1. Introduction
This paper is about multi-level and multi-actor governance of supervision, and the Dutch Consumer Authority is used as an exemplary case. Nowadays, supervising in public/private networks and on the basis of a responsive strategy is widely considered the optimal 'formula' to effectively fulfil supervisory tasks when these concern enterprises which in turn operate in national and international networks.

The Consumer Authority fits this ticket perfectly as it is equipped to fit in with existing civil law and self-regulatory mechanisms to uphold consumer protection, while at the same time it has administrative law instruments that have been newly added to the toolbox of consumer protection law. Furthermore, the Consumer Authority is to act as a partner in the European network of national consumer authorities, whereas, on the other hand, nationally it needs to coordinate its efforts with other public supervisory agencies and with private consumers’ organisations. On a yearly basis the Consumer Authority presents an Agenda setting forth its strategic supervisory priority-criteria and main areas of interest.

Although the Dutch Consumer Authority seems a perfect example of modern supervisory governance, the question remains, whether this image of supervisory ‘networking’ and ‘flexible response’ to infringements of (EC) consumer law, isn’t in effect hampering transparency and thus accountability, and if ‘vertical’ public law remedies aren’t pushing out ‘horizontal’ private or self regulatory solutions.

This question, which suits the attempt to arrive at more general findings, will be discussed on the basis of a description of the Consumer Authority’s underpinnings, the EC Regulation on consumer protection cooperation (in short Rcpc), and the Dutch Act on the Enforcement of Consumer Protection (AECP), and the first impressions of its activities in real life. Next we will look into both the matter of accountability and of public versus private law.

2. Underpinnings; the legal framework
2.1. The Rcpc (EC Regulation on consumer protection cooperation)

Cooperation
The main objective of the Rcpc is cooperation between national authorities and between national authorities and the European Commission. The key to cooperation is the

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1 Michiel Heldeweg is professor of Public Governance Law at the University of Twente. Some descriptive parts of this paper have been taken from Heldeweg’s article, Supervisory governance – the case of the Dutch Consumer Authority, as published in Utrecht Law Review, Volume 2, Issue 1 (June 2006).


4 AECP, Statute of 20 November 2006, concerning rules on entities responsible for enforcement of consumer protection laws (houdende regels omtrent instanties die verantwoordelijk zijn voor handhaving van de wetgeving inzake consumentenbescherming (Wet handhaving consumentenbescherming)), OJ (Stb.) 2006, 591.

5 See Article 1 Rcpc, supra note 3. For a broader policy perspective on the renewal of European consumer policy, see the documentation under http://ec.europa.eu/comm/consumers/overview/cons_policy/index_en.htm. For the Green Paper on European
concept of mutual assistance between national consumer authorities, either concerning a request (through a single liaisons office) for an exchange of information (Art. 6 Rcpc) or to take enforcement measures (Art. 8 Rcpc). The requested authority ‘shall supply’ (without delay) any relevant information, respectively ‘shall take all necessary enforcement measures’ (for the cessation or prohibition of an infringement), but each consumer authority has discretion as to the effectiveness, efficiency and proportionality of the requested response. The requested consumer authority can ask other public offices to assist in responding properly to the applicant’s request, but it can also seek assistance from ‘bodies with legitimate interest’. Thus the Regulation creates a network of enforcement authorities to deal quickly and adequately with cross-border infringements (by the ‘most rogue traders’) of EC laws, regulations and directives which protect consumers’ interests. This implies that national authorities must sometimes execute foreign law. Sharing knowledge about the domestic law of 28 countries and understanding the pertinent differences is therefore of great importance. This is where the network can play an important role.

**Entities**

The Rcpc distinguishes the following four types of national entities:

1. The ‘competent authority’ (Art. 3, sub. c) – being any public authority within a Member State having responsibility to enforce ‘the laws that protect consumers’ interests’. In the Netherlands, the main competent authority is the newly created Consumer Authority, but, as will be shown below, some competences rest with other, already existing, public supervisory authorities.

2. The ‘single liaison office’ (Art. 3, sub. d in conjunction with Art. 4, par. 1) – this stands for the public authority in each Member State which is uniquely designated as being responsible for coordinating the application of the Rcpc within that Member State. In the Netherlands this authority rests (exclusively) with the Consumer Authority.

3. Possible ‘other public authorities’ (Art. 4, Para. 2) – refers to the fact that other public offices, apart from the ones under 1 and 2, may be involved in supervisory and enforcement activities as addressed in the Rcpc, not on the basis of competences derived from the Rcpc, but on the basis of their already nationally attributed competences.

4. ‘Bodies having a legitimate interest in the cessation or prohibition of intra-Community infringements’ (Art. 4, Para. 2) – points to a similar involvement, but in this case by an entity outside ‘public office’.

The competent authority (as described under 1.) may, upon a request for assistance from an authority of another Member State, instruct a designated civil law body, ‘to take all necessary enforcement measures available to it under national law to bring about the

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1. First mentioned in Art. 2, Para. 1 Rcpc, and elaborated in Chapters II and III of the Rcpc
2. Art. 8, Par. 2 Rcpc – see also Art. 15, Par. 2 Rcpc.
3. Art. 6, Par. 2 and Art. 8, Par. 2 Rcpc, as well as Art. 8, Par. 3 Rcpc (see also in the below)
5. Article 3, sub. b Rcpc describes an intra-Community breach as any act or omission contrary to the laws that protect consumers’ interests, as defined in the regulations and transposed directives referred to in Article 3, under a Rcpc (as listed in the Annex), ‘that harms, or is likely to harm, the collective interests of consumers residing in a Member State or Member States other than the Member State where the act or omission originated or took place; or where the responsible seller or supplier is established; or where evidence or assets pertaining to the act or omission are to be found.
6. See also the (Dutch) Explanatory Memorandum to the AECP (E.M.(AECP0), supra note 4, p. 8)
7. Art. 2.3, Para. 1 AECP, supra note 4.
cessation or prohibition of the intra-Community infringement on behalf of the requested authority.'\(^{14}\) Note that the Rcpc expands on Directive 98/27/EC on injunctions for the protection of consumers’ interests and this directive includes the possibility for transboundary class actions, as implemented in the Netherlands in Article 305c CLC.

2.2. *On a comparative note*

The Explanatory Memorandum to the Rcpc acknowledges that the introduction of the Rcpc will require some changes to the enforcement rules in Member States. It states that ‘Clearly (…) some Member States will be more affected than others will. A large majority of Member States and acceding countries nevertheless have public authorities with specific. Different to the Rcpc-memorandum,\(^ {15}\) the Explanatory Memorandum to the AECP offers some consolation in offering a concise overview of some basic aspects of the legal regimes for consumer protection in 10 Member States.\(^ {16}\) It goes beyond the scope of this paper to individually present and discuss these national choices. The most relevant conclusions from that overview – and any further investigation - for the purposes of this contribution are:

- that in a number of states a consumer agency (at least similar to and certainly suitable for adjustment to the requirements of the Rcpc) existed prior to the introduction of the Rcpc - in others, as noted in the Rcpc, such a public authority had to be introduced or specifically designated;
- that where consumer authorities do exist, sometimes they operate as an independent agency and sometimes under the political responsibility of a minister (vis-à-vis parliament). Numerically, the independent agencies are roughly in balance with the subordinate authorities;
- that in a number of cases the supervision and enforcement of consumer protection law is, organisationally speaking, combined with the supervision and enforcement of competition law (such as in the UK, France and Italy) – in the Explanatory Memorandum to the Rcpc the option of combining competences in both fields is propagated for those Member States that already have a public Competition Authority but lack a consumer authority as such.\(^ {17}\) Across the Member States substantive law ranges from civil and administrative law to criminal law. In most countries effective enforcement, in the case of obstruction by the offender, lies with the courts. Clearly most (existing) authorities distance themselves from individual complaints, and focus on collective infringements and on the possibility of (support for) class actions.

