The Neo-Corporatist Approach

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Non-Legislative Means of Consumer Protection: The Dutch Perspective

ABSTRACT. This report approaches the new spheres of self-regulation, soft law and deregulation in the Netherlands from both a factual and historical point of view. Using the Dutch Advertising Code as an example, the article discusses the advantages and disadvantages of self-regulation, thereby illustrating that self-regulation may even lead to greater protection of the consumer than would otherwise be achieved: the operation of the Dutch Advertising Code is not only successful, but is also more far-reaching than the draft EEC directive on misleading advertising.

Self-regulation exists in many other spheres which, however, do not necessarily further protect the position of the consumer. Where a Complaints Commission exists, the situation is somewhat different in that disputes may generally be settled without great expense and relatively quickly.

Self-regulation and concerted action have achieved a certain level of consumer protection in the Netherlands, but this, of course, does not mean that there is no room for progress: the author here shows the inter-dependency of non-legal rules with legal rules despite the tendency seen in the past years in the Netherlands to deregulate what were formerly public agencies and consumer-related institutions.

An economic crisis – there is a general feeling, and ample evidence, that we are in the midst of it. There also exists a widespread opinion that in times of crises consumer protection is looked upon as a luxury by politicians – and sometimes consumers. Draft directives of the European Economic Community on consumer credit, door-to-door sales, misleading advertising and product liability do not seem to make any headway. On the national level of the member states, the consumer legislation of the 1970's has hardly had a chance to become effective when already the threat of deregulation looms over it.

As is often the case, the real picture may be less gloomy than experts try to make us believe. Even if consumer legislation is not increased, possibly even decreased, private regulation might conceivably take its place. This calls our attention to the non-legislative means of consumer protection: the codes and guidelines, the standard contracts, the arbitration tribunals and conciliation schemes.

Non-legislative means of consumer protection have existed for a long time, possibly even longer than consumer legislation. They have often been thought of as a temporary affair, set up by business

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interests in order to buy time. The present wave of deregulation forces us to reconsider this picture. Self-regulation and other non-legislative means of consumer protection may be there to stay. In that case a number of questions arise. What level of protection do these non-legislative means offer consumers: how are they enforced; who set the rules? A second generation of questions relates to the possible intervention of the EC to encourage the consumer-supplier dialogue or to harmonise non-legislative means of consumer protection.

In this paper I shall only deal with the first category of questions, which I will look at from a Dutch perspective.[1] Because of its practical importance, and also because of the wealth of data which are available, I have singled out one specific area of a non-legislative means of consumer protection for closer scrutiny: that of advertising (Section 2). In another section the other major areas of consumer protection will be reviewed (Section 3). Before coming to these subjects, we shall first have to settle some terminological and other preliminary issues in Section 1. After Section 3, I shall try to formulate some tentative conclusions.

1. PRELIMINARY QUESTIONS

From Self-Regulation to Concerted Action

Self-regulation has nearly always played an important role in the area of consumer protection. In the Middle Ages, the guilds required their members and apprentices to apply the highest levels of craftsmanship. Present-day manifestations of self-regulation include codes of practice, standard contract terms, arbitration tribunals and conciliation schemes.

The reasons for self-regulation may differ from branch to branch. Sometimes public relations are important, often the wish being to keep out strangers. The Dutch advertising code was set up in defence against the threatening intervention by the legislature. Concern for the loss of export markets resulted in the establishment of quality and safety standards, which later were often incorporated into legislation.

In the Netherlands self-regulation is usually seen as a positive phenomenon. More generally the organisation of society by private associations or companies is often considered superior to public regulation. Several segments of societal life, which elsewhere are state-controlled and -regulated, have been left to private initiative in the Netherlands. Banking and insurance, basic industries, the broadcasting system, education, health care and transport, to mention just a few examples, are wholly or partly privately controlled.

