CHAPTER 1

Introduction

Willem van Boom and Marco Loos[1]

On Friday 15 September, the Symposium 'Collective Consumer Interests And How They Are Served Best in Europe' was held in the building of the *Koninklijke Nederlandse Academie van Wetenschappen* in Amsterdam, co-hosted by the editors of this book. This symposium coincided with the onset of the institution of a Dutch Consumer Authority, which was scheduled to officially come into practice on 1 January 2007. In the Netherlands, such a 'consumer watch dog' is new. However, in several European countries consumer authorities or other regulatory bodies have long since been established. The symposium was meant, first of all, to hear about and learn from the experience of these foreign consumer authorities and regulatory bodies. However, and moreover, the symposium also served a more profound goal.

Since the 1975 Consumer Policy Programme, consumer law in the member states of the European Union has developed especially within the framework of the European Union. The vast majority of substantive consumer law in the member states of the European Union nowadays is of European origin, varying from legislation on consumer health and safety, including the regulation of foodstuffs, toys etc., doorstep selling, package travel and timeshare, insurance law, product liability, unfair contract terms, unfair commercial practices, distance selling of goods and services, distance marketing of financial services and consumer sales and consumer guarantees. As the key areas of substantive consumer protection have now to some extent been harmonised, the interest of both the consumer rights movement as well as the European Commission seems to be slowly shifting. In the 1970s and 1980s, the consumer rights movement in the European countries primarily focussed on the acquisition of consumer rights, i.e. on improvement of the position of the consumer by way of changes in the substantive law.

In the eyes of the European Commission, consumer law was and is instrumental to the establishment and completion of the internal market. As a result of the instrumentalist view on consumer law, the emphasis in European consumer law lies more and more at correcting information asymmetries by imposing duties to inform on sellers and service providers, often combined with the introduction of cooling off-periods and rights of withdrawal.

Since the beginning of the 21st century, a new trend seems to be emerging. Next to legislation supporting the development of new markets and marketing techniques (e.g. e-commerce), the attention is somewhat shifted from improving the position of the consumer in *substantive* law, towards improving the possibility of the consumer to actually realise his right.[2] This trend has two different aspects: on the one hand, the European legislator (as the national legislators) focuses on alternative dispute resolution schemes (ADR), such as mediation. On

---

[1] Willem van Boom is professor of private law at Rotterdam Institute of Private Law, Erasmus University Rotterdam (the Netherlands). Marco Loos is professor of private law at the Amsterdam Institute of Private Law, University of Amsterdam (the Netherlands).

[2] Cf. OECD, *Consumer dispute resolution and redress in the global marketplace*, OECD (2006).

the other hand, following the experience in especially the UK and the Scandinavian countries, the individual enforcement of consumer rights was supplemented by collective action schemes, either entitling private consumer organisations to act on behalf of the collective of consumers, or establishing regulatory agencies in public law to do so.

On 27 October 2004, the European Council and the European Parliament adopted Regulation (EC) 2006/2004. The regulation lays down the conditions under which the competent authorities in the Member States will have to cooperate with each other as well as with the Commission in order to ensure compliance with and enforcement of consumer protection laws (art. 1). The Regulation has led the Dutch government to establish a Consumer Authority. The Consumer Authority is to provide its services to the consumer authorities in other European member states in the enforcement of European legislation in crossborder situations. The government decided, however, to broaden the scope of the Consumer Authority's competence also to national situations, implying that the Consumer Authority will be authorised to enforce European legislation in domestic situations as well.