In the following we will see how the Dutch legislator responded to this spectrum of options on different counts.

2.3. *The AECP (Act on Enforcement of Consumer Protection)*

**Backdrop**

The introduction of the Dutch Consumer Authority is part of a re-evaluation of consumer protection in the Netherlands. In that sense the AECP is not just an implementation of the Rcpc, but also a response to the deficiencies within the existing legal framework for consumer protection. The Explanatory Memorandum to the draft AECP stipulates three grounds for this re-evaluation:\(^ {18}\)

- a strong market should be matched by a strong government;
- major gaps in the legal fabric of existing consumer protection;
- implementing the Rcpc.

Unfortunately, there is no further elucidation of the opinion that strong markets should be matched by strong governments, so we are left to assume that the Dutch government

\(^{14}\) See Art. 8, Para. 3 Rcpc, *supra* note 3. This instruction is not a transferral of competences – see ECLG, *supra* note 5, pp. 3-4.

\(^{15}\) The choice of a public consumer authority is addressed in E.M.(Rcpc), *supra* note 5, pp. 7-8, and will be further discussed below.


\(^{17}\) E.M.(Rcpc), *supra* note 5, under no. 36. As we will see, the Dutch government did not share this point of view.

\(^{18}\) E.M.(AECP), *supra* note 4, p. 2.
considers this ground to be ‘self-evident’. The argumentation that is given in relation to the second ground may, however, shed some light on this point. The gaps or deficiencies in existing consumer protection law that the Dutch government considers most serious, relate to consumer complaints of a collective nature. It finds that a public law response to these collective breaches of consumer protection will benefit the workings of the markets and thus contribute to economic growth, even though public supervision should and should only intervene where the market fails to effectively solve conflicts concerning consumer interests through self-regulatory or civil law mechanisms for dispute settlement. If the market fails to deal with collective infringements, the government should be sufficiently equipped, such as through a public supervisor, to act unilaterally and decisively – there’s the strong government against the market! The implementation of the Rcpc may not be the only but it is, however, the prime objective behind the AECP, especially the establishment of the national Consumer Authority, as its ‘piece de resistance’. The Dutch government has chosen the option of creating a new authority, because the already existing supervisory agencies focus on sectoral legislation, such as telecommunications and financial services, whereas consumer protection requires a more general supervisor. Furthermore, the existing public authorities fulfil a task that is a poor match for consumer protection, as is considered to be the case with the Netherlands Competition Authority.

Framework
The AECP offers a new supervisory framework with the Dutch Consumer Authority as its main competent authority (Art. 3 under c and Art. 4, Para. 1). Initially, this authority will be a division of the Ministry of Economic Affairs, operating under ministerial supervision and responsibility. Ultimately, four years after the establishment of the Authority, an evaluation will be made, in order to decide whether the Authority should be converted into an independent agency.

Five other, already existing Dutch supervisory agencies are also designated as competent authorities, with the obligation to execute competences from the Rcpc, in as far as they are explicitly assigned to them in the draft AECP. These agencies are: the Netherlands Authority for the Financial Markets, the Netherlands Health Care Inspectorate, the Dutch Media Authority and the Food and Consumer Product Safety Authority. Whenever one of these (other) authorities is competent to enforce the pertinent regulations, the Consumer Authority is not. Three already existing supervisory authorities have been designated as ‘other public authorities’ (see Art. 4, Para. 2 of Rcpc): the Dutch Health Care Authority, the Independent Post and Telecommunications Authority and the Netherlands Competition Authority belong to this group. In the case of a concurrence of competences (Article 4.2 of the Rcpc) the draft AECP gives priority to the existing ‘other authority’ to respond to the breach of consumer protection law. Finally, the draft AECP allows for the

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19 According to the Memorandum, research shows that in the Netherlands, during the years 2001-2003, approximately 10,000 complaints from individuals were lodged with private complaints organisations, concerning (mainly) collective breaches of consumer law – breaches involving an open group of consumers. The Dutch government feels that these numbers show that in the cases involved the individual protection of consumers’ interests is insufficient. Furthermore, collective breaches require more attention as they disrupt the market and distort equal competition.

20 E.M. (AECP), supra note 4, p. 2-3.

21 Ibid., pp. 6 and 25.

22 E.M. (AECP), supra note 4, p. 3.

23 Art. 4 Rcpc, supra note 3, leaves it to the Member States to decide whether to create a new entity or to assign the new tasks and competences to an existing entity.

24 The OPTA: the Independent Post and Telecommunications Authority.


26 The NMa: the Netherlands Competition Authority. This is in contrast to, inter alia, the British Office of Fair Trading, which combines supervision in both areas.


28 This follows from the fact that the draft AECP distinguishes between sets of rules and regulations that are to be enforced specifically by the Consumer Authority or by any of the other competent authorities (see a-h in the annex: the Dutch Consumer Authority is only competent concerning a and b; the other competent authorities are competent concerning c-h).
possibility to designate ‘bodies having a legitimate interest in the cessation or prohibition of intra-Community infringements’ (as mentioned in Art. 4, Para. 2 of the Rcpc).

Non-discrimination and extraterritorial competences
The Rcpc is aimed at enforcing laws that have been enacted to prohibit intra-Community collective infringements of consumer interests. Hence the AECP is limited to that scope, with the exception of the competence of the Consumer Authority to (also) act against relevant infringements of a non-transboundary nature – Article 2.2 AECP (so as to avoid discrimination in terms of enforcement effectiveness concerning national and intra-Community transactions).29 Article 1.1, sub. m AECP ensures, that the Dutch Consumer Authority has the competence also to apply foreign law so as to enable adequate responses to requests for mutual assistance. Naturally, the aforementioned ‘broadened competence’ of the Consumer Authority only extends to Dutch consumer law.

Private versus public governance
EC consumer protection law as referred to in the Rcpc has been largely implemented in the Netherlands in the Civil Code (CLC), enforcement being a matter for the civil courts. Dutch consumer protection law is originally based on the view that, through and within the law, the consumer himself should be able to enter into a contract and, if necessary, to protect his rights, if need be by resorting to the courts. Furthermore, consumer organisations (as ‘bodies with a legitimate interest.’), either of Dutch origin or from abroad, have the power to start a class action on the basis of Article 305a and Article 3:305c of the Dutch Civil Code (CC), demanding – if necessary before the courts – that the consumer rights which they protect be upheld. Finally, the Netherlands consumer law system knows is underpinned by numerous instances of self-regulation, such as procedures for out-of-court dispute settlement (also known as ‘alternative dispute resolution’)30 and the joint formulation of general sales conditions.