Self-regulation of Dutch society is not only achieved on a voluntary basis. In the 1920's public organisation of trade and industry was first set up. This movement has gained momentum until the enactment of the *Wet op de bedrijfsorganisatie* (Business Organisation Act) in 1950, thereby earning a place for the Netherlands under the heading "the neo-corporatist approach" in the programme of this workshop. In the 1950's and 60's the gradual merging of different branches of industry and the rapid expansion of markets in the EEC brought this development to an end. At present, some 40–50 public trade organisations, mainly in the area of agriculture, food supply, retail trade and the manual trades and professions, still operate successfully. These organisations have compulsory membership and possess legislative power with regard to their own trade or industry. This power is often used to impose upon members what might be called "legislative self-regulation."[2]

More recent is the transformation of several forms of self-regulation into concerted action. In the early days of self-regulation, organisations which might be deemed representative of consumers did not exist. Soon after the two large consumers' organisations – Consumentenbond and Konsumenten Kontakt – came into being, they became involved in private regulation of consumer affairs. Although the degree to which this has occurred is not always the same, it now seems appropriate in some instances to talk of concerted action rather than of (one-sided) self-regulation. This development has only taken place with regard to private self-regulation. The public trade organisations have not yet invited consumers' organisations to take part in their self-regulation, although it should be mentioned that employees – who often associate themselves with the consumer point of view – are represented on their boards.

Self-Discipline, Self-Regulation and Concerted Action

In legal writing several terms are used to denote the phenomena described above. The most commonly used term is "self-regulation" – or the corresponding "Selbstregulierung" or "zelfregulering" – which clearly is of Anglo-American origin.[3]

Recently, the term "self-discipline" – in Dutch: "zelf-discipline" – has also come to be used. I would not favour the use of this term with regard to the privately made rules which we are discussing as an alternative to legislation. It seems to me that self-discipline would also (or perhaps only) relate to informal rules which a company develops for its own behaviour. Thus, the limited use which companies make of the freedom to draw up unfair standard contract terms, the liberal policy of reimbursing the victims in product

liability cases, the practice of allowing consumers to trade in retail items, these are examples of self-discipline without any formal regulation. In this paper, I shall only deal with the regulatory side of self-discipline.

Instead of self-discipline, I would rather, drawing from French and Belgian terminology, introduce the concept of "concerted action." This would mean self-regulation with the participation of consumers' organisations. In legal writing, concerted action is often described as quasi self-regulation, the term self-regulation being reserved for regulation in which consumers' organisations are not involved. The concept of concerted action in my view has a more positive ring, suggesting as it does that it is the common thing, as against self-regulation – or rather, unconcerted action – which is the exception.

Self-Regulation, Concerted Action and Deregulation

The concept of deregulation, which we have already linked with that of concerted action, deserves some closer attention. Deregulation first became popular in the United States, when the Carter Administration proposed to decrease the Federal Government's regulatory power. The deregulation of the rules administered by the Civil Aeronautics Board was President Carter's greatest success; the rejection of the proposed deregulation of gas prices was his greatest failure. When President Reagan took over, a new wave of deregulation swept over the United States and this time it crossed the Atlantic. In 1982, deregulation became a popular catchword in Western Europe, and more in particular in the Netherlands. As of 1983, a number of measures have been announced, some of which will decrease the level of consumer protection.

Although deregulation is of American origin, the Dutch use of the concept is different from the American one. In the United States, deregulation seems to be confined to the regulatory agencies. In the Netherlands, the term is used for regulation by law in general. On the other hand, the inclusion of incentives (Mitnick) in the American definition, as opposed to the Dutch use which only purports to influence directives, makes the American use of the concept of deregulation broader in a different sense.

In view of the proposed deregulation, the Dutch government has set up a number of commissions charged with drawing up detailed plans within a short time. One of these commissions, the "Commissie deregulering in verband met de economische ontwikkeling," has recently considered all bills and draft bills which are pending in Parliament or are being discussed within government and which have to do with consumer protection. The commission, which consists of

top civil servants and is presided by a Law Professor of the Catholic University at Nijmegen, not noted for his progressive ideas, was installed February 15, 1983, and within a few months already made its first recommendations. On June 27, 1983, the Minister of Economic Affairs published the commission's recommendations, together with the government's comment.[4]

I shall now take a more detailed look at the commission's recommendations. The first bill taken under review is the Lubbers reform bill to amend the *Wet economische mededinging* (Economic Competition Act) of 1956. This was one of Lubbers' last acts as Minister of Economic Affairs in a centre-left government which was in power from 1973–1977 (he presently heads a centre-right government). The Lubbers bill would have introduced a general requirement of preventive control of competition agreements which at present is still absent in the Netherlands. It would also, from a positive view of price agreements which is totally foreign to anti-trust legislation in other European countries, have empowered the government to lay down minimum prices. Both proposals – as well as some other less important ones – are criticised by the commission and will be taken back by the government.