The proposal of a bill to introduce such a Consumer Authority gives rise to the question whether consumer rights are indeed best enforced by public law regulators or agencies. At the conference, this matter was looked at from various angles. One of these is whether it is private organisations such as consumer associations and foundations that should take care of the collective enforcement. Professor Dr. Hans-W. Micklitz (Bamberg University) set out the strengths and weaknesses of such collective private enforcement of consumer law. He distinguished between the different collective enforcement instruments, which include actions for injunction, test cases, skimming-off procedures, and collective damage procedures on the basis of either opt-in or opt-out. He contrasted these schemes with enforcement of private individual rights through consumers, consumer organisations, trade organisations and/or consumer agencies. In the opinion of Micklitz, collective private enforcement provides adequate answers to current societal changes.

Professor Dr. Gerrit Betlem (University of Southampton) addressed the European directives and regulations pertaining to the public law enforcement of consumer interests by regulatory agencies will be addressed. In his presentation, Betlem focused on the two main EC law instruments containing specific provisions on powers to enforce consumer law: the 1998 Directive and the 2004 Regulation. The focus of both instruments is on intra-Community infringements, the envisaged enforcers and their powers, and extraterritorial consumer protection. Betlem argued that the combined effect on a number of conceivable transnational enforcement scenarios is considerable. Conclusions were drawn in the light of the 2003 OECD Guidelines on transnational enforcement of consumer law, in order to answer this central question: What progress has been made with the 2004 Regulation and how does it fare when judged by the standards set by the OECD? Despite some shortcomings in the private law

sphere – the public law aspects are largely satisfactory –, the legislative framework improves on the ECJ's case law by requiring equal protection of consumers based in the home State and abroad.

Although the EU law framework does not impose any obligations on watchdogs to assist individual consumers who litigate against foreign traders, and there is insufficient detail on legal action by watchdogs against traders based in other countries, including the freezing of assets, Betlem did find that the EU framework makes a useful contribution by stipulating that watchdogs must protect foreign as well as indigenous consumers. This ends forms of discriminatory enforcement which have occurred in the past. It is also an improvement in the case law of the ECJ.

In the discussion that followed the presentation, interesting insights in the cross-border enforcement issues were dealt with. The overall conclusion was that mainly public authorities will benefit from the new transnational enforcement system and that private consumer organizations seem reluctant to tackle cross-border issues.

In order to gain from the experience with regulatory agencies abroad, two speakers were invited to illustrate the effectiveness of such bodies. In his contribution, professor Dr. Geraint Howells (Lancaster University, UK) made a presentation of the OFT (Office of Fair Trading) and its enforcement strategy in consumer affairs. From a policy point of view, this presentation facilitated comparison with the recent Dutch approach. In short, the OFT has returned from the heavy enforcement strategy and is now inclined towards stimulating communication and self-regulation. Criminal prosecution as a means of enforcement is on its way back, so it seems. As regards the OFT its willingness to bring legal action has been seen to vary depending on the inclinations of the organisation's leadership. The present hierarchy certainly stresses the desire to educate and achieve market-based solutions by working with businesses. It is thought important that enforcement remains a last resort, but one that is available to the regulators. In this respect moves towards higher and more easily imposed administrative fines are to be welcomed, so Howells argues. Furthermore, he argued that it must be possible for regulators to take matters to court. In recent times there seem to have been an increased readiness to take matters to court where traders do not accept the OFT's line. The OFT's enforcement work has involved cross border practices. Undertakings were taken from two Dutch companies in relation to bogus prize draw mailings. Moreover the OFT pursued the Belgian company D Duchesne SA to the Brussels Court of Appeal and may have to go even higher in the Belgium courts. This point sparked discussion with Betlem and the other participants.