The Dutch government has taken the view that the obligation to establish a consumer authority does not necessitate a change to the existing civil law and self-regulatory provisions and arrangements. In fact, the opinion was clearly ventilated that, where private consumers are able to manage their own affairs, public law supervision should not interfere – a stance that is referred to as ‘subsidiarity’.31 The responsibility for proper conduct primarily rests with the consumers and traders (suppliers, providers and sellers) themselves and should not be shifted to the consumer authority. This authority should only be called into action when collective consumers’ interests are infringed and the system of civil law enforcement is unable to generate an effective response.32

Dual system
Hence the introduction of public law provisions for the supervision and enforcement of civil consumer law (embedded in the Civil Code) is enshrined in the AECP as a ‘dual system’. This is seen as an inevitable consequence of the Rcpc, especially in view of the the types of responses and sanctions that Article 4, Para. 6 of the Rcpc prescribes as the necessary supervisory and enforcement competences of the relevant authority:33 the right of access to information, to be supplied with information on demand, the right of on-site inspections, to request that an infringement be terminated, to obtain from the seller or supplier an undertaking to cease the infringement (and to have this published), to require the cessation or prohibition of an infringement (and to publish the resulting decisions) and to require payments for non-compliance. These competences are

29 As to the other authorities, their existing competences should already suffice for the protection of national transactions – and thus there should be no danger of discrimination; E.M.(AECP), supra note 4, p. 5.
30 Alternative dispute settlement is an issue that is also supported by the EU; e.g. Commission Recommendation of 4 April 2001, OJ 2001 L 109/56, containing common criteria for consensual out-of-court procedures; the Proposal for a directive on certain aspects of mediation in civil and commercial matters, 22.10.2004, COM(2004) 718 final; and services such as the European Consumers Centre’s network (ECC-Net: http://europa.eu.int/comm/consumers/redress/ecc_network/index_en.htm).
31 E.M.(AECP), supra note 4, p. 6.
32 E.M.(AECP), supra note 4, p. 6 and pp. 25 and 28. There is more on this issue in the below.
33 See also Art. 4, Para. 3 Rcpc, supra note 3.
described as rights which can either be exercised by the authority itself (subject to the possibility of a judicial review), or by requesting an injunction from a competent court of law.

At the same time the Dutch government chose to create a new civil procedure to enable the new Consumer Authority to enforce civil law consumer protection by requesting an injunction at the civil courts. The alternative, appealing to the administrative courts, could lead to conflicting interpretations between the civil and administrative courts concerning specific concepts in the Civil Code. Although initially it was felt that administrative enforcement sanctions would not fit in with the protection of individual rights in the legal relationship between consumers and traders – as administrative sanctions only create a relationship between the Authority and the trader – the draft AECP was amended to also bestow upon the Consumer Authority general administrative law sanction (whether or not upon request), aside from its specific administrative sanctioning powers on the basis of (existing and future) administrative law consumer protection, such as provisions in the Prices Act (Prijzenwet; offering, amongst other provisions, a legal basis for prescriptions on the clarity of price lists). These sanctions are up for appeal at an administrative court. Administrative law instruments also apply when the Consumer Authority involved in merely supervisory activities, such as the above-mentioned access to information or on-site inspections.

On balance
It seems as if the Dutch government has ‘turned necessity into virtue’ when implementing the Rcpc. The need to design a ‘competent authority’ was combined with filling the gaps in consumer protection law, especially with regard to collective breaches. As a consequence a dual system has come into existence in which public responsibility and public law instruments are added to an existing, primarily civil law and self regulatory enforcement system. Furthermore, the Consumer Authority almost seems like a spider in a web of authorities and private organisations. One part of this web is the European network of national consumer authorities; another part is the web in which the Consumer Authority must coordinate and fine-tune its activities with other national supervisory authorities and with national bodies with a legitimate interest.

So, again, the question will be whether this web and the powers allocated provide a basis for effective (and efficient) supervision, or whether the result stands to pose a threat to (transparent) accountability and public enforcement pushing out private.

3. Characterising the Dutch Consumer Authority
3.1. Core tasks & competences

Enforcement, supervision & sanctioning
Supervision and enforcement are the core activities of the Rcpc-Consumer Authorities. Both activities serve to uphold regulation, which in consumer protection law is mostly laid down in statutes (in the Netherlands mainly in the Civil Code), in statutory orders and, within the scale of individual legal relations, in administrative acts and contracts (including policy guidelines and general clauses).

In this paper we define supervision as the whole of activities employed to determine whether a certain conduct infringes existing regulations. The term Enforcement encapsulates all mechanisms (including supervision!) which aim to ensure compliance with existing regulations. Taken in a more restricted sense, enforcement is about

34 E.M. (AECP), supra note 4, p. 6-7.
36 Art. 3, under c Rcpc, supra note 3.
37 This authority was already established prior to the acceptance of the AECP. See the letter by the Undersecretary of Economic Affairs of 1 December 2005.
38 Information exchange may be considered as a third activity – see, amongst others, Arts. 6 and 7 Rcpc, supra note 3.
sanctioning unlawful behaviour, with the aim being to punish or to remedy, and to compensate or remove the (causes of) infringements of existing rules.

When consumer authorities are organised independently from ministerial powers, they seem to fit the term regulators. The White Paper on Good European Governance refers to these as, ‘A range of (...) agencies (...) in areas with a need for consistent and independent regulatory decisions’. Their powers may extend well beyond supervisory activities. Verhey & Verheij found that Dutch regulators come equipped with administrative powers (to regulate, especially by individual administrative acts, such as licences), with powers to issue rules (for laying down generally binding norms or policy guidelines), powers to settle disputes (generally as an optional feature for reaching an out-of-court settlement) and other powers (especially to issue non-binding rulings, comments or recommendations or to give advice and present reports on the basis of research, investigations or inspections). Matching impressions of an increasing number and variety of powers in the hands of regulators may be found in the case of European agencies. For the time being, the Dutch Consumer Authority only holds powers of supervision and sanctioning, both under control of the courts. The only power to set general rules is that of setting policy guidelines on the use of these specific competences, and certainly for the time being, this power will rest with the minister.

3.2. Compliance supervision

The activities of the Consumer Authority focus on proper adherence to rules of conduct by citizens and companies within the market. Although there may be an interface, we need to separate this type of compliance supervision from competition supervision (in general terms, aimed at safeguarding fair trade in general, and more specifically, aimed at enhancing the process of the liberalisation of a specific branch of public services. The Consumer Authority is active in supervision of market players’ conduct, aimed at ensuring that market transactions are carried out in conformity with relevant rules of conduct. Apart from consumer transactions (as discussed here), financial services (savings, loans, insurances and investments) also fall within this category (but in The Netherlands are left to the supervision of the Financial Markets Authority.

