



Sociaal Economische Raad
Social Economic Council

DRAFT LETTER OF ADVICE

To the Acting Minister of Tourism, Economic affairs,
Traffic and Telecommunication
The Honorable Mr. Rafael Boasman
Soualiga Road #1
Pond Island
Great Bay
Sint Maarten

Philipsburg, February 9th, 2017

Our reference: SER /17/EK/01

Re: Letter of advice concerning the draft consumer ordinance.

Honorable Minister Boasman,

On January 10th, 2017, the Social Economic Council hereafter (SER) received two advice requests from your predecessor Minister I. Arrindell:

As the draft law was compiled in Dutch, and the letter of advice in English. Certain laws and words mentioned between brackets are in the Dutch language.

- The draft Consumer Ordinance ("ontwerp Landsverordening consumentenbescherming").
- The draft Competition Ordinance ("ontwerp Landsverordening, van de houdende regelen op het gebied van de concurrentie").

In this letter of advice the SER will evaluate the social, economic and legal consequences of the solicited advice request regarding the draft Consumer Ordinance ("ontwerp Landsverordening consumentenbescherming").

The advice on the draft Competition Ordinance will follow shortly after this advice as this was separately requested.

Background on the draft Consumer Ordinance:

The draft Competition Ordinance has been drafted with the purpose to establish a competition authority. This same competition authority will serve to enforce (handhaven) rights concerning consumer protection under the Consumer Ordinance. However, in this advice the SER emphasizes that it will solely discuss the competition authority as mentioned in the draft Consumer Ordinance.

According to the explanatory memorandum of the draft consumer ordinance, this ordinance has been drafted with the purpose to protect the welfare of the consumers of Sint Maarten and forms part of the policy agenda of the government.



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Ministry VROMI

Date of Receipt:

Jan 13-02-2017



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In order to achieve this, the government wants to make use of the competition authority [mededingingsautoriteit] (which will be established under the Competition Ordinance), to ensure that legislation protecting the interest of the consumers will be complied with. Another task of the competition authority under the Consumer Ordinance is providing information to consumers and entrepreneurs about their rights and obligations.

The SER observed that:

1. Studies should be carried out to conclude whether a competition authority as proposed concerning consumer protection is indeed necessary for Sint Maarten;
2. The choice to establish a competition authority to guarantee consumer protection adds little value to the current consumer protection framework;
3. The term “collective interest” has not been defined;
4. The costs for implementing a competition authority are significant compared to the added value of consumer protection;

We kindly refer to attached elucidation for further elaboration.



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Advice:

Given the information that was provided, the SER in its meeting of February 9th, 2017, **unanimously** advises the Government as follows:

In principle, the SER is in favor of a consumer authority which will protect consumer rights. In general, the SER also favours the establishment of a competition authority for competition purposes. However, the SER is not in agreement with the proposed draft consumer ordinance in its current form. Studies should be done to determine what kind of consumer protection is needed on Sint Maarten.

The outcome of these studies will allow policymakers to recommend what type of consumer authority is needed to solve any problems that consumers may encounter. In this endeavour the cost factor should be taken into account.

The SER also suggests that the establishment of a competition authority and the establishment of a consumer association on Sint Maarten should take place simultaneously as the added effect would be that they reinforce each other.

Before October 10, 2010 Sint Maarten had a Consumer Foundation named "Windward Island Consumer Foundation" which main task was advocacy on behalf of the consumers. At that time, this foundation was set up to serve the interest of consumers but it is now dormant¹.

Hence, the SER advises the government to first (re) establish an entity that protects consumers. In setting up this entity, all stakeholders who represent the general interest of consumers should be included to give their input.

Looking within the Kingdom of the Netherlands, both the Netherlands and Curaçao have a consumer foundation. These consumer foundations provide their consumers with information about price comparison and quality of products and services, as well as help consumers access their rights for example.

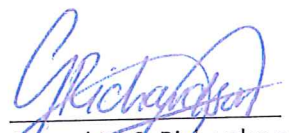
We trust to have informed you sufficiently herewith.

Should you require any additional information after reading the above, please feel free to contact us at your earliest convenience.

Respectfully,



Oldine Bryson- Pantophlet
Chairlady



Gerard M.C. Richardson
Secretary-General

¹ Interview with Mr. Virgilio Brooks, President of the Windward Island Consumer Foundation, on February 1st, 2017



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Elucidation

With reference to the previous mentioned observations, the SER remarks the following:

1. Studies should be carried out to conclude whether a competition authority as proposed concerning consumer protection is indeed necessary for Sint Maarten:

In the Netherlands a Consumer Authority was established based on the REGULATION (EC) No 2006/2004².

