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LETTER OF ADVICE

To the Minister of Tourism, Economic affairs,
Traffic and Telecommunication
The Honorable Mrs. Melissa Arrindell-Doncher
Soualiga Road #1
Pond Island
Great Bay
Sint Maarten



Philipsburg, April 26th, 2017

Our reference: SER /17/EKBP/05

Re: Letter of advice concerning the draft competition ordinance.

Honorable Minister Arrindell-Doncher,

On January 10th, 2017, the SER received two advice requests from your predecessor Minister I. Arrindell:

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

The SER advice on the draft Consumer Ordinance dated February 9th, 2017, was sent to you on February 13th, 2017.

In this advice on the draft competition ordinance, the SER will evaluate the social, economic and some legal consequences of the draft competition ordinance ["ontwerp Landsverordening inzake concurrentie"], with exception of the budget as the proposed institution supported by it would execute both tasks (consumer protection and competition).

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

Background:

In 2010 the Government of Sint Maarten started an initiative to address competition in the Sint Maarten economy. The Department of Economic Policy & Research together with the Directorate of Programs & projects started the 'Feasibility Study of an Independent Competition Authority & Law'. This study would form the basis to address the entrepreneurial as well as the investment climate on Sint Maarten.¹

¹ Gibbes, L and Radjouki, E, DPP and DEPR.(2010), Terms of Reference. Feasibility study Independent Competition Authority & Law.



Sociaal Economische Raad
Social Economic Council

Due to its small scale, Sint Maarten's economy is characterized by a limited number of suppliers in several markets. With this comes the natural risk of abuse of market power leading to inflated prices and limited consumer protection, which negatively affecting the purchasing power of consumers. The following observations determined the focus for the research. ²

Lack of legal framework

The government organizations and legislation process have not kept pace with the rapid economic development on the island. There has been a lack of an adequate legal framework concerning:

- competition and pricing
- mergers and acquisitions
- alignment of market behavior by firms
- consumer protection

Government intervention and supervision

Together with the above-mentioned challenges, there has been limited supervision from the government on different markets. Regarding market regulation, Sint Maarten applies the principles of a free market economy and acknowledges that our economy is an open economy. However, government interventions aimed at market regulation and behavior do take place. These interventions include among others:

- the provision of business permits
- price regulation via price ordinances
- subsidization of industries/sectors
- government assistance after hurricanes
- the setting of tariffs.

The aim of the project is to improve the investment climate by removing 'red tape' and ensuring a transparent and predictable business environment and simplify procedures. The increase in transparency and competition of businesses on Sint Maarten are expected (a) to boost the investment climate of Sint Maarten, (b) to enhance consumer protection, and (c) to improve market efficiency. ³

SEO Economisch Onderzoek⁴ carried out the research. Findings of the report indicated that a key characteristic of small island economies such as Sint Maarten is the concentrated nature of most of its markets. This is due to the economies of scale, whereby in many markets only one or a few suppliers are active, even if there is room for additional suppliers. Small economies are faced with relatively high barriers to enter a relatively small market, be it either economic, legal or political. These conditions have an upward effect on prices in small island economies and consequently on the cost of living and the cost of doing business. This has a negative effect on welfare in general and a tendency to negatively affect the distribution of wealth. Moreover, a lack of effective competition between suppliers of goods and

² Gibbes, L and Radjouki, E, DPP and DEPR.(2010), Terms of Reference. Feasibility study Independent Competition Authority & Law.

³ Gibbes, L and Radjouki, E, DPP and DEPR.(2010), Terms of Reference. Feasibility study Independent Competition Authority & Law.

⁴ Buiren van, K.S. (2011), Towards effective competition in St. Maarten. SEO economic research. SEO- report nr.2011-44



Sociaal Economische Raad
Social Economic Council

services tends to have a negative effect on innovation and leads to limited choice for consumers between varieties of products and services.⁵

The research demonstrates that the island is confronted with significant distortions of competition [concurrentieverstoringsen] in several markets, including the wholesale and retail markets of food, electricity, fixed and mobile telecommunications, construction of infrastructure and the banking and insurances sector. According to the Policy Paper, the choice to research these sectors was based on their importance for the economy of Sint Maarten, such as the contribution to GDP, employment and linkage with other sectors in the economy, and the visibility and importance of the sector for consumers in their daily lives.

These distortions of competition increase the cost of living in Sint Maarten, decrease purchasing power, increase the cost of doing business and negatively affects Sint Maarten's international competitive position. Therefore, an effective competition policy should aim at correcting and preventing these distortions of competition in order to improve the economic positions of the consumers of St. Maarten and stimulate economic growth.⁶

The proposed competition policy of Sint Maarten contains:

- Cartel prohibition
- Prohibition of the abuse of a dominant position
- Merger control
- Competition advocacy

Based on the competition policy the draft competition ordinance has been drafted with the purpose to establish a competition authority for Sint Maarten.⁷ This competition authority [mededingingsautoriteit] will be called the "Fair Trade Authority Sint Maarten".