As to the *Prijzenwet* (Prices Act), the commission issues a mere recommendation to the government to make only a limited use of the – extremely extensive – powers conferred upon the government by this Act.

Both the commission and the government agree that the *Uitverkopenwet* (Clearance Sales Act) of 1956 should be abolished. This Act is often infringed and has lost much of its earlier relevance.

However, the commission's recommendation not to enter a bill against the use of tobacco will only be followed partially by the government.

An important bill which at present is being discussed in Parliament is the bill to reform the *Warenwet* (Consumer Goods Act). Most of the recommendations made by the commission, more in particular some highly anti-consumer proposals, will not be taken over by the government. Thus, the recommendation not to put into the preamble as a separate aim of the Act "giving good information regarding goods to consumers" is rejected by the government.

The proposed *Wet veiligheid elektrische en gastoestellen* (Act on the Safety of Electrical and Gas Appliances) is supported by the commission in view of the fact that it will enable the government to meet the requirements of EC-directives. The government is backing this support. The commission is somewhat more reserved concerning the bill on Energy Saving Appliances: it recommends that the bill should only enable the government to introduce EC-directives.

This limitation of the bill's scope of application is rejected by the government, however.

Finally, a number of important bills in the area of private law have been considered by the commission on deregulation. The commission recommends to keep the Consumer Sales bill, but not as mandatory law, without a recourse by the seller against the producer, and without direct action of the consumer vis-à-vis the producer. Only the latter two recommendations will be taken over by the government. The commission's proposal to drop the bill on standard contract terms is not followed by the government. The government does however approve of the commission's recommendation to await an EC-directive on product liability before introducing legislation.

Taken together, the commission's recommendations, if implemented, would have constituted a severe blow to the still fragrant Dutch consumer legislation. As it is, the government has rejected most of the recommendations. However, the deregulation exercise has not yet come to an end. In the second round a number of existing consumer protection laws, such as those on door-to-door sales and on gifts, will be considered by the commission. It remains to be seen what the government will do with the commission's recommendations this time.

The subject of deregulation was brought up in this paper because of a possible connection with self-regulation and concerted action. The government's comments on the commission's recommendations are so brief, however, that no information can be gained from them whether or not the possibility of trade and industry and possibly the consumers' organisations taking over regulation has seriously been considered.

Soft Law

There has recently been a trend to group together the various forms of self-regulation and concerted action under the heading "soft law." In this subsection I intend to look for the origin of this concept and to analyse whether its introduction in the area of consumer protection is a happy one.

Soft law is a concept which originates in public international law. It is said to have been coined by McNair. According to one author, the term denotes the grey area between the white area of the law and the black area of non-law. Another author emphasises the dynamic nature of this grey area: soft law is a transitional stage in the development of norms where their content is vague and their scope imprecise.

The concept of soft law has been developed in order to make up for a deficiency in traditional sources of public international law.

The traditional sources do not sufficiently take into account the effects of not legally binding directives such as the United Nations Second Development Decade and the Helsinki Final Act. The directives show a large diversity, but they all have two things in common. First, they are generated or produced by authorities which also have the power to produce "hard law"; second, they all are not – or at least not fully – legally binding.

To what extent can self-regulation and concerted action in the area of consumer protection be brought under this concept of soft law? So far, the concept has only been used in international law; from this point of view only those legally non-binding directives which emanate from international authorities – such as draft directives of the EC and draft treaties of the Council of Europe – would fall within the scope of soft law proper. However, I see no problem in extending the scope to national law. In that case, the not legally binding directives of national authorities who have the power to produce hard law would also be called soft law. Even when we leave out the problem that on the national level many regulatory agencies which produce not legally binding directives do not have legislative powers either – or only minor powers – it appears that only a minority of the guidelines, arbitration and conciliation schemes, etc., discussed in this paper emanate from the government. Secondly, many of these schemes do have binding effect.

Our conclusion must be that the concept of soft law may be useful from the point of view of authorities with legislative power – and especially international authorities – but that it does not cover most of the phenomena which are usually grouped together under the heading "self-regulation."[5]

Advantages and Disadvantages vis-à-vis Legislation

So much has been written about the advantages and disadvantages of self-regulation that a brief survey may suffice.[6] The advantages and disadvantages will be set out from three points of view: those of consumers, suppliers, and government. Of course we should keep in mind that legislation and self-regulation usually do not exist alone, but rather live comfortably or uncomfortably a life of symbiosis.

