
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UNFAIR COMMERCIAL PRACTICES

The long road to harmonized law enforcement

edited by
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future usage and exposure to various high penalties, while their sophisticated counterparts enjoy the attractive rates without suffering longer-term penalties. The latter therefore benefit from the presence of myopic consumers, without whom issuers would not have the incentive or the resources to offer exceedingly low rates upfront. Issuers have little reason to educate myopic consumers, who will become less profitable once sophisticated. Yet any consumer law intervention to help myopic consumers – say, a prohibition of teaser rates – would inevitably also hurt those sophisticated consumers who benefit from the prohibited practice. And while the harm to these consumers may be justified, it diminishes the attractiveness of using consumer law to address this type of exploitation of consumer bounded rationality.

In other circumstances, the prohibition of practices that mislead some consumers may impose harm on their more rational peers even when the latter do not benefit in any way from the bounded rationality of the former. For instance, when consumer law requires sellers to offer free returns of their products within a certain period, sellers demand higher prices to cover the costs associated with the fraction of returned products. Therefore, the free return requirement benefits consumers who misinterpreted their need for the product while harming those among their counterparts who make more rational predictions of their future needs.

More generally, therefore, in the shadow of behavioral heterogeneity, consumer law faces difficult tradeoffs. Beyond the need to determine, first, which practices generate a truly material distortion of consumer transactional behavior and, second, who is the average consumer, the benefits of many consumer law interventions for less rational consumers may need to be weighed against the harm they impose on more rational consumers. All in all, while consumer law cannot ignore the behavioral processes that shape real consumer behavior, it also must take great care when drawing on behavioral insights to interpret and develop the law in this important area.

**ENFORCING THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE**

*The enforcement model of the Netherlands*

Katalin J. Cseres

**Introduction**

The EU Directive on Unfair Commercial Practices (UCPD) has brought radical changes in the Member States’ consumer law regimes. Accordingly, it has been extensively discussed with regard to substantive law issues such as the fairness notion, the substantive test of material distortion as well as the concept of the average consumer. However, its impact on the Member States’ traditional enforcement models of consumer law is equally crucial.

The adoption of the UCPD has raised fundamental questions about the enforcement of EU law. First, the adoption of the UCPD has indicated that cross-border enforcement of consumer law had to be improved in the EU. In fact, it has prepared the ground for Regulation 2006/2004, which obliged Member States to set up administrative authorities to enforce consumer laws cross-border.

This paper analyzes the local implementation of the UCPD by mapping the Member States’ enforcement models with regard to sanctions, remedies and the administrative or judicial bodies who enforce the respective unfair trading rules. It examines whether effective and uniform enforcement of EU law can be guaranteed in a multi-level enforcement system composed of diverging national remedies, sanctions and enforcement institutions. This is a challenge in the multi-level governance system of EU law enforcement, where similar substantive rules have to be implemented through different procedures, remedies and different, sometimes multiple, enforcement bodies. How do these national enforcement systems influence the application of EU rules? And more

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importantly, is the Europeanization of national unfair commercial practices laws and enforcement effective and legitimate?

This paper presents a case-study on the implementation of EU Directive on unfair commercial practices in Dutch law. It examines how Europeanization of unfair commercial practices has changed the traditional Dutch model of consumer law enforcement and institutional design. The paper finds that the implementation of the UCPD together with the implementation of Regulation 2004/2006 made the Netherlands break with its legacies of traditional consumer law enforcement with regard to both remedies and enforcement institutions.

This paper is organized as follows: First, it maps the enforcement of consumer laws in the various EU Member States. The second section discusses the relevance of the UCPD and the third section analyzes the provisions of the EU Directive on Unfair Commercial Practices with regard to law enforcement. While the Directive was aimed at maximum harmonization, its provisions on law enforcement leave a wide margin of discretion to the Member States on issues of sanctions, remedies and the allocation of enforcement powers to institutions. The fourth section analyzes the Dutch legislative and institutional framework as it has been changed in the course of implementing the UCPD. Finally, the paper closes with conclusions.