Regulations concerning consumer protection are likely to concern: (a) the need for transparency or proper information; (b) freedom of choice, having a real choice and being able to switch from one service provider to another; (c) fair trade, reasonable prices and sales conditions and the absence of obligatory package sales; (d) possibilities

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40 Such as the right to inspect goods, to search a house or to demand information
43 Administrative orders (ex post facto) fall within the jurisdiction of administrative courts. Of course to get an injunction requires ex ante court order.
45 Verhey and Verheij, supra note 41, pp. 146-147 (with references).
46 In the Netherlands general competition supervision rests with the Netherlands Competition Authority. Specific supervision rests with specific agencies for specific areas: the Independent Post and Telecommunications Authority (OPTA), the Directorate for Supervision in Energy Affairs (DTe) and The Dutch Health Care Authority (NZa). Ideally, once liberalisation has been completed, this type of supervision should cease and only the general competition supervision should remain.
for complaints and compensation and access to reliable tribunals. Supervision by consumer authorities will certainly have to address the above issues, especially under (a-c) and possibly under (d). In some countries, however, such as the United Kingdom and Italy, the legislator has seen fit to combine supervision of market players’ conduct with general competition supervision.47

Principles of supervision
In a 2005 Dutch central government White paper on supervision, six principles of good supervision were presented.48 How do they match with the positioning, tasks and powers of the Consumer authority? First the principles:

- **selectivity** (if possible, the government should leave supervision and enforcement to civil society and restrict itself to offering a safety net);
- **decisiveness** (supervision should be effective);
- **cooperation** (putting limits on the burden of supervision by improved cooperation between the manifold supervisors);
- **independency** (acting in a trustworthy fashion and independent from political or other partisan opinions or interests);
- **transparency** (giving reasons for supervisory policies and activities and applying openness);
- **professionalism** (on each level of supervision: the individual supervisor, the supervisory agency and the occupational group; integrity, coherence and improving competences are the key criteria).

If we apply these principles to the Dutch Consumer Authority at least four important questions arise:

1. the (Explanatory Memorandum to the) AECP advocates that the Authority will operate (selectively) as a ‘safety net’. The main question will be whether the Authority will be able to restrict itself to this role if and when intra-Community trade increases and if and when private parties appeal on the Authority to apply its administrative legal sanctions?
2. will the cooperation, which is envisaged in agreements between the Dutch Consumer Authority and other public supervisors and private legitimate bodies, create sufficient trust among the players and with the consumers to avoid a supervisory ‘Babylon’?
3. similarly, will the new system of a European network and national networks create sufficient transparency to sustain trust but also to have clarity on accountability (for policy choices) so as to underpin effective and efficient operations?
4. finally, will the Authority be able to operate independently or is ministerial influence unavoidable given the vulnerability of the national supervisory network and the liability of the state vis-à-vis the Community (and how will this affect the quest for professionalism)?

Clearly these questions require answers, although some may only prove to be answerable in practice and over time.

4. Governing supervision
Our main question, at the start of this paper was whether the Consumer Authority’s strategic position in supervisory ‘networking’ and a ‘flexible response’ to infringements of (EC) consumer law, isn’t in effect hampering transparency and thus accountability, and if ‘vertical’ public law remedies aren’t pushing out ‘horizontal’ private or self regulatory solutions.

In effect these are two, albeit intertwined, questions.

a. Are we, on the one hand, witnessing a shift in supervisory governance from self regulatory, private law supervision (by nature in symmetrical and reciprocal patterns)

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47 It goes beyond the scope of this article to determine which internal arrangements have possibly been put into place to separate the treatment of these different domains.

to (coercive and unilateral patterns of) public law, and does this merely amount to public law instruments being added to the supervisory 'tool box' or is public law pushing out private law, so that we must evaluate the introduction of the Consumer Authority as effectively a publicisation of consumer law supervision.

b. Are we, on the other hand, witnessing a shift in supervisory governance from direct and individual (legally empowered) responsiveness (as in an injunction for cessation, redress or compensation of damages) to indirect responsiveness through public-private networks (through 'custodian entities') and how does this effect supervision in terms of (transparent) accountability (Who is responsible for which action; who acts first?) in terms of new communicative 'strategy-building' between public and private 'custodians' and matching supervisory tactics?

Both questions also touch on effectiveness: is public better than private, how does subsidiarity work in the dual system and are networks more adequate in their responsivity to infringements? In causal terms multi-level aspects (as in the new European network of public law Authorities) and Multi-actor aspect (as in the national public-private networks of 'custodians') are here assumed to have an impact on existing national arrangements of civil law and self-regulatory enforcement, but may also place the Consumer Authority in a 'splits' (to be responsive to the minister or to the European Commission, or to private entities in the national context).

4.1. Coordination between public and private law

The European (Rcpc) perspective

The Rcpc offers little guidance as to the question of the division between civil law and public law in the area of consumer protection law. In the Explanatory Memorandum, however, some remarks are made on the question of why a network of public authorities is deemed to be necessary.49

First of all, the competences involved in supervising and enforcing Community consumer protection law (i.e. investigatory and sanctioning powers) need to be unilaterally binding. Furthermore, the use of these powers will require guaranteed confidentiality and professional secrecy.50 The Memorandum also presents public authorities as having a proven reputation for speedy, efficient, effective and comprehensive enforcement, which is considered an important deterrent to rogue traders.51 Impartiality and accountability are presented as being more effective when authorities act in the public interest than when supervision and enforcement are left to private entities. Furthermore, mutual assistance depends upon reciprocal rights and obligations (ensuring effective protection in cross-boundary situations) and reciprocity warrants equivalent public authorities in each Member State: 'The mutual assistance rights provided in the regulation should therefore only be entrusted to public authorities.'52 Private bodies can play their part, but primarily with regard to domestic consumers.

Secondly, the Memorandum ascertains that a large majority of the Member States have recognised 'the value of a public dimension to their enforcement systems', and it builds on this to present the creation of a network of public consumers’ authorities at the EU level as a necessary assurance for Member States to adopt, in the future, the maximum harmonisation of consumer protection laws (such as the directive on unfair commercial practices) – because ‘consumers will be protected by equally effective public authorities when shopping cross-border’.53 This point is also reiterated with regard to the enlargement of the internal market, since the proposed regulation is said to be an opportunity to ensure effective enforcement in the new Member States.

49 E.M.(Rcpc), supra note 2, p. 7-8.
50 E.M. (Rcpc), supra note 5, under no. 34.
51 Ibid.; stating that there is proof that some rogue traders already exploit the gaps in countries without public enforcement.
52 Ibid.
53 Ibid.
Finally, the Memorandum reminds us,\textsuperscript{54} that because its scope is limited to cross-border infringements, the regulation does not compel Member States to change their arrangements for domestic infringements. Furthermore, new public authorities are not necessarily required in those Member States that currently lack such authorities, because the limited responsibilities of the regulation could be given to existing public authorities – for instance to public authorities responsible for the enforcement of competition law matters.\textsuperscript{55}

Clearly, the \textit{R CPC} presents a confident choice for public supervision, but it also allows for a continuation of existing domestic civil law and self-regulatory systems of consumer protection law.

\textbf{The Dutch (AECP) perspective}

Enforcing consumer protection law in the Netherlands was primarily a \textit{civil law domain}, in which the consumer himself is considered capable of protecting his own rights, if need be in an out-of-court procedure, or in the civil courts. Furthermore, private ‘bodies with a legitimate interest’ may engage in self-regulatory cooperation with (organisations of) traders, for instance in adopting general sales conditions, and they may also commence a civil law class action.