According to the explanatory memorandum of the competition ordinance, this ordinance is influenced by three factors, namely: economic context, cultural context and legal context. The main question was: How can effective competition supervision be established on Sint Maarten? It was determined that Sint Maarten has a relatively high market concentration, and therefore it is important to have an institution in place that regulates and supervises markets to prevent abuse of dominant market positions and cartels.

⁵ Buiren van, K.S. (2011), Towards effective competition in St. Maarten. SEO economic research. SEO- report nr.2011-44

⁶ Buiren van, K.S. (2013), Towards effective competition in St. Maarten. SEO economic research. Policy Paper

⁷ Buiren van, K.S. (2013), Towards effective competition in St. Maarten. SEO economic research. Policy Paper



Sociaal Economische Raad

Social Economic Council

The SER observed that:

1. Not all characteristics and circumstances of Sint Maarten have been taken into account. For example, the SEO research report does not take the open border with French Saint Martin into consideration in so far this is relevant for competition in the researched markets;
2. The draft competition ordinance is conflicting;
3. Competition advocacy is strongly recommended by the SEO research report, but is only partly included in the draft competition ordinance;
4. The system of the turnover tax in Sint Maarten contributes to distortion of competition;
5. The operational costs of a competition authority are reasonable if the competition authority becomes an independent organization and addresses both consumer and competition issues. If the competition authority, while remaining a separate legal entity [zelfstandig bestuursorgaan], pools resources with another organization or takes on less responsibilities than currently envisioned in both draft laws, the budget would need to be revised;
6. All the instruments, except for raising public awareness as part of 'competition advocacy', as suggested in the SEO economics research report are incorporated in the articles of the draft competition ordinance;

We kindly refer to elucidation for further elaboration.



Sociaal Economische Raad
Social Economic Council

Advice:

The SER examined the draft competition ordinance and advises the Government not to establish a competition authority because:

- Sint Maarten already has many government (related) institutions that encounter difficulty to effectively execute their responsibilities. These difficulties raise doubt whether a competition authority would become effective with regard to its responsibility. Therefore, it would be to the benefit of government to focus on improving the effectiveness of existing institutions before bringing new ones to life which would further burden the budget, especially in times of strained public finances and sluggish economic growth.
- The SER expects the return on investment of a competition authority to be limited as the chances to effectively increase competition and consumer benefit in markets with a limited number of suppliers are low, especially when those markets, such as (fixed) telecoms and electricity, are (de facto) monopolies by government owned companies or when markets are so small that increasing the number of suppliers is not feasible.
- The limited number of competitors or price distortions in various markets are also related to existing regulations and policies of government (turnover tax, slow business establishment and other license practices and setting of maximum prices for basic goods). Government would be more effective to resolve these distortions by adapting these regulations and policies directly instead of creating a new institution and outsourcing the solution of a problem the government helped to create.
- The open border with French Saint Martin has not sufficiently been taken into account so far this is relevant for competition in the different markets in Sint Maarten. Additionally, parallel imports and self-imports by consumers (would) counter possible abuse of dominant market position in certain goods markets.
- Turnover tax contributes to decrease the number of suppliers. Therefore, the SER advises to start a discussion to replace the current turnover tax system to stop stimulating vertical integration. Vertical integration reduces the number of parties in markets where turnover tax is levied, which in turn influences competition in those markets. See also SER 'Letter of Advice concerning turnover tax and border control' (June, 2015) and 'Letter of Advice concerning registration of transactions at the ports of entry and indirect taxation' (March, 2016).

The SER commends that research has been conducted regarding a competition policy for Sint Maarten, of which the outcome serves as the basis for the draft competition ordinance.



Sociaal Economische Raad
Social Economic Council

Dissenting views of the minority:

Oldine Bryson-Pantophlet, Chairperson SER and independent expert

- The competition authority will benefit the consumers. However small this step may be, it is a step towards consumer protection. That aspect of the competition authority was not taken into consideration.

Theophilus Thompson, member WIFOL


- While the researched information, the proposed legislation and this SER advice focus on the formal sector, the informal sector continues to show growth and fills the gaps left by the formal business sector. This means that the formal business sector is not addressing the needs of the consumers, and a competition authority should therefore be established.

Francio Guadeloupe, member independent expert

- What is expedient should not be confused with what is required. The reasoning behind the categorical 'no' vote as relates to the competition authority would be based upon such a confusion. It might not be expedient at the moment to create a competition authority – as it would make more practical sense to focus attention on other improvements. Yet recognizing that a weak government is not conducive to the necessity of balancing state and market interests in liberal democracies, a competition authority fit to the realities of our open border situation could contribute to a more robust government apparatus; the report arguing for the establishment of such a body, notwithstanding critiques one may have of it, reiterates this truism. For the record, arguing for a more robust administrative apparatus is not the same as advocating big government or more cumbersome red tape.