1. The enforcement of EU consumer law in the Member States

Across the EU Member States there is a wide diversity of models for enforcing consumer laws; some Member States have predominantly private enforcement, others rely mostly on public bodies. In accordance with the principles of national procedural and institutional autonomy, the Member States are free to entrust public agencies or private organizations with the enforcement of consumer laws as well as to decide on the internal organization, regulatory competences, and powers of public agencies. However, Regulation 2006/2004 on trans-border cooperation between consumer authorities indirectly intervened with the national enforcement models by imposing conditions under which national authorities responsible for enforcing consumer rules must cooperate with each other. The Regulation in fact obliged Member States to designate administrative authorities to enforce consumer laws.1 Similarly, in the course

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1 See Article 3a on the definition of a competent authority: “competent authority” means any public authority established either at national, regional or local level with specific responsibilities to enforce the laws that protect consumers’ interests.” See also Antonia

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3 See Article 3a on the definition of a competent authority: “competent authority” means any public authority established either at national, regional or local level with specific responsibilities to enforce the laws that protect consumers’ interests.” See also Antonia

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Katalin J. Cseres

Enforcing the Unfair Commercial Practices Directive of the liberalization of numerous network industries the European Commission gradually extended the EU principles of effective, dissuasive and proportionate sanctions as formulated in the European courts' case-law to a broader set of obligations and criteria for the Member States' national supervision of EU legislation. This process of Europeanization of supervision1 obliged Member States to establish independent national regulatory agencies with core responsibilities for monitoring markets and safeguarding consumers' interests2 through ensuring effective law enforcement and complaints processes.4 Accordingly, many Member States have strengthened the role of regulatory agencies and have empowered them with a growing number and diversity of regulatory competences. Liberalization was, thus, characterized by a noticeable shift from judicial enforcement to more administrative enforcement.2

However, the mushrooming of regulatory agencies is now being replaced by a public policy of reducing their numbers in order to address the problem of control over regulatory agencies. This also signals a new legal and political framework for regulatory agencies which builds on accountability as its central tenet instead of the initial concept of independence that justified the creation of regulatory agencies.3 In the following the implementation of the UCPD in the EU Member States will be analysed by focusing on questions of enforcement.

Even though problems of unfair trade practices formed one of the driving factors behind the establishment of consumer authorities in the 1970s, it was the Directive on Unfair Commercial Practices in 2005 that signalled the need to strengthen trans-border enforcement in consumer law. It also prepared the ground for Regulation 2006/2004, which obliged Member States to set up administrative authorities to enforce consumer laws cross-border.

The aim of the UCPD was to achieve a high level of convergence by fully harmonizing national laws of unfair commercial practices in business-to-consumer relations and thus to give Member States little room for variations of implementation. The Directive is a legislation of maximum harmonization and accordingly, the Member States cannot implement stricter rules and raise the level of protection for consumers. The Directive provides comprehensive rules on unfair trading practices and strives hard to provide precise guidance to national enforcement agencies and courts about the scope of its provisions as well as general rules and standards to determine its scope of application and formulate precise requirements to national legislators and courts.

In 2010 the EU Parliament prepared a paper in order to analyse the effects of UCPD-implementation in the Member States. The most important problems identified were legal uncertainty as to the general clauses introduced by UCPD, e.g. the concept of unfairness, problems concerning the burden of proof,

Enforcing the Unfair Commercial Practices Directive especially in connection with certain provisions of the black list, the obligation for full harmonisation or the compliance of national legal frameworks with the provisions of UCPD, the effects of UCPD on B2B relations and contract law, and the problems arising from the transposition of UCPD into different national enforcement regimes. In March 2013 the EU Commission has published its first report on the functioning of the UCPD. The Report established that the UCPD made it possible to address a broad range of unfair business practices, such as providing untruthful information to consumers or using aggressive marketing techniques to influence their choices. The legal framework of the UCPD proved effective to assess the fairness of the new on-line practices that are developing in parallel with the evolution of advertising sales techniques.