The Dutch legislator has adopted the \textit{R CPC}-view that the obligation to establish a consumer authority does not necessitate a change in the existing civil law and self-regulatory provisions and arrangements. \textit{Subsidiarity} is the key and public supervision should be regarded as a safety net. Hence, a \textit{dual system} was designed to ensure that (European and additionally national) public law requirements are met (especially the responses and sanctions prescribed in the \textit{R CPC}), without disturbing the existing fabric of civil consumer law – or rather, expanding on civil law by creating a new civil injunction procedure (Art. 305d CLC).\textsuperscript{56}

As presented in the above the \textit{Dutch Consumer Authority} only enforces consumer protection law as listed under a. and b. of the \textit{AECP} Annex – see Article 2.2, Para. 1 \textit{AECP}. This annex lists both the relevant regulations and directives and concerning the latter also the statutes by which these directives were implemented:

- The regulations under a., which are all directives, have been implemented in the CLC and are enforced through civil law means, such as the new and speedy civil procedure of a request for an injunction (Art. 2.5) and the right to request a civil court to declare that agreements on class compensation for damages (to which the \textit{Dutch Consumer Authority} is a party) are generally binding.\textsuperscript{57} The main subjects of civil law protection are misleading advertising, travel arrangements, general sales conditions, time-sharing arrangements, distant sales, consumer sales and guarantees and, finally, e-commerce.

- The regulations under b., again only directives, are implemented in public law statutes: the Act on door-to-door or street sales (or hawking) and the Prices Act. These can only be enforced through administrative law enforcement; on demand for mutual assistance with regard to an intra-Community breach of consumer protection law (Art. 2.7, Para. 3).\textsuperscript{58} The main administrative instruments are: the administrative order subject to a penalty (Art. 2.8), the administrative penalty (Art. 2.9) and the public announcement on the use of one or both of these sanctions,\textsuperscript{59} and of refraining from such use on the basis that an undertaking by the trader has been agreed upon.

\textsuperscript{54} \textit{Ibid.}, under no. 35.

\textsuperscript{55} \textit{Ibid.}, under no. 36; the Memorandum goes on to say that there is a possible positive synergy between the consumer protection and competition dimensions of market surveillance and enforcement.

\textsuperscript{56} See Art. 8.1 draft \textit{AECP}, \textit{supra} note 4. An administrative procedure was rejected due to the fear of diverging interpretations of CLC provisions.

\textsuperscript{57} Chapter 2, § 2 \textit{AECP} (civil law enforcement). See also E.M. (\textit{AECP}), \textit{supra} note 4, p. 17 and p. 33-34.

\textsuperscript{58} See E.M. (\textit{AECP}), \textit{supra} note 4, p. 17 and Para. 5.2, p. 31-33. See also Chapter 2, § 3 \textit{AECP} (Administrative Law enforcement), \textit{supra} note 4.

\textsuperscript{59} Because the one sanction is retributive and the other punitive, Dutch administrative law determines that they can be applied simultaneously.
Note that the administrative law supervisory competences apply generally, regardless of whether a (suspected) infringement concerns civil or public consumer protection law.

In drafting the AECP the Dutch government decided, on appeal from a parliamentary majority, to extend the list of Annex b. also to those civil law provisions that may be considered sufficiently precise (in wording) and hold an unconditional order or prohibition; effectively extending the administrative law sanctions onto the domain of substantive private law, albeit only in cases where an infringement of a substantive provision is easily concluded (as, for example, in requirements concerning traders/sellers providing information, sales on distance, e-commerce, package tours, and time sharing). Infringements of more open norms should be left to the civil courts to decide upon. To this end Chapter 8, holding specific types of such clear and unconditional norms, was added to the draft AECP, and the abovementioned annex was amended hitherto.

The dual system, albeit no longer as pure as originally drafted, preserves the existing system of mainly civil law consumer protection (through self-regulation), while adding instruments for intra-Community infringements. The Consumer Authority is built, as the Explanatory Memorandum puts it, on a 'civil foundation’. Apart from individual consumers being considered capable to stand up for their own rights, this foundation is underpinned by consumers organising themselves (or being organised), such as in the Consumers’ Association (Consumentenbond). Together with organisations representing traders, these consumers’ organisations have adopted self-regulatory arrangements and organisations, such as the Dutch Advertising Code Foundation and the Consumer Complaints Foundation, which are important players in dealing with consumers’ complaints. Furthermore, the consumer organisations, as ‘bodies with a legitimate interest’ may commence class actions in the case of a collective infringement of consumer protection law.

As a consequence of the aforementioned subsidiarity principle, The Consumer Authority may, apart from a case in which a request for mutual assistance was made, only act: (1) in the case of collective breaches of consumer protection law and (2) when the market seems incapable of enforcing consumer protection law through self-regulation or civil procedures. Especially the second requirement, which expresses the subsidiarity principle, requires some mode of cooperation between the Consumer Authority and the domain of private (collective consumer) initiatives. To this effect the AECP offers three important public-private arrangements:

- Firstly, the AECP facilitates, in Article 6.1, the adoption of so-called cooperation protocols for bilateral agreements between, on the one hand, the Consumer Authority and, on the other, consumers’ organisations and joint organisations of consumers and traders (such as the previously mentioned foundations). These protocols may be about offering information to consumers (referring to proper information offices), dispute settlement, making use of the instrument of class actions and the (new) injunction request procedure, as well as exchanging information on new developments and trends.

- Secondly, the AECP obliges (in Article 6.3) the Consumer Authority to set up institutionalised social deliberations, at least once every three months, with organisations representing consumers and traders, as a means to coordinate the Consumer Authority’s task of executing the AECP with private initiatives and to exchange information about developments and trends relevant to consumer protection. Apart from their direct practical use, these deliberations are considered an

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60 If an infringement is of a strictly domestic nature, the enforcement instruments of the particular statute apply – see Art. 2.17, par. 3 AECP, supra note 4.
62 Parliamentary documents, nr. 18, Second Notice of Amendments. Note that the requirements of Art. 7 ECRM also apply.
63 E.M.(AECP), supra note 4, p. 28 and p. 47.
64 http://www.reclamecode.nl/indexengels.html and http://www.sgc.nl/
65 E.M.(AECP), supra note 4, p. 28 and p. 47.
66 Ibid (also p. 49).
important aspect of providing accountability towards stakeholders; not only should the Consumer Authority be accountable through the mechanism of ministerial responsibility, but also – in terms of good governance – through public accountability.67

• Thirdly and finally, but this time within the scope of mutual assistance, as proposed in Article 8, Para. 3 Rcpc, the competent authorities may decide to involve ‘legitimate bodies’ in the process of mutual assistance. Art. 6.2 AECP takes up this ‘challenge’ by allowing for the possibility of designating such bodies by statutory order (as in the case of the private Dutch Advertising Code Foundation).68 Thus, the subsidiarity principle can also operate under mutual assistance, albeit that the competences of the competent authority will remain in place should the ‘legitimate body’ fail in its response to the request (see also Article 8, Para. 3, final phrase Rcpc).69

As these arrangements give operational meaning to the subsidiarity principle, they will provide the underpinning for the balance between the use of civil law instruments by private parties as against the use by the Consumer Authority of its administrative powers. When subsidiarity prevails, civil law instruments, in the hands of private parties, will also prevail; once a Consumer Authority intervention is considered unavoidable, the choice of instruments depends on the nature of the regulations that the rogue trader has (probably) infringed. Clearly, when a request for mutual supervisory assistance has been made, the likelihood of administrative law instruments being used increases. Firstly, it may well prove difficult for a branch organisation to design self regulatory, yet binding mechanisms that commit individual traders to provide information. Secondly, once the Consumer Authority does have to step in, it will only have administrative law supervisory instruments at its disposal.