The SER took notice of the explanatory memorandum of the [Wet handhaving consumentenbescherming] from the Netherlands. The following points refer to the explanatory memorandum of the [Wet handhaving consumentenbescherming]:

- This law implements the REGULATION (EC) No 2006/2004 [EU verordening 2006/2004] into the national law [Wet handhaving consumentenbescherming] of the Netherlands.
- All European Union (EU) regulations become immediately enforceable as law in all member states simultaneously. However, the Netherlands still transposed the regulation into National law [Wet handhaving consumentenbescherming]. This regulation protects the collective interests of consumers in intra-Community infringements.
- Each EU Member State shall designate the competent authorities and a single liaison office responsible for the application of this Regulation³. For this reason the [Wet handhaving consumentenbescherming] established a "Consumer Authority".
- EC Regulations supersede all national laws that handle the same subject matter and subsequent national legislation must be consistent with and made in the light of the regulation.
- The [Wet handhaving consumentenbescherming] does not contain any new substantive law.

Taking the explanatory memorandum of the draft Consumer Ordinance into account the SER noticed the following:

- The last paragraph on page 22 of the explanatory memorandum of the Consumer Ordinance states: The competition authority is not allowed to settle a dispute between a consumer and a market organization. ["De Mededingingsautoriteit is ook niet bevoegd om handhavend op te treden in een individueel geschil tussen een consument en een marktorganisatie"]. The following paragraph on page 23 of the explanatory memorandum states: The above mentioned statement does not exclude that the competition authority will take enforcement action in response to an individual dispute. ["Het bovenstaande sluit niet uit dat de mededingingsautoriteit handhavend optreedt naar aanleiding van een individueel geschil"]. Furthermore, it is stated that just one complaint may be sufficient to start an investigation. However, this investigation is based on the presumption that several consumers experience the same disadvantage. [Een klacht kan voldoende zijn om onderzoek te starten als het *vermoeden*

² REGULATION (EC) No 2006/2004 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation).

³ See article 4, REGULATION (EC) No 2006/2004.



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bestaat dat meerdere consumenten op eenzelfde manier zijn of kunnen worden geraakt door een bepaalde gedraging van een marktorganisatie]. This statement as presented, indicates that when one consumer files a complaint, the competition authority can randomly decide whether it will start an investigation or not.

The SER is therefore of the opinion that an investigation should never be based on presumptions because it affects the legal certainty. There should be at least some parameters in place to decide whether an investigation is warranted.

Additionally, it is not specifically mentioned in the draft Consumer Ordinance where individuals can file a consumer complaint. The Consumer Ordinance only makes arrangements for individuals to file a complaint against the Competition Authority.

Looking within the Kingdom of the Netherlands, for example Curaçao has a consumer foundation called “Fundashon pa Konsumidó”. This foundation is an independent organization which has been established in October, 1975 by concerned consumers. “Fundashon pa Konsumidó” is a non- profit organization that does not have a political ideology or commercial interest. Despite the fact that this organization is independent they receive a subsidy from the government based on the [“Subsidieverordening Curaçao 2007 (A.B. 2007 no.104)”]⁴.

- Page 21, first paragraph: “It is better to deal with some consumer problems collectively”. On page 23, third paragraph reasons are stated why the scope of this Consumer Ordinance should not be limited to collective interests of consumers but should also include the individual consumer interest. Yet, it was decided not to include the individual consumer interest.
- On page 24, second paragraph it is stated that the draft Consumer Ordinance does not contain any new substantive law. However, the following articles provide consumers with new rights:
 - o Article 2.8 (at this moment the Competition Ordinance is not effective)
 - o Article 2.9
 - o Article 4.3
- In order to ensure uniform interpretation, article 3.3. of the Consumer Ordinance indicates that when other ordinances (laws) have different interpretations of the same concept, the explanation for that concept must be consistent with the explanation of the competition authority. This implies that the competition authority and attached legislation supersede all other national laws. This is not correct because one national ordinance cannot supersede another.

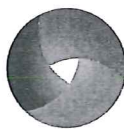
⁴ <http://fundashonpakonsumido.org/>



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The SER noticed that the explanatory memorandum of the draft consumer ordinance has a lot of similarities with the explanatory memorandum of the [Wet handhaving consumenten - bescherming]. The SER is of the opinion that it is important to learn from other countries' past experiences in order to draft a cohesive law that is meaningful for the country in which it applies to. Nevertheless, the issue here is that information has been used in the draft consumer ordinance without tailoring it to the Sint Maarten situation.

2. The choice to establish a competition authority to guarantee consumer protection adds little value to the current consumer protection framework:
 - A competition authority should deal with competition, which is a different concept from consumer protection. Therefore, the name of the institution should also reflect consumer protection.
 - The reason why a consumer authority was established in the Netherlands is because of EC Regulation 2006/2004. On the national level the Netherlands already has other alternatives for individual consumers to protect their rights, whereas Sint Maarten does not (see last paragraph of page 23 of the explanatory memorandum).
3. The term "collective interest" has not been defined:
Some parameters are essential to determine the scope of the competition authority.
4. The costs for implementing a competition authority are significant compared to the added value of consumer protection:
The financial paragraph of the explanatory memorandum, page 33 reflects the implementation costs. A total amount of 1.6 million guilders is budgeted at the end of 2019 in order to have a full operational competition authority. This amount is significant taking into consideration that laws that protect consumers are already in place and should be enforced.



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Datum: 13 februari 2017

Kopie Brief inzake : Letter of advice concerning the draft consumer ordinance.

SER 17/EK/01

T.a.v. : Honorable Prime Minister Mr. William Marlin