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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,

Thank you very much for consulting us on the above matter. You informed that the Netherlands' parliament has voted an amendment that expands the 'bagatelle exemption' in Dutch competition law in the sense that agreements, decisions of associations of undertakings and concerted practices are not prohibited where the combined market share of the participants does not exceed 10% on any affected market. The new rule would apply to all types of agreements and practices including price fixing, market sharing and similar arrangements qualified as hardcore infringements under EU competition law.

At present, the Dutch competition act foresees a double threshold of 5% combined market share and €40 million combined turnover. The rule is inspired by the European Commission's Guidelines on effect on trade which formulate a presumption according to which agreements, decisions of associations of undertakings and concerted practices by parties that reach neither of these thresholds are not liable to affect trade between Member States and hence, do not fall to be examined under EU competition law in accordance with Article 3 of Regulation 1/2003.

In your letter you point out that the Dutch government is currently considering whether it can give its approval to the amendment. In this respect, and without prejudice to a full assessment of the legal implications, I would like to share with you the following considerations:

- As you are aware, the Commission, in its *De minimis* Notice, holds the view that agreements between undertakings do not appreciably restrict competition within the meaning of Article 101 TFEU where the aggregate market share of the parties does not

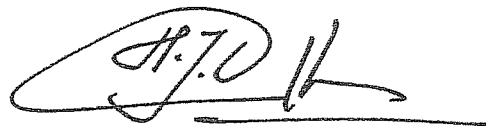
exceed certain market share thresholds (paragraphs 7 to 10 of the Notice). The guidance provided by the Notice in this regard does however not apply to agreements containing hardcore restrictions (paragraph 11 of the Notice).

- We share the view that under the proposed amendment to the Dutch competition act, agreements, decisions of associations of undertakings or concerted practices could fall within the scope of the bagatelle exemption of the Dutch competition act, while they might at the same time be caught by Article 101(1) TFEU. The issue could notably arise for restraints qualified as hardcore in EU law. In this case, the Dutch competition authority and the national courts, when seized with a case, would be obliged to apply the prohibition rule foreseen in EU law. It follows that, in the area concerned, undertakings might find themselves confronted with contradictory indications about what is legal or not, on the basis of national law, on the one hand, and EU law, on the other.
- Moreover, the determination of the applicable law, in light of the effect on trade criterion in Article 101 TFEU, will be decisive for the outcome of individual cases in the 'overlap' area. This may imply that undertakings, when self-assessing the legality of their transactions, as well as national courts or the national competition authority will have to deploy additional efforts in determining the applicable law. The facility introduced by Article 3(1) of Regulation 1/2003, which permits national courts and competition authorities to apply a double legal basis and thereby notably avoid a strict determination of the applicable law, would thus be frustrated for the type of cases in question.

Taking account of the issues arising, we are not convinced that the proposed amendment will result in increased legal certainty for undertakings. It also runs counter the trend which can be observed for many years among the EU Member States to increase convergence of competition laws and thereby simplify the legal framework and ensure more level playing field for undertakings.

By the above, I hope to have contributed to the on-going reflection in the Netherlands. Should you have questions, please do not hesitate to contact me again. Your staff may also be in touch with \_\_\_\_\_, tel. \_\_\_\_\_ or \_\_\_\_\_, tel. \_\_\_\_\_.

Best regards,



Alexander Italianer