In conclusion; towards publitisation?

While preparing the draft AECP, the full-publitisation of Dutch consumer protection law was considered as an alternative to the dual system.70 All public and civil consumer protection law would be enforced by administrative law. A clear advantage would have been that all supervision and enforcement would be ‘in one pair of hands’. It would have required, however, a full regulatory overhaul – transposing all civil law remedies into administrative legislation. Furthermore, full-publitisation would end the benefits of the existing predominantly civil law and self regulatory system (vide ‘the private foundation’). Finally, such a fundamental transformation would pose a considerable risk of having both the civil courts and the administrative courts interpreting and applying concepts and provisions of the Civil Code differently and thus creating legal uncertainty.71

So, the dual system prevailed, and in theory it offers a clear distinction, linked to different sets of civil or public consumer protection regulations. Nevertheless, parliamentary input already caused to a first crossing of the public–private law divide (as Chapter 8 AECP and Annex b. show). Furthermore, in practice, though, the separation of regimes may be difficult to manage when intra-Community trade intensifies and, subsequently, the number of requests for mutual assistance increases – with more speedy transactions through the Internet. Both foreign and domestic partners in supervision and enforcement may then expect the Consumer Authority to respond more rapidly and with more effective and efficient instruments – if need be with administrative orders, even when private consumer law is at stake, or by disregarding possible self-regulatory options. Much will also depend on ‘public sentiment’; to what extend will the public and politicians have sufficient trust in the functioning of the market, especially with regard to the integrity (as opposed to opportunism) or traders. If the latter prove or

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69 E.M.(AECP), supra note 4, pp. 47-48. See also the earlier remark that no competences are transferred.

70 Ibid., pp. 30-31.

71 Again, under the AECP supervision is exclusively a matter of administrative law.
seem to be pushing the barrier, by taking the risk of not being seriously corrected by civil law remedies (which only amounts, in the worst case, to compensation of damage), then the ‘public’ or ‘political’ response may be that the market as such is corrupted to the extent that the meta-public interest of securing the proper functioning of markets may lead to more and more administrative law interventions. Faure has pointed at the underlying argument for this, by clarifying how, from a law and economics perspective, civil law sanctions have a ‘quid pro quo’ character (a ‘one on one’, symmetrical response; at a great likelihood, but limited to compensation of damage only), whereas public sanctioning is of a more public & programmatic character (of a unilateral kind, based on policy priority, at a lower chance of getting caught, but sanctions possibly reaching in excess of the damage, but with built-in avoidance of error costs), which translate into accompanying differences in signals and functions of these responses.

In four years time, 2 years form now, the functioning of the dual system will be subject to an evaluation (Art. 9.2 AECP), also with regard to the cooperation within the domestic network. Should the dual enforcement system prove more burdensome than the (expected) disadvantages of a transformation into a public law system, then a fundamental transformation is still on the cards. My hypothesis is that, also dependent on the impact of the recent financial crisis and new doubts as to the self regulatory abilities of the market and possible increased desire for ensuring market-stability through strong government, we will witness a gradual further publitisation of consumer supervision.

4.2. Responsibility

Working in networks

As to the second question (mainly) on accountability, the new networks of public and private partners in supervising and enforcing consumer protection law are the key element in the new consumer law supervisory governance structure. Considering the three main tasks of the Consumer Authority (the single liaison office, the main supervisory and enforcement authority and – outside legal tasks – the Information office for consumers and traders), the relations with other liaison offices, other competent authorities, other public offices and with legitimate bodies are of utmost importance. In fact, these relations emerge as networks, as there is a structural need (within or outside requests for mutual assistance) to coordinate the use of supervisory and enforcement powers, as well as to exchange or share information on relevant trends and developments in consumer law (practice).

Two types of networks in which the Consumer Authority participates are important here:

1. Firstly, the European network of public authorities, set up according to rules which follow directly from the Rcpc, especially from Articles 6-9 (obligations) and Articles 11-15 (responsibilities and conditions).

2. Secondly, several domestic networks with other competent authorities, with other public offices and with legitimate bodies. These are regulated in part by provisions of the AECP (Art. 2.17, Art. 3.11, Art. 4.3-4 and Art. 6.3), and by agreements laid down in the previously mentioned cooperation protocols. According to Article 5.1 and

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72 M. Faure, Onbegrens toezicht, Justitiële verkenningen 2008/8, p. 84-104.
73 E.M. (AECP, supra note 4, p. 52 (and pp. 72-73).
74 Ibid., Chapter 4, pp. 24-30.
75 Art. 3, under d Rcpc, supra note 3, and Art. 2.3, Para. 1 AECP, supra note 4.
76 Art. 3, under b Rcpc, supra note 3, and Art. 2.2 AECP, supra note 4; E.M. (AECP), supra note 4, p. 30-31.
77 Ibid., p. 27-28.
78 Art. 6, 7, 8 and 9 Rcpc, supra note 3.
79 See also Art. 3.11 AECP (the duty to provide relevant information), supra note 4. All competent authorities are under an obligation to respond to requests for mutual assistance – Art. 6-9 Rcpc, supra note 3. The ‘other competent authorities’ may also apply their regular, existing enforcement competences.
80 Art. 4, Para. 2 of Rcpc, supra note 3, and Chapter 3 AECP, supra note 4. In case of concurrence, the sectoral competences of the ‘other authorities’ will prevail (as they are considered to offer a higher level of protection) – Art. 4.2, Para. 2 AECP, supra note 4; E.M. (AECP), supra note 4, p. 41.
81 E.M. (AECP), supra note 4, pp. 27-28.
82 Required on the basis of Article 11, Paras. 2 and 3 Rcpc, supra note 3.
Article 6.1 AECP, nationally these cooperation protocols are to be formulated for coordination and cooperation between all the competent authorities, offices and bodies, also with regard to the interpretation of certain legal concepts and terms and to the application of provisions of consumer protection law.\textsuperscript{83} Especially with regard to mutual assistance, but also in other cases of coordinated efforts, some measure of agreement will be necessary. Article 4.3 AECP states that on the terms and concepts of civil law coordination suffices (as, finally, the courts will authoritatively decide on the matters in question); but in the case of terms and concepts of administrative law, agreement is necessary (as public office has a primary right of interpretation).\textsuperscript{84} In both cases these joint interpretations will be of great importance to the practice of supervision and enforcement.

Taking responsibility
How will public responsibility for consumer protection be distributed through these different networks, especially with regard to positioning the Consumer Authority in a dual system operating on the basis of subsidiarity.

On the one hand, the Consumer Authority is part of a vertical/hierarchical governance system, in which public law competences and public responsibility dominate (nationally, the Dutch Minister for Economic Affairs and, on the EU level, the European Commission).

On the other hand, the Consumer Authority takes part in a horizontal/reciprocal governance system, in which it interacts in a non-hierarchical manner with other public and private supervisors and legitimate bodies, both on the European and on the national level. In this hybrid governance context,\textsuperscript{85} public responsibility needs to be in tune with the requirements of subsidiarity and dualism, or with the view that the Consumer Authority must provide intra-Community safeguards, whilst at the same time allowing for market relations to self regulate consumer-trader relations and to offer an out-of-court system for the settlement of conflicts – in other words: subsidiary; limiting its interventions to situations of collective market failure.