However, the Commission’s investigation has revealed significant consumer detriment and lost opportunities for consumers in sectors such as travel and transport, digital and on-line, financial services and immovable property. Accordingly, enforcement was advised to be improved both in a national context but particularly at cross-border level. These reports emphasized the relevance of local enforcement strategies, which will be analyzed in the next section.

3. Enforcement of the UCPD

3.1. Sanctions and remedies

With regard to enforcement Article 11 of the UCPD leaves much discretion to the Member States in accordance with the principle of national procedural autonomy. Furthermore, Article 13 UCPD leaves the Member States free to decide what type of penalties should be applied, as long as these are ‘effective,
proportionate and dissuasive'. Similarly, Article 11 UCPD requires that Member States ensure adequate and effective means to combat unfair commercial practices. These provisions, however, do not specify the exact character of enforcement tools. Three main enforcement systems can be identified in the Member States. First, the administrative enforcement carried out by public authorities, second, the judicial enforcement and finally systems combining both elements. Member States may choose from civil, administrative and criminal remedies. For example, the Polish Unfair Commercial Practices Act introduced both civil and criminal remedies. Some jurisdictions combine elements of private and public enforcement. Sanctions vary between injunction orders, damages, administrative fines and criminal sanctions and many Member States combine all these sanctions in their enforcement system.10

With regard to standing, Member States can choose to give individual consumers (and/or competitors) a right to redress but are not bound to do so. The Directive does not oblige Member States to grant remedies to individual consumers. Article 11 of the Directive merely provides that Remedies should be granted either to persons or national organizations regarded under national law as having interest in combating unfair commercial practices. Granting remedies directly to consumers was, however, a novelty in Polish unfair competition law and has recently been proposed in the United Kingdom.11

While individual remedies exist in most of the Member States, in some Member States these remedies do not extend beyond injunctions and in others it consists of making a complaint to the competent authority which will then take up the case. A few Member States do not grant individual consumers individual remedies, not even in the form of tort law.12 However, consumers do have individual remedies on the basis of EU, national contract, or tort law.13

Enforcing the Unfair Commercial Practices Directive

The possibility of collective consumer actions have been recently introduced in some Member States like Denmark, Sweden, Spain and Portugal. While in these Member States collective actions can be brought by groups of individual consumers, in other Member States specific types of collective action have been introduced in order to strengthen the enforcement of unfair commercial practices law in a way that extends beyond the use of injunctions.14 Furthermore, a breach of unfair commercial practices law may qualify as a criminal offence that can be enforced either by public authorities or by the public prosecutor and the criminal courts. This is the case in Latvia, France, the UK, the Nordic countries and Belgium. In other Member States, only the most severe unfair commercial practices can be sanctioned by means of criminal law, in particular when they amount to fraud in the terms of criminal law.15

Finally, the role of alternative dispute resolution varies significantly across the Member States. While ADR plays a central role in the enforcement model of many countries such as the United Kingdom, the Nordic countries, the Netherlands and Spain, its role is more limited in other countries. Moreover, in a number of Member States, specific ADR schemes have been set up that address financial services.16 Some Member States have an even more specific

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10 See Report op. cit. 54.
12 See the discussion in the UK on individual right of action: The Law Commission and The Scottish Law Commission (LAW COM No 332) (SCOT LAW COM No 226) Consumer redress for misleading and aggressive practices, March 2012.
14 For example misleading information may lead to the non-conformity of goods with the contract on the basis of Article 2(2)(d) of the Consumer Sales and Guarantees Directive 1999/44/EC. Misleading actions and omissions may also be regarded, under national law, as a breach of a pre-contractual relationship (nulla in contrahendo) or give the right to avoid the contract, if the respective preconditions are met. CIVIC CONSULTING: Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU. Final report, 2011. 34.
15 The Finnish consumer ombudsman can bring a class action representing individual consumers, which extends to damage claims under unfair commercial practices law. In France, consumer associations can claim damages for damage to the collective interests of consumers. Germany has introduced a "skimming-off" procedure that allows consumer organisations to claim the unlawful profit that a trader has made by using unfair commercial practices; although, the funds recovered go to the public purse and not to the consumer organisations.
17 For example, in the UK the Financial Ombudsman Service, in France the Autorité des Marchés Financiers offers an ombudsman service and in Germany the Banking Ombudsman and the Insurance Ombudsman have gained some importance.
scope, such as the Portuguese banks, which have established a self-regulatory scheme regarding the switching of bank accounts.23