From a consumer point of view, self-regulation and concerted action have the advantage of flexibility, of being easily accepted by suppliers, of regulating norms which are very hard to fit into legislation, of providing an efficient, speedy and simple procedure, and of making available the expertise which is found in the branch concerned. The disadvantages from this point of view may be summarised as follows: there is a lack of adequate sanctions, voluntary

codes do not cover a whole branch, self-regulatory associations may have problems about policing their own members, and self-regulation is one-sided without taking into account the consumer's point of view. The latter two disadvantages are of course absent – at least less prominent – when consumers' organisations have been involved: when self-regulation has become concerted action. Apart from these main disadvantages, it is also said that self-regulation renders fewer precedents than case law of the regular courts, that trade associations often seek a consensus which may mean a lower protection level, that suppliers may not want to accept responsibility for risks considered to be not within their competence (such as the safety issue with regard to tobacco products), and that a self-regulatory agency may not seek sufficient publicity (although the experience with some advertising self-regulatory agencies, such as the Advertising Standards Authority in the United Kingdom, points to the contrary).

Seen from a supplier's point of view, the following advantages of self-regulation have been set out: apart from most of the advantages which self-regulation may have for consumers and which also may count for suppliers, self-regulation may increase the goodwill of the whole branch – not only vis-à-vis consumers in general, but also with regard to consumers' organisations and government, it may render legislation unnecessary (it "keeps the federal camel's nose out of the industry's tent," Levin, 1967), it enables advertising agencies and other suppliers to pose "prejudicial" questions, and it may keep out suppliers of cheap but unreliable or unsafe products. Disadvantages from this point of view are the inadequate sanctions against non-members, the fact that non-members do profit without bearing the costs (free riders), that the costs of running a self-controlling machinery may be high, and that groups within the branch may use self-regulation to their own advantage. A disadvantage of concerted action is that hearing consumers' organisations, which may not always have the same know-how as those of suppliers, slows down the whole self-regulatory procedure.

Finally, seen from a governmental perspective, self-regulation has the advantages that it fits in the present deregulation trend, that the costs are borne by the trade or industry concerned, and that self-regulatory codes may serve as pilot-projects for future legislation. Disadvantages from this point of view are first the encroachment upon what often is seen as a prerogative of the state: legislation and enforcement of rules, secondly there is the danger that the mere existence of self-regulation – even when ineffective – may come to serve as an argument against legislative intervention, and finally that self-regulation may limit competition in an unacceptable way.

Our conclusion can be that self-regulation and concerted action

may at least serve as welcome supplements to legislation. Depending on the way they have been formulated and are implemented, self-regulation and concerted action may also compete with legislation.

2. THE DUTCH ADVERTISING CODE

In this section I intend to compare the level of consumer protection of the Dutch Advertising Code and of the draft EC directive on unfair and misleading advertising. I shall discuss the scope of application, the question who may file a complaint, the costs and the length of the procedure, the burden of proof, preventive control, sanctions, the composition of the self-regulatory agency, appeal, and substantive rules. Before doing so, I shall briefly introduce the Code and the Agency.[7] Where possible, I shall compare the Dutch case with the case in Belgium, France, the German Federal Republic and the United Kingdom.

The Dutch *Code voor het Reclamewezen* was set up in 1964 in order to prevent legislative intervention. From the outset, consumers' organisations have participated in the application and implementation of the code, which is considered to cover approximately 90% of the advertising which falls within its scope of application.

The code is enforced by the *Reclame Code Commissie*, which in 1982 received 510 complaints, 488 of which were handled by the commission. Out of these 488 complaints handled by the commission, 48 had been filed by consumers' organisations, 270 by individual consumers and the remaining complaints by companies or by the commission itself *ex officio*. The number of public recommendations was 49 and the number of non-public ones 217.

How does this compare to other advertising codes? The Belgian *Jury voor Eerlijke Praktijken* was established in 1974, by the *Raad voor de Reclame* (founded in 1967) which in its statutes refers to the Advertising Code of the International Chamber of Commerce. The code covers approximately 80% of all advertising in Belgium. Consumers' organisations do not participate in the enforcement of the code, otherwise than in filing complaints. The number of complaints in 1982 was 204, 37 of which were considered to fall outside the scope of application of the code. Moreover, 56 "prejudicial questions" were posed to the Jury by advertising interests.

