Ministry of Economic Affairs

» P.O. Box 20101 2500 EC Den Haag The Netherlands

Europese Commissie
T.a.v. de heer dr. A. Italianer
Rue de Jozef II 70
B-1049 Brussel / J-70-COMP
België

Directorate General for Energy, Telecom and Markets
Department for Competition and Consumer Policy

Visit address
Bezuidenhoutseweg 30
2500 EC Den Haag
The Netherlands

Date – 16 JULI 2010 –

Re Private member's bill amending the Dutch Competition Act

Dear mr Italianer,

On June 15th 2010 the First Chamber of Parliament in The Netherlands passed a private member's bill amending the Competition Act. Before such a bill can become effective, it has to receive the governmental assent. Before proceeding to this assent my minister would like to make sure the bill is compatible with European law. On July 7th 2010 the director Competition and Consumer Policy of my Directorate General has sent Mr Esteva Mosso an e-mail with the question whether the Commission is willing to share her view on this bill.

Our ref.
ETM/MC / 10109467

In this letter you will find some background information regarding the bill. The current provision of the Dutch Competition Act (section 7, paragraph 2) and the bill to amend this provision are attached in the annexes to this letter. I would appreciate if the Commission would be able to explain if she is of the opinion that the bill is compatible with European law or not.

Background information
Pursuant to the Treaty on the Functioning of the European Union and the Dutch Competition Act agreements restricting competition are prohibited. In the Dutch Competition Act there is a block exemption from this prohibition for agreements of minor importance. This exemption is called 'the bagatelle exemption'. On the basis of this exemption the prohibition does not apply, if two conditions are fulfilled: the joint market share of the contracting parties amounts to 5% at most and their joint turnover amounts to € 40 million at most.

The foresaid bill amending the Competition Act raises the threshold of 5% up to 10% and drops the turnover criterion. According to the Commissions Notice "Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty" the Commission holds the view that agreements do not appreciably affecting trade between Member States when the market share of the parties does not exceed 5 % and their joint turnover does not exceed 40 million euro. These are the same criteria as in the current 'bagatelle exemption'. By raising the market share to 10% and dropping the turnover criterion, the 'bagatelle exemption' applies also to agreements (including hardcore agreements) which are within the scope of European competition law.

Directorate General for Energy, Telecom and Markets
Department for Competition and Consumer Policy

Our ref.
ETM/MC / 10109467

In my opinion the bill supports agreements which are contrary to Article 101 of The Treaty on the functioning of the European Union (agreements restricting competition are prohibited). By doing so the bill might be contrary to the provision in the European law that Member States shall refrain from any measure which could jeopardise the attainment of the Union's objectives (article 4, paragraph 3, of The Treaty on European Union). One of those objectives is the establishment of an internal market. According to protocol 27 the internal market includes a system ensuring that competition is not distorted. Article 101 of The Treaty on the functioning of the European Union ensures that competition within the European Union is not distorted. This means Member States are not allowed to make legislation that is contrary tot Article 101. This also follows from the judgement of the Court of 9 September 2003 (CIF – C-198/01). This judgement is specific with regard to European competition law. In this judgement is explicitly stated that the government is not allowed to adopt legislation or administrative practices which support a violation of Article 81 or 82 EU (now: 101 and 102 of The Treaty on the functioning of the European Union) or oblige companies to such an infringement.

I look forward to receiving your reply. As the Dutch Parliament is awaiting a decision from the government on the assent on short notice, it would be very helpful if you could give a reaction soon.

b.a.

J.A. Vijlbrief
Director-General for Energy, Telecom and Markets

Relevant articles Dutch Competition Act

Section 6
1. Agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings, which have the intention to or will result in hindrance, impediment or distortion of competition on the Dutch market or on a part thereof, are prohibited.
2. Agreements and decisions that are prohibited under subsection (1) are legally null and void.
3. Subsection (1) shall not apply to agreements, decisions and concerted practices which contribute to the improvement of production or distribution, or to the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefits, and which do not:
   a. impose any restrictions on the undertakings concerned, ones that are not indispensable to the attainment of these objectives, or
   b. afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products and services in question.
4. Any undertaking or association of undertakings invoking subsection (3) shall provide proof that the conditions of that subsection are met.

Section 7
1. Section 6(1) shall not apply to agreements, decisions and concerted practices, as referred to in the said section, if:
   a. no more than eight undertakings are involved in the agreement or concerted practice in question, or if no more than eight undertakings are involved in the respective association of undertakings; and
   b. the combined turnover of the undertakings party to the respective agreement or the concerted practices in the preceding calendar year, or the combined turnover of the undertakings which are members of the respective association of undertakings does not exceed:
      i. €5,500,000 if the agreement, concerted practice or association involves only undertakings whose core activity is the supply of goods
      ii. €1,100,000 in all other cases.

2. Without prejudice to the provisions set out in subsection (1), section (6)(1) shall furthermore not apply to agreements, decisions and concerted practices as referred to in the said section insofar as they involve undertakings or associations of undertakings that are actual or potential competitors on one or more of the relevant markets, if:
   a. the combined market share of the undertakings or associations of undertakings involved in the agreement, decision or concerted practice is no greater than 5 per cent on any of the relevant markets affected by the agreement, decision or concerted practice; and
   b. the combined turnover of the undertakings or associations of undertakings involved in the agreement, decision or concerted practice from the goods or services falling within the scope of the agreement, decision or concerted practice during the previous calendar year was no more than €40,000,000.