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

Respectfully,


Oldine V. Bryson-Pantophlet
Chairwoman


Gerard M.C. Richardson
Secretary-General



Sociaal Economische Raad
Social Economic Council

Elucidation

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

1. Not all the characteristics and circumstances of the country Sint Maarten have been taken into account. For example, the draft competition ordinance does not take the open border with French Saint Martin into consideration concerning competition:

According to the SEO Policy Paper, the competition policy for Sint Maarten explicitly takes the distinguishing characteristics and circumstances of the country Sint Maarten into account: concentrated markets, the direct lines between politics and business, the social structure and the small scale of the economy. However, the SER is of the opinion that what also makes Sint Maarten so unique and different from all the other small islands in the Caribbean is that Sint Maarten shares an open border with French Saint Martin. This means that cross border economic activity is a reality for various markets. Consequently, the effectiveness of a competition authority becomes more complex because businesses from both sides can choose to compete on both sides in markets where this is possible. For consumers on the Dutch side in markets where French businesses offer products and services, this would effectively increase the number of suppliers while at the same time the instruments of the competition authority would not influence the economic behavior of businesses from French Saint Martin because they fall under another jurisdiction. The open border has only been mentioned briefly in the research. The draft competition ordinance only takes the proximity of Saint Martin into consideration concerning the choice of similar legal norms related to international cooperation, not economic reality.

2. The draft competition ordinance is conflicting:

Page 1 of the draft competition ordinance states that the competition authority will be established as an independent institution that will provide the Minister with solicited and unsolicited advice on competition in general.

[dat het met het oog op de economische ontwikkeling van Sint Maarten en de bescherming van de welvaart van de consument wenselijk is een onafhankelijke en deskundige instantie te belasten met de handhaving van regels die ontoelaatbare concurrentiebelemmeringen verbieden en bevordering van de concurrentie in het algemeen door het geven van gevraagd en ongevraagd advies aan een of meer Ministers]

However, the draft competition ordinance establishes a competition authority as an independent legal entity with specific rights to intervene and regulate markets.

3. Competition advocacy is strongly recommended by the SEO research report, but is only partly included in the draft competition ordinance:

SEO in its recommendations as well as in the Policy Paper recommends the government to add a fourth pillar to the competition law which is competition advocacy. SEO states that competition advocacy is about informing the public on the benefits of competition and competition policy and advising the government on competition matters. This can also be described as promoting the importance of competition towards the public, consumers and businesses, but also towards the government. Furthermore, SEO states that the most important task of the competition authority in its first 5 years of



Sociaal Economische Raad
Social Economic Council

existence will likely be competition advocacy. The reason for the five years is based on an example of the Peruvian competition authority that in its first five years devoted more than 60% of its budget to competition advocacy.

4. The system of turnover tax in Sint Maarten contributes to distortion of competition:

In its conclusion, SEO points out that the price of food is high in Sint Maarten, not only in the perception of the consumer, but also compared internationally. A comparison of homogenous food items learned that most items are more expensive in Sint Maarten than in Curaçao and the Netherlands, and that the average price of the food basket exceeds the average price by 6% in Curaçao and 36% in the Netherlands. This despite the fact that Sint Maarten does not have import duties and the turnover tax rate is higher in Curaçao. Furthermore, SEO states that turnover taxation creates an unlevel playing field between large vertically integrated supermarkets and smaller super-minimarkets: consumer prices of vertically integrated supermarkets contain one 'round' less turnover tax. Therefore, turnover tax stimulates vertical integration, and it is vertical integration of wholesale with retail food suppliers in Sint Maarten, in combination with the exclusive right to supply major food lines, which creates a serious distortion to competition resulting in high prices and loss of consumer welfare.

The SER is of the opinion that a discussion needs to take place to adjust the current indirect tax system. In its Letter of Advice concerning turnover tax and border control' (June, 2015) and 'Letter of Advice concerning registration of transactions at the ports of entry and indirect taxation' (March, 2016), the SER argues that the current turnover tax system has extensive shortcoming in compliance, extent of coverage and economic impact. Additionally, turnover tax stimulates vertical integration. This leaves smaller business at a disadvantage when they buy products from wholesalers to sell to consumers; they are less competitive if the same wholesaler also sells to consumers. Therefore, turnover tax is not conducive to market competition, especially in a small-scale economy. The SER kindly refers to its advices on this matter for further explanation.

5. The operational costs of a competition authority are reasonable if the competition authority becomes an independent organization executing both consumer and competition responsibilities. If the competition authority, remaining a separate legal entity [zelfstandig bestuursorgaan], pools resources with another organization or takes on less responsibilities than currently envisioned in both draft laws, the budget would need to be revised:

The financial paragraph of the explanatory memorandum of the consumer ordinance, page 33, reflects the implementation costs for the competition authority. A total amount of 1.6 million guilders is yearly budgeted at the end of 2019 in order to have a full operational competition authority [ontwerp Landsverordening, van de houdende regelen op het gebied van de concurrentie] which also addresses consumer rights [ontwerp Landsverordening consumentenbescherming]. In its advice regarding the consumer ordinance, the SER emphasized that this amount is significant taking into consideration that laws that protect consumers are already in place.



Sociaal Economische Raad
Social Economic Council

6. All the instruments, with the exception of raising public awareness as part of 'competition advocacy', as suggested in the SEO economics research report are incorporated in the articles of the draft competition ordinance.