The most interesting advertising code is the British Code of Advertising Practice, which was established by the Advertising Association in 1962. In 1982 the Advertising Standards Authority received 7,680 complaints, 4,576 of which had to be dismissed for various reasons (such as the fact that the complaint concerned

television advertising, which is covered by a different set of rules). The British system of self-regulation is financed by an automatic, 1% surcharge on all advertising expenditures, which is received by the Advertising Standards Board of Finance Ltd.

Of more recent origin is the *Deutsche Werberat*, which was founded in 1972 without any direct consumer participation (the *Arbeitsgemeinschaft der Verbraucher* has one delegate in the board and is also represented in its co-ordination commission, but is said to have no real influence). In the first 10 years of its existence, the *Deutsche Werberat* received 2,065 complaints, 601 of which resulted in an advertising campaign being stopped or changed. In the first six months of 1983 the council received 112 complaints, 39 of which were held to be unfounded.

The French *Bureau de Vérification de la Publicité*, finally, was founded in 1953, but only as of 1971 were consumer representatives nominated to its board, an independent president was appointed, and the possibility of filing a complaint was widened. In 1982 a total of 3,361 cases were treated, 1,641 upon complaint by individual consumers.

In all of the countries mentioned, the advertising code has some competitors for specific advertising markets (such as mail order sales or radio and television) or for specific products (such as pharmaceutical products). These specific codes will not be discussed in this paper.

Scope of Application

With regard to the scope of application of the advertising codes – cf. article 2 of the EC draft directive – two observations should be made. First, the Dutch Advertising Code does not apply to broadcasting advertising (nor do the Belgian, British and French codes; only the German code does apply). There is a separate self-regulatory authority for broadcasting advertising, which – as opposed to the Advertising Code – is based on formal legislation.

Second, the Dutch code does apply to all kinds of advertising, including religious and political advertisements, as does the British code. The Belgian, French and German codes on the contrary apply only to commercial advertising.

Who May File a Complaint?

Article 5 of the EC draft directive limits the circle of the persons or legal entities who may file a complaint to those who have an interest in the case. The Dutch Advertising Code does not make any

limitation: anybody, consumer or supplier, with or without an interest, may file a complaint. The same is valid for the advertising codes in the other countries discussed in this paper. Only anonymous and clearly insufficient complaints will be refused.

Length and Costs of the Proceedings

Article 5 of the EC draft directive also requires a speedy and inexpensive procedure, as well as summary proceedings in emergencies. In the Netherlands it takes an average of 57 days after the complaint is filed before it is heard and an average of 11 more days before the decision is sent. In the other countries discussed in this paper, complaints are usually handled much faster. In the Federal Republic one writer, on the basis of complaints filed by himself, comes to the conclusion that the average time is 32 days. In France and the United Kingdom, the average time for handling advertising complaints is said to be between 3 and 8 weeks, and in Belgium between 6 and 8 weeks, all much faster than the Dutch procedure. The Dutch code contains a provision for summary proceedings in urgent matters, but this is rarely invoked.

In order to file a complaint, no registration fee is required in the Netherlands. The only costs which the plaintiff has to bear are those of postage and of travelling. The same applies to the filing of complaints in the other countries.

Burden of Proof

In article 7 of the EC draft directive the burden of proof is imposed upon the supplier. The Dutch Advertising Code does not contain such a rule. Therefore, the starting point must be that the consumer/plaintiff should prove his allegations. In practice, this is usually no problem. Moreover, the Code Commission has the power to require the supplier to prove the truth of descriptions, statements, signs and pictures, and it does use this power if necessary.

In the Federal Republic and the United Kingdom, a reverse situation exists. Advertisers and advertising agencies are required to hold such substantiation ready for production. But in practice, consumers often have to prove their case. In the United Kingdom, the ASA is among those who publicly admit this; in the Federal Republic Beier's research has demonstrated it. As far as Belgium and France are concerned, the procedure is secret and since no research similar to Beier's research in Germany appears to have been done no conclusions can be drawn in this regard.

Preventive Control

Under the Dutch Advertising Code, preventive control may be imposed in case of repeated violation of the advertising code with a danger of more violations. For medical, pharmaceutical and dental advertisements, which are covered by other codes, preventive control is required. The Code Commission may act ex officio; having done so very rarely in earlier years, it used this power 12 times in 1982. A possibility which the Commission uses fairly often is that of issuing a public recommendation. Still, it seems doubtful whether the Dutch code is in conformity with the requirements of article 5 of the EC draft directive in this regard.