The variety of national enforcement tools is striking in light of the far-reaching harmonization goal of the Directive. Moreover, the broader institutional framework comprising of locally developed enforcement strategies may further differentiate the Member States' enforcement models.

3.2. Institutional bodies enforcing the UCPD

While the Commission has been closely monitoring the Member States' legislations, procedures and remedies and maintains a database on recent cases, Member States' choices with regard to institutional arrangements between enforcement bodies are less scrutinized. This is surprising as the Member States' institutional design of enforcement agencies demonstrate a strikingly diverse picture on the allocation of regulatory powers. Table 1, below illustrates the allocation of regulatory powers in the Member States.

<table>
<thead>
<tr>
<th>UCPD</th>
<th>Administrative enforcement body</th>
</tr>
</thead>
<tbody>
<tr>
<td>Denmark</td>
<td>Consumer Ombudsman</td>
</tr>
<tr>
<td>Finland</td>
<td>Regional Administrative Offices</td>
</tr>
<tr>
<td>Sweden</td>
<td>The Swedish Consumer Agency and the Consumer Ombudsman</td>
</tr>
<tr>
<td>Ireland</td>
<td>National Consumer Agency (NCA)</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Office of Fair Trading (OFT), local weights and measures authorities in Great Britain (Authority)</td>
</tr>
<tr>
<td>Belgium</td>
<td>Directorate General Control and Mediation (ADCB)</td>
</tr>
<tr>
<td>Germany</td>
<td>Twofold system: The Federal Office of Consumer Protection and Food Safety (HVLI) and regional Chambers of Trade and Commerce</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>Authority for Consumer s and Markets</td>
</tr>
</tbody>
</table>

24 The OFT will be abolished, and the United Kingdom will merge its competition and national enforcement functions with the also abolished Competition Commission to form a new Competition and Markets Authority (CMA).

Luxembourg: “Ministry responsible for consumer protection”, i.e. currently the Ministry of the Economics.
France: Departmental protection for population protection (DDPP).
Italy: Italian Antitrust Authority - General Division for user's and consumer's rights (AGCM-GDPC).
Malta: Director of Consumer Affairs.
Portugal: ASAE, Food and Economic Safety Authority (ASAE), and the Regulatory Entity.
Spain: Local Consumer Information Offices (OMIC).
Greece: Secretariat General for Consumers of the Ministry of Economy, Competitiveness and Maritime Affairs.
Cyprus: Consumer Protection Service of the Ministry of Commerce, Industry and Tourism, and any officer of that Service authorized in writing by the Director to act on its behalf.
Austria: Regional Administrative Authority.
Bulgaria: Consumers Protection Commission with the Ministry of the Economy, Energy and Tourism.
Croatia: Consumer Protection Department, Ministry of Economy, Labour and Entrepreneurship.
Czech Republic: Czech Trade Inspection Authority (CTIA).
Estonia: Consumer Protection Board.
Hungary: Hungarian Authority for Consumer Protection, Hungarian Competition Authority (GVH), Hungarian Financial Supervisory Authority (FSA).
Latvia: Health Inspectorate (human medicinal products), State Food and Veterinary Service (veterinary medicinal products), Consumer Rights Protection Centre (for all other services and products).
Lithuania: State Consumer Protection Authority, Competition Council of the Republic of Lithuania.
Romania: National Authority for Consumer Protection.
Slovakia: Supervisory Bodies: either special bodies to whom a special field of consumer protection is assigned or the Slovak Commercial Inspectorate ("SCI")
Slovenia: Market Inspectorate, a body within the Ministry of Economy.

