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Competition DG

Director General

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Mr J.A. Vijlbrief
Director-General for Energy, Telecom and Markets
Ministry of Economic Affairs
P.O. Box 20101
2500 EC Den Haag
The Netherlands

Subject: HT.1535 - Private member's bill amending Article 7 of the Dutch Competition Act

Dear Mr Vijlbrief,

Introduction

By letter received on 23 July 2010 you informed the Commission that the First Chamber of the Dutch Parliament has voted an amendment to the Dutch competition act expanding the 'bagatelle exemption'. A final step in the legislative process is the approval of the Dutch government. In considering whether or not to grant such approval, it first would like to learn from the Commission whether the amended bagatelle exemption is compatible with EU law.

Currently, the Dutch bagatelle exemption foresees a double threshold of 5% combined market share and €40 million combined turnover. That rule is inspired by the NAAT-rule (non-appreciable affectation of trade) in the European Commission's Guidelines on Effect on Trade.[1] Hence, an agreement that, in the absence of an appreciable effect on trade between Member States, can be presumed to fall outside the scope of EU competition law, is equally exempted from the application of competition law in the Netherlands. The current law in the Netherlands does not state that restrictions such as price fixing or market sharing (so-called 'hardcore' restrictions) do not fall under the bagatelle exemption.

The proposed amendment of the law foresees that agreements, decisions of associations of undertakings and concerted practices (hereafter jointly referred to as 'agreements')

[1] Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 101, 27.04.2004, p.81.

would not be prohibited if the combined market share of the participants does not exceed 10% on any affected market. The previous criteria (5% and € 40 million) would be dropped. The new rule would equally apply to all types of agreements including hardcore restrictions.

The Dutch bagatelle exemption would as a result no longer mirror the EU's NAAT-rule. Most clearly it would mean that agreements exceeding 5% market share (or the aggregate annual turnover of €40 million), but which stay below 10% market share, would now be exempted where previously they were not.

The stated objective of the law is to provide more market power to small and medium-sized enterprises, so that their position vis-à-vis stronger buyers can become more balanced, allowing hence the conclusion of agreements e.g. on prices and customer division.

In your letter, you have asked whether the Commission could share its views on the Bill. More particularly, you question whether the new bagatelle exemption might be contrary to Article 4, paragraph 3 of the Treaty on the European Union and to the judgment of the Court of Justice of 9 September 2003 (Case C-198/01, CIF) as the new law would support agreements which are contrary to Article 101 TFEU.

By letter of 30 July 2010 we provided you with a number of considerations which plead against the foreseen change, notably identifying a risk of increased legal uncertainty for undertakings. At that time it was stated that our views were without prejudice to a full legal analysis. Subsequent telephone contacts between our services took place in which clarifications were asked by your services.

We hereby provide you with a more complete assessment of the proposed legislation.

This letter may repeat certain points made in the letter of 30 July 2010, but please use this submission as stating our complete position, superseding therefore the letter of 30 July. It represents the opinion of the Directorate-General for Competition within the Commission.

Assessment

1. Legal Framework: The Commission's de minimis Notice, the Guidelines on Effect on Trade, primacy of EU law.

Appreciable effect on competition (de minimis)

The Commission's *de minimis* Notice considers that certain agreements are, due to the absence of an appreciable effect on competition, not prohibited by Article 101(1) TFEU if the parties' aggregate market share does not exceed a defined threshold (paragraphs 7 to 10 of the Notice).[2] The threshold used for agreements between competitors is 10%

[2] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), OJ C 368, 22.12.2001, p.13.

aggregate market share on any relevant market affected by the agreement.[3] The Commission, however, considers that **the *de minimis* exemption does not apply to agreements containing hardcore restrictions** (paragraph 11 of the Notice), such as price fixing, output limitations or market sharing agreements. Such agreements are considered to have merely detrimental effects on the economy (even if they concern agreements between small or medium-sized companies).