Preventive control only appears to be popular in France, where the BVP received 1,131 such requests from advertisers in 1982. As far as the monitoring of codes and the issuing of general recommendations is concerned, the ASA plays an active role. In Belgium, the number of requests of a preventive control is also rising rapidly, whereas the only positive thing which may be said in this regard of the German council is that it has actively been engaged in drawing up new guidelines for specific categories of advertising.

Sanctions

The Dutch Code Commission has at its disposal two types of recommendation (apart from the preventive control by general recommendations discussed above): the non-public recommendation – which in reality serves as a mere warning – and the public recommendation in case of repeated violation of the code. The latter recommendation is a real sanction: it is made public and the advertising media may no longer place the advertisement concerned. Dutch research shows that both types of recommendations are quite effective.

In the other countries the sanctions which the codes impose are similar, but the actual practice is quite different in the various countries. In France and the United Kingdom, the sanctions seem to be quite effective; in the United Kingdom especially, much publicity is given to the ASA Council's recommendations. This is much less the case in Belgium. In the Federal Republic of Germany finally, the sanctions seem to be rather ineffective, if we may once again use Beier's research as a basis for our conclusions.

Composition of the Code Commission

The *Reclame Code Commissie* is composed of a majority of members

who are nominated by the advertising industry and therefore does not conform to the EC draft directive. The same applies to the *College van Beroep* (Appeal Commission) and to the board which governs the foundation under the auspices of which the Code Commission operates. Still, consumers' organisations are represented in all bodies. In general, the consumers' organisations are satisfied with the outcome. Only in some instances, such as in discrimination cases (where the Code Commission has taken a rather old-fashioned position), have they shown themselves dissatisfied with the outcome.

Only the ASA Council in the United Kingdom seems to be in conformity with the draft directive, with a majority of independent members. The Belgian and French situation is close to that in the Netherlands, and only in the Federal Republic are consumers worse off in this regard.

The Netherlands seem to be the only country, where appeal from decisions of the Code Commission lies to a separate self-regulatory body, the *College van Beroep*. In the other countries, consumers will have to go to an ordinary court.

Substantive Rules

In all countries here under review the Code Commissions and their Founding Fathers have developed a large number of rules for the advertising trade, which in every regard compare favourably with legislative rules. The Dutch Advertising Code, like the more sophisticated British Code, provides a higher level of consumer protection than does the EC draft directive.

3. OTHER EXAMPLES OF CONCERTED ACTION

In this section I shall indicate briefly some other areas of consumer legislation, where self-regulation or concerted action plays a role.[8] As we shall see, not all of the areas discussed are regulated by trade and industry itself.

Prices

Perhaps the most conspicuous area where concerted action is absent, is that of prices. This, however, is understandable, since under the *Prijzenwet* (Prices Act) the government has extensive powers to set maximum prices, to regulate price increases and the disclosure of prices, etc.

Self-regulation is not absent. The main aim of this form of self-

regulation is usually to prevent murderous competition, and it therefore results in minimum prices, which may be detrimental to consumers. Only in a certain sense may consumers profit from this development: a system of minimum prices may postpone the disappearance of marginal retailers such as the small neighbourhood grocery and the milkman, who will be especially appreciated by the elderly population.

Possibly because of the *Prijzenwet*, the Netherlands have hardly any effective antitrust legislation. The reform bill which would have brought the Netherlands more in line with other European countries, has partially fallen victim to the recent deregulation fad as we have seen earlier.

Consumer Information

The best example of self-regulation which has dismally failed, is that of informative labelling. A government-supported attempt to promote informative labelling on a voluntary basis through the *Stichting informatieve etikettering Nederland* ended in failure in 1975 because of lack of support from trade and industry. The foundation prepared some 700 labels, but only 43 were in use by the time the foundation was liquidated.

In some branches of trade and industry though, self-regulation has had results. Three examples of products where a branch has adhered to self-regulatory information schemes are detergents, domestic electrical appliances, and paint.

Marketing Practices

Marketing practices is an area where self-regulation and concerted action have had some success. The most successful achievement, the advertising codes, has already been discussed in Section 2. The Mail Order code, which for instance provides for a cooling-off period for all transactions, is another example.

It will be interesting to find out whether or not the proposed abolishment of the *Uitverkopenwet* (Clearance Sales Act) – under the deregulation heading, discussed in Section 1 – will result in some form of self-regulation taking the place of the old legislation.