25 In Luxembourg, administrative authorities cannot impose fines or order injunctions.
26 They are under the authority of each department's Prefect ("Préfet", the State representative in each county "département"). There is also a regional directorate which implements the missions that require supra-departmental actions. However, the regional directorates have no direct enforcement authority.
27 (e.g. the Slovak Postal Regulation Office supervises the protection of consumers in postal services).
28 The SCI is a budgetary organisation of the Slovak Ministry of Economy. It is responsible for controlling the sale of products and provision of services to the consumers and handles the complaints of the consumers.
The legal regime of the UCPD builds on enforcement through administrative authorities and courts. However, the allocation of the enforcement powers to public authorities is complex because many Member States have maintained regulatory trading laws that directly or indirectly relate to unfair commercial practices in the areas of financial services and immovable property. These trading laws are also enforced by public authorities by means of public law or criminal law. Especially in the area of financial services Member States have established special authorities. Administrative models vary significantly between Member States concerning the supervision of financial markets, the activity of banks and insurance companies. There are Member States like the Netherlands, where the enforcement of unfair commercial practices law is divided between a special financial markets supervisory authority being responsible for the enforcement of the prohibition of unfair commercial practices in that area of financial services and a consumer authority (now merged into the Authority for Consumers and Markets, ACM) is competent in all other areas. In other Member States, there are overlapping responsibilities that have created the risk of either duplicated activities or redundancy where both enforcement bodies rely on the other to take action.

In this aspect the UCPD follows the approach of EU consumer law in earlier directives, and it has allowed the Member States to establish or maintain their own specific enforcement systems. Most Member States have entrusted public authorities with the enforcement of the national implementation of the UCPD, such as the Nordic countries, the UK and Ireland and most of the Central and Eastern European Member States. However, in some Member States, public authorities and consumer organisations operate alongside each other; the consumer organisations obviously are only able to bring law-suits in court, while the public authority can also issue desist orders and fines. Bulgaria, Cyprus, Romania, and the Netherlands are examples here.30

The Commission published a guidance31 in 2009 to ease the problems of interpreting the provisions of UCPD. However, the guidance did not touch upon problems that the enforcement agencies face. For example, BEUC reported that


several public enforcement agencies and private organizations claimed a lack of resources and consequently an inability to monitor all relevant commercial practices and to ensure an effective enforcement of the Directive. This has led to a limited number of cases being brought and/or a focus on the cases that are most likely to succeed. This includes cases that are normally clear cut, rather than those having greatest precedent value and/or cases that are likely to have the greatest impact on the market and trader behaviour as a whole.

The next section discusses how the UCPD was implemented in Dutch law and it will analyze how Dutch legislation and institutional setting changed and how these changes influenced the interpretation and eventual enforcement of the UCPD in the Netherlands.

4. The enforcement of the UCPD in the Netherlands: institutional changes and enforcement challenges

The Dutch Unfair Commercial Practices Act (Wet oneerlijke handelspraktijken) came into force in 2008. The Act implemented the UCPD by amending the 1992 Dutch Civil Code (Burgerlijk Wetboek) and the Consumer Protection Enforcement Act of 2007 (Wet Handhaving Consumentenbescherming). The UCPD has been implemented through general private law and administrative law and not through sectoral regulations. In the Netherlands consumer law traditionally was an issue of private law enforcement and the emergence of administrative enforcement of consumer law is a clear example of Europeanization. The Netherlands did not have a tradition of either regulating, legislating or even criminalizing commercial practices. This is why the implementation of the UCPD did not result in a significant change of the legal system of commercial practices. In fact, the former legislation on marketing was revoked in the course of deregulation in 1980s-90s, the introduction in 1992 of the New Dutch Civil Code accommodated the development of comprehensive consumer protection standards in civil law.32 However, it did considerably change the enforcement model the Netherlands had maintained so far.