Effect on Trade between Member States

The above mentioned *de minimis* Notice does not deal with the issue of when EU law becomes applicable (Article 101 TFEU particularly for the issue at stake). In other words, for the de *minimis* Notice to become applicable, it first has to be established if trade between Member States can be appreciably affected. As you are aware, the Commission has issued separate Guidelines on the Effect on Trade Concept. The principles laid down in those guidelines reflect Commission practice and the case-law. To assess the element of appreciability, the Commission uses a negative basic standard indicating when in principle agreements are not capable of appreciably affecting trade between Member States (NAAT-rule). This negative presumption applies to all agreements where the parties have a maximum 5% aggregate market share on any affected market within the EU and where, for horizontal agreements, the undertakings concerned have a maximum annual EU turnover of EUR 40 million in the products covered by the agreement. Hence, the application of these principles requires a consideration of market shares by the Commission and the economic operators. It must be noted that a 'potential' effect may be enough to trigger the application of EU law. The guidelines of the Commission are without prejudice to the interpretation of Articles 101 and 102 TFEU which may be given by the Court of Justice and the General Court of the European Union.

The criterion under which EU law becomes applicable is one that is relatively quickly satisfied, as a 'potential' influence on trade may be sufficient. For agreements where EU law does not apply, it does not mean, however, that these cannot have a detrimental effect on the (national or local) economy.

Horizontal agreements and concerted practices which do not fall short of the above thresholds are subject to EU law, and hence may fall under the prohibition of Article 101(1) TFEU (a case by case analysis is required: see point 51 of the Guidelines Effect on Trade).

2. Comments on the proposed legislation

The proposed law may conflict with Treaty obligations

Price-fixing and market sharing are presumed to have only negative effects on the market and to jeopardise the objectives pursued by the EU competition rules, i.e. to ensure markets operate free from distortions and to benefit consumers.

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[3] The Commission *de minimis* notice uses two different thresholds: 10% aggregate market share for agreements between actual or potential competitors and 15% aggregate market share for agreements between non-competitors. In both cases the *de minimis* rule does not apply if the agreement contains hardcore restrictions. This letter will further focus on agreements between competitors.

It is not entirely clear whether the proposed extension of the Dutch bagatelle rule is intended to apply to agreements that are capable of appreciably affecting trade between Member States. At least the new law does not exclude this possibility. This, together with the purpose of the proposed amendment, seems to suggest that the new rule would apply to a category of agreements which may also fall under EU law.

Contrary to the proposed Dutch bagatelle exemption, Article 101(1) TFEU generally prohibits agreements containing a hardcore restriction even if the combined market share of the parties involved is below 10%. Thus, in respect of agreements that contain hardcore restrictions and are capable of affecting trade between Member States, it seems that **the new rule seeks to exonerate agreements that may be prohibited under EU law**. In our view, this would **jeopardise the attainment of the Union's objectives** (Article 4(3) TFEU).

In all cases where an agreement or practice is capable of affecting trade between Member States, Article 101 TFEU has to be applied in full, pursuant to Article 3 (1) of Regulation 1/2003. Due to the open nature of the Dutch economy it cannot be excluded that agreements would fall under EU law when the affectation of trade criterion would be met. If such an agreement or practice contains a hardcore restriction, **the Dutch competition authority (NMa) and Dutch courts would, due to the primacy of Article 101 TFEU, have to disapply the Dutch 'bagatelle exemption'**.

However, even if the new 'bagatelle exemption' would only apply in cases where an agreement is not capable of affecting trade between Member States it would still raise a number of important concerns. In listing these we will focus on the possibility that the new Dutch law applies to hardcore restrictions - the type of agreements that indeed appear to be at the heart of the considerations for making the proposal.

The amendment would create risks of legal uncertainty

The stated aim of the new law is to offer certain business opportunities to SMEs, bringing them in an improved competitive position against stronger market counterparts with buying power.

The practical result of the new bagatelle rule, however, might be that SME businesses, confident that they act legally under *national* competition law, may in fact be infringing EU law thus exposing themselves to the possibility of administrative fines or civil claims for damages.