Safety and Quality of Products and Services

The safety and quality of products and services have long been a concern of trade and industry. In the case of the guilds, this interest was usually accompanied by the wish to limit membership to a small

number of craftsmen. In the XIXth century, however, the main reason for this interest became keeping up goodwill abroad.

There has often been a correspondence between private and public regulation in this area. Private regulations often served as pilot projects for state intervention.

Two sub-areas where self-regulation still plays an important role are the issuing of quality labels and the setting of norms. The latter is done by the *Nederlands Normalisatie Instituut* and the *Nederlands Electrotechnisch Comité*, which are private institutions (although with strong government influence). Quality labels which are issued by private organisations are for example the KEMA, KIWA, NVH and GIVEG labels. Another example of quite a different nature is the guarantee fund of the Dutch tour operators.

Consumer Credit

In the area of consumer credit two examples of self-regulation may be given. The first concerns the disclosure of interest rates, which prior to legislative intervention a number of companies have undertaken already.

A second example is that of debt-counselling and debt-adjusting, for which the association of *Volkskredietbanken* (the former municipal pawn houses) has set up rules.

Standard Contract Terms

With regard to standard contract terms, self-regulation plays an important role in the sense that many national organisations of trade and industry have formulated standard contract terms, which they then either impose upon or – more often – recommend to their members. Only in a very limited number of branches have consumers' organisations been accepted as negotiating partners. The main function of the proposed legislation on standard contract terms – which will not be affected by the recent deregulation proposals – will be to provide a stick behind the door in order to encourage the negotiation of bilateral standard contract terms.

Consumer Complaints

Self-regulation and concerted action have had quite some success in the area of consumer complaints. Self-regulation in the form of providing consumers with a speedy, inexpensive and simple procedure exists in many branches of trade and industry. In some cases, consumers' organisations have participated in setting up bi-partisan

complaints boards for products or services such as interior decorating, dry-cleaning, laundry, recreation, travel, wooden floors, kitchens, and public utilities (gas, water, electricity). A piece of government regulation which perhaps might be qualified as soft law, is the regulation on recognition and award of subsidies to consumer complaints boards.

At present, a general overhaul of the lower court (*kantongerecht*) proceedings is being envisaged. At a time when the government has to economise, a major reform of civil procedure is not too difficult to predict. It is not yet certain in which way the existing consumer complaints boards may play a role in this reform. Some research has recently been done into effectiveness and consumer satisfaction with both the lower court civil procedure and complaints boards procedures. The complaints boards have not scored higher than the lower courts on all points.

CONCLUSIONS

In this paper I have tried to show that in the Netherlands a number of widely varying forms of self-regulation and concerted action co-exist in the area of consumer protection. On the one hand, these non-legislative rules may be compared with legislation, and on the other with various forms of self-discipline. The concept of soft law is not appropriate to cover all of these phenomena. Rather it should be reserved for non-binding recommendations and guidelines emanating from an international authority (and possibly national authorities as well) – the non-binding recommendation of article 189 of the EC Treaty is a good example of a vehicle for soft law.

Self-regulation and concerted action do not only deal with the drawing up of substantive rules; they often involve the setting up of arbitration tribunals or conciliation schemes. Sometimes, as is the case with regard to some of the Dutch consumer complaints boards, the settlement of disputes seems to have greater importance than the drawing up of normative rules. I want to stress this, since leaving the complaints boards out of the picture distorts it. Actually, if a speedy, inexpensive and simple court procedure were available, it may be doubted whether all of the present codes and collective contracts would exist.

In the case of advertising, self-regulation and concerted action were developed under the threat of legislative intervention. In the area of safety and quality standards, the goodwill abroad of Dutch export products often served to promote the drafting of codes, which later were sometimes replaced by legislation. Self-regulation

also served another function: to keep a branch of trade or industry closed to outsiders. The change from self-regulation to concerted action is of recent origin. This is understandable, since consumers' organisations themselves became representative for consumers only in the 1960's.

An area which seems appropriate for concerted action is that of advertising. As far as substantive rules are concerned, the Dutch advertising code – as well as most other European codes – offer a level of protection which in many regards exceeds that of the EC draft directive. A number of weak points in the present self-regulatory system are the one-sided composition of the Code commissions, the burden of proof which in some cases rests upon the consumer, the absence of preventive control for repeat offenders, and the absence of ex officio control. In some other countries, there already are developments in these directions.