Before the implementation of the UCPD, neither an extensive general law on unfair commercial practices nor specific rules for financial services existed. Unfair commercial practices in Dutch consumer law had been governed by a
tradition of self-regulation through negotiations involving the government, who provides the framework for negotiating informal Codes of Conduct. This form of self-regulation entails a dialogue between business and consumer organizations that gives rise to bipartisan general terms and conditions (GTC). The Dutch government has set up a coordination group, the Dutch Social and Economic Council, which provides for procedural rules and expertise during negotiating. However, the government is itself not a party to the agreement.

4.1. Private enforcement

Following previous legislative techniques with regard to implementation of the EU Directives on Misleading and Comparative Advertising in the Dutch Civil Code, as wrongful extra contractual acts (tortious liability), the Dutch legislator also implemented the UCPD in the Civil Code. The legal framework for all this is based on the insertion of the substantive rules on unfair commercial practices in section 6.3.3A of Book 6 (on obligations) of the Civil Code, the core Article is 6:193b (1). Accordingly, unfair commercial practices were qualified as private law torts rather than breaches of public law. The enforcement of consumer law in the Netherlands used to be based on private law remedies in case of violating the law. Dutch consumer law enforcement relied on private litigation, self-regulatory and ADR schemes, and collective and representative action by private associations and foundations. Private individuals may seek prohibitory and mandatory injunctions and pursue claims for damages. Representative associations and foundations may also seek prohibitory and mandatory injunctions in the course of collective action proceedings on the basis of 3:305a Dutch Civil Code.33

4.2. Public enforcement

As far as public law enforcement of the Unfair Commercial Practices Act 2008 is concerned, either the Consumer Authority (now ACM) or the Netherlands Authority for the Financial Markets (Autoriteit Financiële Markten, AFM) is the competent authority.

33 Ibid. 7.2.1.1.

In 2007 the Dutch Consumer Authority was established with the task of promoting fair trade between businesses and consumers focusing on the economic interests of consumers. One of the reasons for the new authority was the implementation of EC Regulation 2006/2004 on consumer protection cooperation. The Dutch Consumer Authority (Consumentenautoriteit) was established by the Consumer Protection Enforcement Act of 2007 as an agency under the Ministry of Economic Affairs, Agriculture. Since 2007 it developed a comprehensive public law framework for the enforcement of consumer law. The enforcement of unfair commercial practices has been one of Consumer Authority’s core activities and priorities throughout the last years. In the new ACM the consumer is claimed to play a central role and accordingly, unfair trading practices is among its key areas for enforcement.

The public law remedies for breaching UCPD are laid down in Article 8.8 of the Consumer Protection Enforcement Act 2007. Violating the provisions is an administrative offence. The Act lists various available sanctions. The competent authority may, subject to judicial review, impose a fine of maximum 450,000 Euro per committed offense, may issue a stopping order, a compliance order (an administrative order holding a positive mandatory duty to comply, issued either after commission of the offense or, by way of anticipatory remedy, where the offense is imminent), and it may publish its order or a voluntary compliance by the trader.24

Since the implementation of the UCPD in the Netherlands there has been a notable shift to public law enforcement. The Netherlands thus shifted enforcement powers from private agents to administrative authorities due to the requirements of Regulation 2006/2004 on trans-border consumer law enforcement.

As a result of the joint requirements of the UCPD and Regulation 2004/2006 the Netherlands has shifted from a dominantly private enforcement model to a public enforcement model. This shift was clear example of the external influence of EU legislation.

4.3. Interplay between private and public enforcement

The Unfair Commercial Practices Act 2008 thus rendered unfair commercial practices into both wrongful acts in private law and administrative offenses in
public law. The interplay or even an optimal combination between private and public enforcement is not an either-or option but the most effective allocation of enforcement depending on economic resources, legal tools, expertise, and incentives. Distribution of responsibilities between private and public actors depends on regulatory policy comprising market-conforming, market complementary or market correcting tools.