Companies concluding agreements may consider, depending on their assessment of the market definition and calculation of market shares, that under the Dutch competition act they would conclude restrictions that are exempted. However, if the agreement is capable of affecting trade between Member States (as determined e.g. by a national court confronted with the question, the NMa or the Commission being solicited for instance as a result of a complaint), the SMEs that have concluded anti-competitive agreements and that were meant to become exempted may well attract fines or civil law consequences from their behaviour. In other words, **the proposed law is liable to introduce a measure of legal uncertainty that may turn out to be detrimental rather than beneficial for SMEs.**

Against trend of convergence in EU; general prioritisation on hardcore restrictions

The proposed amendment to the Dutch Competition Act would also seem to **convey a wrong signal to the business community**. Indeed, it would be contradictory, on the one hand, to prioritize the fight against hardcore cartels, while, on the other hand, relaxing the opposition to the same type of behaviour for undertakings with a market share below 10%. Furthermore, it would not be a safe premise that due to the prioritisation decisions of competition authorities, price fixing or market-sharing agreements involving undertakings with low market shares would in any case escape strict scrutiny. These types of hardcore infringements are generally the main focus for competition enforcement across the EU.

The introduction of the new bagatelle exemption would also **run counter to the approach adopted at EU level and the clear trend within the European Competition Network (ECN)** towards convergence of substantive competition provisions. Competition authorities in all neighbouring countries of the Netherlands rely on *de minimis* rules which are identical or similar to those of the Commission and, consequently, do not exempt practices such as price fixing and market sharing. Convergence of competition rules across the EU is very much welcomed as it further contributes to the simplification and transparency of the legal framework for businesses and ensures a level playing field for undertakings operating within the Internal Market.

> *Based on a case-by-case analysis, in application of Article 101(3) or exemptions under national law, agreements that offer benefits can already be permitted.*

The Explanatory Memorandum to the proposed law states that the law intends to provide more balance for small suppliers vis-à-vis big companies by allowing the former to conclude restrictive agreements among themselves even if they contain hardcore restrictions. This possibility would be detrimental for customers (which, depending on the market, can also be SMEs) as it would enable undertakings to raise prices. Moreover, the new bagatelle exemption will not only apply in situations of unbalanced market power but it would enable all kinds of undertakings to strengthen their market position and increase prices, even where they already hold a strong position vis-à-vis buyers. We note that under the current legal framework, both at national and European level, undertakings, and especially those with a limited market share, **already have the possibility to cooperate, provided that their agreements fulfil the conditions mentioned in Article 101 (3) TFEU.**[4] Hence, joint selling arrangements, for instance, can be assessed on a case-by-case basis in considering whether possible anticompetitive effects are outweighed by other benefits.

Conclusion

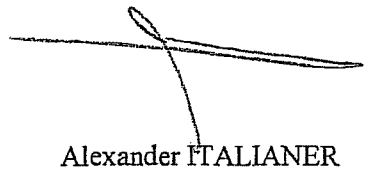
I hope this complementary explanation will allow you to assess the compatibility of the new Dutch bagatelle exemption with competition law and policy in the EU and as applied by the Commission. In summary, the adoption of the amendment raises questions of conformity with EU law to the extent that it seeks to exonerate agreements that may be

[4] See for instance point 7 of the *de minimis* Notice, see footnote 2, Commission Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, 97, Commission Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ C 3, 6.1.2001, 2 and Commission Guidelines on vertical restraints, OJ C 130, 19.5.2010, 1, point 23.

prohibited under EU law which, in our view, would jeopardise the attainment of the Union's objectives (Article 4(3) TFEU). Moreover, it conflicts with Commission policy and appears undesirable for business because of the uncertainty and risks it creates. It would provide for inconsistent signals to companies and go against the very purpose of the application of competition law to agreements that experience shows have no benefits for efficiency or innovation. Also from the point of view of consistency within the European Competition Network, the proposed legislation would appear to run counter to the trend of convergence that Member States and the Commission strive for. In short, the proposed amendment raises, in our view, several issues of EU competition law and policy which weigh against adoption.

Should you have any additional questions, please do not hesitate to contact me again. Your staff may also get in touch with , tel.
or , tel.

Yours sincerely,



Alexander ITALIANER