The Scandinavian experience was demonstrated by Dr. Klaus Viitanen (Helsinki University, Finland). In his presentation, Viitanen gave an in-depth report of the typical features for the Nordic system of consumer protection, whereby regulation of marketing and unfair contract terms by general clauses go hand in hand with special state authorities, Consumer Ombudsmen. For

the supervision of marketing and unfair contract terms, special courts – often called the Market Court or Council – are competent for cases pertaining to the collective interests of consumers. Furthermore, the residual role of consumer organisations in the supervision was highlighted. The most noticeable part of the presentation was the twin avenue approach of enforcement of consumer collective interests by regulatory agencies in the four Nordic countries (Ombudsmen) on the one hand and the Market Courts on the other hand. An important element in the success of this twin avenue approach is that the Ombudsmen has acquired authority and can 'speak softly and carry a big stick' whereas the Market Courts are specialized courts consisting of professional judges, expert members and representatives of interest groups. The role of private enforcement through consumer organisations and business organisations is residual, possibly because consumer organisations were in practice non-existant when the Nordic system was established in 1970´s. Later the need to come into action was obviously not as big in other European countries because the system seemed to work rather well.

Mr. Sjoerd Ammerlaan (Dutch Consumer Authority, Ministry of Economic Affairs) presented the Dutch bill. In his presentation, Ammerlaan gave an in-depth insight into the legal framework of the Consumer Authority in the Netherlands, how it operates within the European enforcement network, and how it wants to develop its strategy for the coming year. In the discussion that followed, specific points of comparison were raised. The presentations by Betlem and Howells proved a valuable background for analyzing the Dutch approach from a European and the UK perspective.

Dr. Katalin Cseres (University of Amsterdam) discussed the competition law implications of finding effective means for the enforcement of collective consumer interests. She dealt with three main issues. First, she indicated the legal possibilities consumers have in order to enforce their rights by making use of competition rules. Second, she set out the competition law perspectives of enforcing consumer interests by applying consumer protection rules. Third, the institutional side of this discussion was studied. On the one hand, she addressed the question whether it is the public agencies or the private organizations that are better placed to enforce the law. On the other, she addressed the question how competition authorities, consumer organizations and courts can or should cooperate in order to make enforcement of collective consumer interests a success. Cseres argued that in European consumer law the shift from substantive rights to procedural rights has been gaining more weight. Previously Directives in the area of consumer protection have left enforcement of the law entirely to the Member States. It is obvious, however, she argued, that effective legal redress for consumers constitutes a corollary of the substantial rights conferred by any legal order. If consumers are granted substantive rights without providing mechanisms to ensure their effective exercise, these rights have no practical value. The development of European law that has evolved along the lines of the Injunctions Directive as well as the Enforcement Cooperation Regulation

has led the discussion on the one hand, to finding effective means of collective consumer redress providing an efficient supplement to individual redress schemes such as small claims procedures and ADR. On the other, the deterrent effect of currently available remedies and sanctions are being reviewed. The question is whether the present arsenal of remedies and sanctions (mainly consisting of injunctive relief and fines) should be extended to the recovery of damages. With regard to providing consumers with meaningful compensation for damages suffered as a consequence of 'anti-consumer' practices the discussion taking place in competition law can provide useful insights. Cseres indicated that the application and effectiveness of procedural rules directly depend on consumer and business behaviour. As regards consumer behaviour, she remarked that consumer complaints are influenced by the general attitude of consumers towards seeking redress and situational variables. In this respect, questions such as to what consumers want when they seek redress and how they seek it, are important. As regards business behaviour, the impact of the enforcement of consumer interests on businesses and the influence of (the threat of) legislation is of primary importance. An effective institutional framework is equally important to achieve an efficient redressal system. Whether it is public authorities or private organizations who take consumers by their hands can make a difference not only for consumers but for businesses, too. The role of competition authorities is perhaps more obvious in cases where consumers enforce their rights on the basis of competition law. Whether they could assist consumers in other ways by, for example, enforcing fair trading rules requires a more careful consideration.