Though the complementary self-regulation in the form of bilateral sets of GTC\(^5\) has increased over the years, this development cannot be directly be linked to the enforcement of the UCPD.\(^6\) Moreover, some of the self-regulatory codes have been replaced by public law regulation while others have been embodied in the regulatory framework. The result has been an increasing overlapping and cross-referencing between private law, administrative law regulation and self-regulation.

The Dutch public enforcement bodies have clearly stated that decisions by private enforcers, so codes of conduct are in no way determinative as to the fairness of a commercial practice.\(^7\)

4.4. Institutional changes in the public enforcement

In 2011 the Dutch Minister of Economic Affairs decided to merge the Netherlands Competition Authority (NMa) with the Dutch Consumer Authority (CA) and the Netherlands Independent Post and Telecommunications Authority (OPTA) into a new administrative authority called the Netherlands Authority for Consumers and Markets (ACM).\(^8\) The Dutch Ministry argued that this institutional change will increase the efficiency and effectiveness of competition oversight and market regulation, as a consolidated authority is able to anticipate market developments in a flexible and integrated manner, and make better use of its consolidated knowledge and expertise. Another anticipated benefit of the merger is cost savings.\(^9\)

This is a remarkable development in the light of the fact that in 2007 when the Dutch Consumer Authority was established, the Dutch government opted for a separate new agency. The Dutch government argued that even though the Netherlands Competition Authority (NMa) was a general supervisory authority, it was unfit to enforce consumer protection laws as the NMa pursues a different perspective, namely to maintain well-functioning markets which makes workable competition possible and which guarantees an optimal allocation of resources.\(^10\)

Still, the compound organizational model of the ACM might prove more effective in overseeing markets against unfair commercial practices than separate agencies. This institutional arrangement may demonstrate better institutional performance norms such as expertise, administrative efficiency but also in terms of independence and accountability. It has been argued that the consolidated authority is capable of anticipating market developments in a flexible and integrated manner, and making better use of its consolidated knowledge and expertise.

In many sectors a growing number of market wide problems emerged where complex market failures are present and taking a compound form of, for example, abuse of a dominant position and unfair trade practices. Regulatory agencies have to investigate cases where a mix of complex issues arise, such as imperfect information-based market power, which may harm consumers by

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\(^5\) The bilateral GTC steer business' commercial conduct and describe many commercial practices, public enforcers consider them as codes of conduct. They lack a number of commitments that characterize codes of conduct such as standards of service and advertising guidelines. The Consumer Authority (now the ACM) did not explicitly assert how the code itself relates to the legal standard of professional diligence and the notion of fairness in the Directive.


\(^7\) CPI Reuterdam 19 April 2012, LJN BW3358, at § 23.3; Permission op. cit. 23.

\(^8\) Caledonado (case 510, 17 June 2010) and Smart Media Services (case 220, 26 January 2009) were fined for breaching the SMS-Code of Conduct. Garant-od-Matic (a mail-order firm) got collared for breaching the Prepayment Lottery Code (case 544, 21 September 2010). Greenhouse (case 661, 27 May 2011) and the Nederlands Energie Maatschappij (case 527, 6 September 2010) were fined for not complying with the Consumer and Energy Supplier Code.

\(^9\) The consolidation of these three existing authorities will be realized through two separate bills: the 'bill on ACM Establishment Act was submitted to the Dutch Parliament and the

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Second Chamber has accepted it by 2 October, the First Chamber has finally accepted it in February 2013. The substantive bill planned to be passed before 2014.