In two respects attuning (vertical) public responsibility to (horizontal) networking may prove difficult.

• Firstly, how can the Consumer Authority find a balance between operating as a equal participant within the ‘horizontal/reciprocal’ national networks (and to take part in, or to assist in the workings of the self-regulatory consumer protection system),\textsuperscript{86} and on the other hand being part of the ‘public law regulatory machinery’ (called government – operating under ministerial responsibility)?

• Secondly, how does operating within the European network, under the responsibility of the European Commission, coincide with the Consumer Authority’s national ties, both under public regime (of government, guided by ministerial guidelines, and of networks will other public regulators) and under the private self regulatory network system (as part of the ‘public law EU machinery’), adhering to the notions of dualism and subsidiarity?

Let us look at these questions separately.

National networks
As specific competences are attributed to the Dutch Consumer Authority, it will be able to act according to its own specific supervisory and enforcement powers, i.e. according to its own legal authority.\textsuperscript{87} Organisationally it belongs to the Ministry of Economic Affairs,

\textsuperscript{83} E.M.(AECP), supra note 4, pp. 42-43.

\textsuperscript{84} Ibid., p. 43.

\textsuperscript{85} This is not the place for an exposure of the views on the concept of governance. For an overview see: Oliver Treib, Holger Bähr and Gerda Falkner, ‘Modes of Governance: a note towards conceptual clarification’, European Governance papers N-05-02 (ISSN 1813-6826), 17 November 2005, \url{http://www.connex-network.org/eurogov/}.

\textsuperscript{86} Reciprocity warrants equivalence or the certainty that none of the parties concerned have an exclusive right or power over other parties.

\textsuperscript{87} Related to (possible) breaches of only the legislation listed in the Annex – apart from the matter of the application of foreign consumer protection law.
as a separate division directly under the Secretary-General.\textsuperscript{88} Thus, on the one hand, the \textit{Authority} has its own powers and is – formally speaking – detached from the policy-making (regulatory) divisions\textsuperscript{89} while, on the other hand, \textit{full} ministerial responsibility continues to apply. This allows the minister to issue instructions, not only of a general nature (in the form of policy guidelines) but also specific instructions (pertaining to one particular case). As for the use of policy guidelines, under Dutch law an administrative office (such as the \textit{Consumer Authority}) is allowed (only) to set these rules aside if in a particular case acting in conformity with such a rule would result in a disproportional disadvantage.\textsuperscript{90} Furthermore, the fact that specific supervisory and enforcement competences have been assigned to the \textit{Consumer Authority}, instead of to the minister, confirms that the \textit{Consumer Authority} should be able to act, as far as possible, of its own accord, as it also implies that – under Dutch law – the \textit{Consumer Authority} is allowed to also adopt its own policy guidelines. In practice the minister should make full responsibility ‘feel’ like limited responsibility.\textsuperscript{91}

At the same time it should be well understood that all other competences pertaining to the \textit{Consumer Authority} – such as the annual report to the European Commission and the signing of cooperation protocols with other supervisors and with legitimate bodies – rest explicitly with the minister! That is to say that the willingness to cooperate and the conditions for cooperation are to be agreed upon by the minister.\textsuperscript{92}

So, with regard to operating in horizontal, national networks, we may conclude that the boundaries are set by the minister and the use of the \textit{Authority’s} (own) competences will have to be in accordance with certain protocols. Not only for strictly legal reasons, but also to avoid the situation where the necessary trust in making these reciprocal networks work will be undermined. By the same token, the minister should aim to arrive at cooperation protocols that allow for sufficient discretion, so as to offer the \textit{Consumer Authority} sufficient opportunity to create trust within the network. Finding the proper balance between regulation and discretion will be a major challenge – in fact regardless of whether full or limited ministerial responsibility applies.

Meanwhile the \textit{Consumer Authority} has started cooperation with\textsuperscript{93} other public supervisors,\textsuperscript{94} with private consumer organisations,\textsuperscript{95} entrepreneurial organisations,\textsuperscript{96} and self regulatory organisations.\textsuperscript{97} Leading strategy is that the \textit{Consumer Authority} provides so-called “2\textsuperscript{nd}-line” (instance) supervision – in principle only acting if private “1\textsuperscript{st} line”, sectoral organisations can not rapidly and/or effectively respond,\textsuperscript{98} or in cases of recidivism or to add extra strength to a private response.\textsuperscript{99} Together with the telecom, fair trade and financial markets authorities (OPTA, NMa and AFM) the \textit{Consumer Authority} cooperates in the implementation of the Dutch Consumer Code (Wmo). See also the CA-website: \url{http://www.consumentenautoriteit.nl/Over_de_Consumentenautoriteit/Samenwerken}.

\textsuperscript{88} The highest civil servant within a ministerial department.

\textsuperscript{89} With the aim of ensuring its independence and for the sake of transparency. Note that within the Authority itself an organisational division will be made between supervision, sanctioning and administrative reviews. See E.M.(AECP), supra note 4, p. 28.

\textsuperscript{90} In doing so too readily (to the liking of the Minister) the \textit{Consumer Authority} could be confronted with a disciplinary response from the minister; but, legally speaking, the decision taken will still 'stand'.

\textsuperscript{91} E.M.(AECP), supra note 4, p. 26; especially by refraining from specific instructions (in individual cases).

\textsuperscript{92} E.M.(AECP), supra note 4, pp. 26-27 and pp. 44-45. The protocols with other competent authorities and with other public offices have to be agreed upon with other ministers or with boards of independent government agencies.


\textsuperscript{94} NMa, OPTA, AFM, VWA, Commissariaat voor de Media, Inspecties V&W en Gezondheidszorg, NZa, College Bescherming persoonsgegevens.

\textsuperscript{95} Juridisch Loket/Europese Consumentencentrum, Stichting Geschillencommissies, Consumentenbond en Stichting de Ombudsman.

\textsuperscript{96} VNO-NCW, MKB-Nederland.

\textsuperscript{97} Stichting Reclamecode.


\textsuperscript{99} \url{http://www.consumentenautoriteit.nl/Over_de_Consumentenautoriteit/Samenwerken}.
Authority has started an information portal Consuwijzer, in which some private organisations also participate.

Responsibility and the European network
The Rcpc has the legal provisions on mutual assistance and cooperation in the European network – in Articles 6-15. In the course of cooperative practice, further, more specific conditions for issuing and handling requests for mutual assistance, or for the sake of information exchange, may be developed. These informal agreements may interfere with both the ministerial influence on the Consumer Authority and with the specific features of Dutch consumer protection law (subsidiarity and dualism); indeed all the more so if and when the European Commission actively participates in the network (either within or outside the boundaries of Arts 16-17 Rcpc).

On the face of it, the Community’s (or Commission’s) role in this context is limited to supporting measures which raise the standard of enforcement generally and which improve the ability of consumers to enforce their rights (promoting the exchange of best practices). The network should be complementary to existing enforcement mechanisms. Still, setting a course of action in support of cooperation and of the coordinated effort of supervision and enforcement may involve exchanges of officials between the competent authorities, national actions on information, advice and education, consumer representation, the extrajudicial settlement of disputes, access to justice and statistics.