Two areas where concerted action shows some progress are those of the complaints boards (although the long due reform of the lower court procedure is still awaited by all) and of standard form contracts (where legislation is needed as a stick behind the door). In other areas of consumer protection, legislation is still needed to provide the norms. There is no indication that the need for legislation will diminish in the near future, the present trend of deregulation notwithstanding.

NOTES

[1] There is a large number of books and law review articles in Dutch which give some information about self-regulation in the area of consumer law. The most commonly used monographs on consumer law are Brack (1980), Dommering (1982), Keijser (1977), and Stutterheim (1983). More detailed information regarding some aspects of consumer legislation will be found in Dommering-van Rongen, Duk, and Hondius (1979–). An English language introduction to Dutch legislation was published by Hondius (1979). The most recent Dutch law review article on the subject matter of this paper is Kabel (1983), which was inspired by an earlier article by Stuyck (1981) on "self-discipline" in Belgium.

[2] More information regarding the Dutch *publiekrechtelijke bedrijfsorganisatie* (public trade organisations) may be found in Boot and de Jong (1978).

[3] As far as terminology is concerned, the articles by Kabel (1983) and Stuyck (1981) provide us with a number of ideas and with further references.

[4] A general survey of deregulation in the United States and in the Netherlands is given by Slot (1983). The most recent publication on "privatisering" is de Ru (1981). See also Kaag (1983). The letter of the Minister of Economic Affairs of June 27, 1983 is published in *Handelingen Tweede Kamer der Staten-Generaal*, 1982–1983, 17 931 nr 5.

[5] Pertinent references on soft law are: on the origin of the concept, Dupuy (1977); on the area between law and non-law, van Hoof (1983); on the UN Second Development Decade, Virally (1970); on the Helsinki Final Act, Schachter (1977), van Dijk (1980); on the various categories of soft law, Tammes (1983).

[6] Some recent publications on advantages and disadvantages of self-regulation are: Beier (1979), Boddewyn (1983 a, b), Brandmair (1978), European Consumer Law Group (1983), Humble (1978), LaBarbera (1983), and Pickering and Cousins (1983).

[7] There exists a number of recent publications on the Dutch Advertising Code: Overeem (1983), van Delft-Baas (1982), Verkade (1978–).

[8] Many references may be found in Hondius (1979). More recent references are with respect to consumer credit Huls (1981), and with respect to standard contract terms several publications by Gras, see, e.g., Gras (1979) and his forthcoming thesis. Two research projects in the area of consumer complaints have been carried out by Francken (1982, 1983). The most recent survey of consumer complaints boards has been issued by the Sociaal-Economische Raad (1983).

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ZUSAMMENFASSUNG

Nicht-rechtliche Maßnahmen zum Verbraucherschutz – das Beispiel der Niederlande. Der Beitrag geht zunächst auf die grundsätzliche Einschätzung und Terminologie von "Selbstregulierung", "soft law" und "Deregulierung" in den Niederlanden ein. Es herrscht eine positive Einstellung zu Selbstverwaltungsmaßnahmen der Wirtschaft. Mit dem Aufkommen von zwei einflußreichen Verbraucherorganisationen, Consumentenbond und Konsumenten Kontakt, konnte in Teilbereichen das System der Selbstregulierung zu einem solchen der konzertierten Aktion erweitert werden. In diesem Sinne ist eine Ergänzung, teilweise auch ein Ersatz von Gesetzgebung möglich.

Dargestellt werden Selbstegulierungsmaßnahmen auf dem Gebiet der Werbung durch einen Kodex. Für die Einhaltung der Regeln über lautere Werbung sorgt eine besondere Beschwerdekommission, an der Verbrauchervertreter mitwirken. Die Implementation des Kodex wird positiv eingeschätzt. Er bietet z.T. einen höheren Verbraucherschutz als der EG-Richtlinienvorschlag über irreführende Werbung.

In vielen anderen Bereichen existieren Selbstregulierungsmechanismen, die allerdings wenig effektiv sind und meist auch keine Verbrauchervertretung aufweisen. Eine Ausnahme machen Beschwerdekommissionen, die Streitfälle schnell und kostengünstig erledigen. Gesetzgebung bleibt hier notwendig als Mittel zu verbraucherfreundlichem Verhalten, etwa wie geplant zu Allgemeinen Geschäftsbedingungen.

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