\(^{10}\) The ACM's three departments which focus on consumers, regulation and competition will be complemented by a central legal department, an office of the chief economist, and the corporate affairs department which will be responsible for (international strategy and communication and support staff. The new authority will be run by a collegial board, consisting of three members. It will focus on three main themes: consumer protection, industry-specific regulation, and competition oversight. With a collegial board, the coherence between these three themes will be safeguarded. The substantive bill will amend legislation, simplify procedure, and streamline powers.

imposing excessive (unfair) prices or other unfair trading conditions and thus distort consumers' otherwise welfare maximizing choice. This is especially so in markets of non-homogeneous, complex products such as financial services, where thus consumer behaviour can often create significant barriers to entry. Sellers may exploit consumers' lack of knowledge about their rights or their inability to understand standard contract terms, complex goods, to conduct direct comparisons and to monitor service delivery. The potential role of bundling as a strategic response to consumers' imperfect rationality has already been recognized in two important articles by Thaler and Craswell and more recently, Bar-Gill studied firms' bundling practices as a strategic response to consumer misperception.42

Combating these kind of practices requires considerable resources, expertise and ability to bear financial risk as it might involve large multinational companies violating both consumer laws and competition law through abuse of a dominant position.43 The complex market failures necessitated a more integrated approach merging both legal and economic knowledge from competition law and consumer protection. It brought together competition law and consumer protection experts and administrative authorities in order to initiate more coordination.44

Sharing staff's expertise in consumer law and other regulatory areas (for example, competition law and sector regulation) can also improve the agency's effectiveness in dealing with complex regulatory issues as mentioned above. For


43 In contrast to the bundling and tying in the competition law literature - strategies used by a seller with market power in market A trying to leverage its market power into market B - bundling in response to consumer misperception may occur in intensely competitive markets. His analysis demonstrates that such competitive bundling can be either welfare enhancing or welfare reducing. When bundling exacerbates the adverse effects of consumer misperception, regulation designed to discourage bundling may be desirable. Bar-Gill suggests several "unbundling policies" that can protect consumers and increase welfare in markets where bundling is undesirable. Oren Bar-Gill: Bundling and Consumer Misperception. University of Chicago Law Review, 2006.; NYU, Law and Economics Research Paper No. 06-02. Available at SSRN: http://ssrn.com/abstract=873044.

44 OFFICE OF FAIR TRADING: Empowering and Protecting Consumers: Consultation on institutional changes for the provision of consumer information, advice, education, advocacy and enforcement. OFF Report, September 2011. OFF 1507.

45 OFFICE OF FAIR TRADING: Joining up competition and consumer policy: The OFT's approach to building an integrated agency. December 2009. 10.

5. Conclusions

Unfair business practices have been one of the key priority areas of the Dutch Consumer Authority (now the ACM) since 2008, when the legislation entered into force. Telemarketing and unfair online practices are still leading areas where the agency's action is very much needed.45 The enforcement of unfair business practices in the Netherlands has gone through a radical change in the last five years. The traditionally private enforcement based model of consumer law enforcement has been transformed into a public enforcement regime with the enforcement of unfair business practices as its core activity.


47 Civic Consulting, Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU, Final report, Country Reports, The Netherlands 2011, 7.2.11. However, it did use the UCP rules for combating unfair commercial practices aimed at encouraging consumers to invest large sums in otherwise unregulated investment firms and funds. In its decisions, the ACM has ordered the disclosure of vital information in annual reports of investment firms for the benefit of these consumers—not merely at the start of the contractual relationship but also during the course of the execution.

The very recent merger with the Netherlands Competition Authority and the Netherlands Telecommunications Authority might even further strengthen this public enforcement model and prove effective in particular in the area of unfair commercial practices. This is because these kinds of practices often present complex market failures where not only consumer law, but sector regulatory rules or even competition law tools have to be applied.

The Dutch enforcement that emerged as a result of the UCPD is a clear example of how EU law enters and radically changes endogenously developed national law and enforcement models. This remarkable Europeanization process raises important questions with regard to the effectiveness and legitimacy of such externally imposed legal rules on domestic legal systems that internally developed interacting with and adapting to the domestic economic, political and social system. At the same time, the Dutch implementation also proves that even in case of maximum harmonization, the EU principles of procedural and institutional autonomy provide the framework for Member States to develop their own local enforcement strategies taking account of the local economic, social and political needs. Ultimately, this case-study shows that looking at enforcement provides a deeper understanding of local enforcement strategies and it offers new insights for future Europeanization strategies.