Clearly, agreement on these issues may have a strong effect on the consumer authorities’ operations. The Community’s impact could reach even further when partners within the network, including the Commission, jointly decide upon the applicability or interpretation and application of (intra-)Community consumer law. Such a development may give rise to the question whether (nationally) ministerial responsibility for the Consumer Authority will still be able to function effectively. This question has also arisen in the wake of a number of similar networks that have been created over the last decade, such as in: telecommunications, energy, food safety, monetary policy, and general competition supervision. In some networks the Commission even has the explicit power to take decisions which are binding on network participants. Although this is not the case in the Consumer Authority’s network, the Commission may nevertheless still see fit to present recommendations or guidelines, by which the authorities and the Member States have to abide – in view of Article 10 EC Treaty (the principle of loyalty). This may well curtail the possibility for a minister to (nationally) influence the behaviour of the Consumer Authority by means of policy guidelines or otherwise, whilst at the same time Member States may still be held liable for the failure, by their own – subordinate – authority, to enforce Community legislation.

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100 [Http://www.consuwijzer.nl](http://www.consuwijzer.nl)

101 Chapter IV, Art. 16-18 Rcpc, supra note 3; these Articles suggest that substantive matters will be decided upon in due course and by the Member States and the Commission jointly – see also: E.M. (Rcpc), supra note 2, no. 34 and nos. 44-48.

102 See the emphasis in opinion of the ECLG, supra note 5, p. 3.

103 Verhey and Verheij, supra note 41, p. 166.


107 The European System of Central Banks; Art. 8 EC Treaty. This system effectively shuts out Member States’ influence.


110 See also the BZK Policy Paper, supra note 48, p. 13.

111 An interesting example of this problem is offered by the case of the regulation on executive agencies responsible for managing one or more Community programmes (Council Regulation (EC) 58/2003 of 19 December 2002, OJ 2003, L 11/1) – see Van Ooik, supra note 42, pp. 144-145.
Furthermore, the possibilities for upholding the typically Dutch system of consumer protection (especially subsidiarity and dualism), may come under threat, as a European regulation overrules national responsibilities.

Accountability and Legitimacy
The legitimacy of decision-making in European networks of supervisors, also considering the role of the Commission within these networks, may be problematic. Some authors even speak of a clear danger that (formally or de facto) independent agencies will gradually be ‘sucked out of their national institutional structures’, without there being proper democratic compensation within the networks. The opportunity to introduce horizontal or alternative means of accountability, such as being directly accountable to Parliament, stakeholders’ participation, and active openness may be worthwhile manifestations of ‘good governance’, and thus soften democratic vulnerability, but they can hardly be expected to offer full compensation.

This viewpoint should be taken into consideration when the European Consumers’ Network kicks off, especially as a shift towards European dominance may well put national attempts at preserving and building upon ‘civil foundations’ at risk. The Recp is presented as a framework that allows for national consumer protection schemes to retain their specific characteristics. If this is to be taken seriously, the European network definitely needs to restrain itself and, nationally, authorities should ideally operate as agencies, as this offers them the opportunity to interact with public and private ‘partners’ on a reciprocal basis. Setting the ground rules for such reciprocity and interactions could and should remain a ministerial responsibility. This responsibility would serve to uphold national choices against possible European policy dominance through the agencies as parties to the European network. At the same time this responsibility should not be taken up to over-regulate cooperation protocols, as this could easily be seen as placing little trust in the Consumer Authority. Smart regulation is clearly required in order to find the right balance.

5. In conclusion
How is this new supervisory governance structure of consumer authorities going to operate, particularly with regard to the coordination between civil and administrative law and the division of responsibility for supervision in a system of dualism and subsidiarity? In the above text this leading question has given rise to many elements and aspects, questions and possible answers.

Meanwhile the new system of supervisory governance in consumer protection is two years old, and we have some first impressions, albeit mainly from within. Cases are still limited in number. In some 6 cases an administrative sanction (of a penalty and or an order under penalty) was applied, in some other cases a threat to sanction had the desired effect. At the same time in 2007 the Consumer Authority was corrected over being too hasty in applying the naming and shaming sanction. Understandably this is a learning experience, as is working together with the Stichting Reclame Code (Dutch Advertising Code) – which also has its alternative procedure for dispute resolution.

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112 Verhey and Verheij, supra note 41, pp. 321-322.
113 With all the dangers of regulatory capture.
114 The Explanatory Memorandum to the AECP refers to the obligation of ‘institutionalised social deliberations’ with organisations of consumers and traders as an important instance of good governance. E.M.(AECP), supra note 4, p. 50.
115 Similarly Verhey and Verheij, supra note 41, p. 252.
116 See the ECLG insistence, as referred to in note 97.
117 E.L.M. Vos en S.W. Ammerlaan, supra note 93 (both authors work with the Consumer Authority); L.B. Melchers en E.L.M. Vos, supra note 93 (Melchers worked with the Consumer Authority till April 2008). Note that both articles were written as private research.
118 Vos and Ammerlaan, supra, p. 76-80.
120 http://www.reclamecode.nl/.
As always, ‘the proof of the pudding is in the eating.’ But as yet it still is too early to tell whether a proper balance may be found with proper transparency as to accountability through the networks and a measure of effectiveness that does indeed comply with subsidiarity and dualism (also in terms of avoiding a ‘regulatory overstretch’).\(^{122}\)

We may conclude that the Rcpc allows for a *dual system* and *subsidiarity*, as introduced by the Dutch government. Nonetheless the dual system may well prove to be insufficiently resilient in the wake of increasing and speedy intra-Community trading implementation, causing pressure to apply a ready ‘administrative fix’ to newly arising infringements, surpassing civil law and self-regulatory alternatives, all in neglect of subsidiarity. A considerable amount of trust is placed in the ‘good governance’ of the relevant networks – and what if our trust in the functioning of the market is disappointed…?

Furthermore, ‘good governance’ may be the stepping-stone to achieve trust, but ministerial overregulation or a lack of transparency is the pitfall. If the basic rules for taking responsibility and the division of powers to take binding decisions remain unclear or offer too little room for the *Authority* to (reciprocally) involve itself, commitment within the networks may fall short of the promise of rapid, efficient and effective supervision and enforcement. This in turn may lead to a call for full *publicisation* of Dutch *collective* consumer protection law – given the requirements set by the European Community.

All of the changes caused by the *Rcpc* will probably serve the intra-Community protection of consumer law. There should, however, be serious concern about the likelihood that these changes will indeed disrupt those national systems of consumer protection which, presently, offer protection through civil law and self-regulation. *All* the parties concerned, the Commission included, will have to show their willingness to invest in ‘working together’ on the basis of trust and transparency. Should this fail, regardless of the *Rcpc*’s intentions, a (protracted) transition, within these Member States, to a system of administrative law enforcement against collective infringements of consumer law and a withdrawal of civil society involvement can be expected.

**Enschede October/november 2008**

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\(^{121}\) Ammerlaan and Janssen, *De Consumentenautoriteit; een introductie*, Tijdschrift voor consumentenrecht en handelspraktijken, 2006/5, p. 140-146; Vos and Ammerlaan, *supra* note 93, p. 82.

\(^{122}\) If only we consider the many cooperation protocols, recommendations and positions that will be the result of working in networks… Overstretch may lead to confusion, hesitance to act, disappointment and decline in trust.