Dr. Chris Hodges (Oxford University, UK) evaluated the effectiveness of public and private models for regulating consumer protection. In his presentation, Hodges made a critical analysis of the policy considerations underlying European consumer law enforcement. In particular, he focussed on the role and involvement of consumer organisations in enforcing regulation, and in regulation by private litigation. According to Hodges, the evidence is that consumer involvement in regulatory enforcement is ineffective and inefficient. The data may be limited, and further empirical research is called for. But if this conclusion is correct, it has profound implications for Community policy on regulation and enforcement, as well as tort law. The 'responsive regulation' structure deserves to be far more widely understood – applied in practice. Theoretical considerations indicate that we should be suspicious both of regulation of business by consumer interests, and equally of consumers by business interests. If consistency, quality of output, and accountability are important, balanced regulation through public institutions seems the optimal solution, although self-regulation under a 'responsive regulation' structure. If costs are a barrier to current public policy in strengthening public regulatory bodies, then it needs to be understood that these are necessary costs but also that solutions can and should be made to make regulatory systems more efficient. Further EU harmonisation, the involvement of approved consumer bodies in surveillance (but not

in enforcement), and extension of co-regulation within defined parameters, all appear to offer potentially useful ways forward. A further point of criticism raised by Hodges concerned the area of resolving multiple private damages claims. Experience clearly raises concerns about enforcement of regulation through civil litigation. The development of excessive and disproportionate transactional costs, self-interested lawyer-led litigation and excessive claims culture, would appear to harm the economy rather than encourage competition, decrease prices, and increase employment or innovation. There are many similarities between the functions and powers of the British OFT, a German, Austrian and now Dutch Consumer Authorities, and the Nordic Ombudsmen. Although some may differ in the extent to which they are formally part of government, they essentially operate as public authorities, rather than consumer organisations. If this observation is correct, there is considerable scope for proceeding by way of ensuring that such bodies operate as public authorities in the 'responsive regulation' mode. Further, an important part of their functions could be to facilitate low cost, extra-court mediation systems, rather than expensive and aggressive enforcement actions. The central proposition put forward by Hodges was that policy should be more evidence-based. The discussion that followed did in fact support this idea.

This book contains the presentations of the symposium as they were subsequently developed by the authors. It also concludes a presentation which was developed for the symposium, but could not be delivered there. Prof. dr. Roger Van den Bergh (Erasmus University Rotterdam) had hoped to give a presentation on collective enforcement of consumer law from the perspective of law and economics. Van den Bergh doubts that a lenient enforcement of consumer protection laws in a Member State alone will effect the relocation of traders looking to profit from that lenient system. He feels that other factors (taxes, wages, infrastructure) are likely to have a much greater impact on location decisions as these costs are a far greater component of the costs of doing business. He equally doubts that consumers will more often engage in cross-border transactions when consumer protection laws were better enforced as, again, other factors seem more relevant, e.g. language, culture, distance and travelling costs. Nevertheless, he argues, there is a case to be made for better enforcement of consumer law. Like Cseres, he relates the enforcement of consumer law to the enforcement of competition law and argues that the former may learn from the experiences of the latter. Van den Bergh warns his audience that overenforcement of consumer legislation would be counterproductive as it may stifle innovation, whereas underenforcement of consumer law could lead to (or increase) market failure. In his view, both instruments – consumer and competition policy and law – may contribute to the development of healthy markets and redressing existing market failures. A proper mix of private and public collective enforcement will yield the best results, Van den Bergh argues. In this respect, he criticises the otherwise positively evaluated Regulation 2006/2004, as it seems to favour public enforcement even in areas of consumer law where

private parties possess better information than public authorities and there is no serious risk of under-deterrence. Unfortunately, Van den Bergh could not deliver his speech due to other pressing obligations. He nevertheless kindly agreed to submit a contribution to this book.

In the final chapter of this book, we will draw together the main issues discussed and arguments presented by the other authors and make some suggestions for finding the right balance between private and public enforcement efforts.

We hope this book may provide the tools for the Dutch Consumer Authority to achieve the goals it has set for itself, and moreover fuel to the debate on the proper enforcement of both domestic and European consumer law.

Rotterdam/Amsterdam, April 2007