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Policy rule Priorities in enforcement investigations by the Fair Trade Authority Curaçao

Policy Rule pursuant to article 2.16 of the National Ordinance on Competition regarding prioritization in enforcement investigation by the Fair Trade Authority Curacao.

March 20th, 2020

Introduction

The Fair Trade Authority Curacao (FTAC) receives more complaints and signals about possible violations of the National Ordinance on Competition than it can investigate, taking into account its investigative capacity. Because of this, the FTAC is forced to make choices which signals and complaints to investigate and which not. These choices are made using a prioritization policy.

In this context, the FTAC classifies a request for enforcement actions as a *complaint*. If there's no request for enforcement, then it is regarded as a *signal*.

When a complaint is received, the FTAC checks first whether the complaint should indeed be considered as a request for enforcement action under the National Ordinance regarding Competition. Firstly, it is decisive whether the complainant is an *interested party* according to Article 1.1, sub e. of the National Ordinance regarding Competition. Secondly, the complaint must *meet the requirements set by Landsverordening administratieve rechtspraak(Lar) (the National Ordinance Administrative Jurisprudence)*. These requirements are reflected in the form "Complaint about a possible violation of cartel prohibition or abuse of dominant position", that FTAC has established to lodge a complaint. The FTAC then investigates, using its prioritization policy, whether it should give priority to the investigation of the complaint, given the available research capacity. In the following paragraphs the principles of the FTAC's prioritization policy are elaborated on.

FTAC's Prioritization Criteria

The FTAC determines the priority of an investigation of a complaint about a possible violation based on the following questions:

- How great is the consumer's interest involved in the possible violation?
- How great are the economic and social consequences concerned with the possible violation?
- Is the FTAC's action against the possible violation efficient and effective?

When balancing different interests, the FTAC uses as its guiding principle that they primarily serve the interests of consumers in general. Additionally, the FTAC takes into account the sectors or focus areas that have been identified in FTAC's annual agenda. The FTAC also takes into account the individual interest of the concerned applicant when assessing the priority of an investigation.

If the answer to one or more of the above questions and interests leads to the conclusion that a further investigation into a complaint is not a priority, the FTAC will reject the application due to lack of priority.

Consumer Interest

To answer the question of how great the consumer interest involved with the possible violation is, FTAC will examine whether the possible violation directly or indirectly affects the consumer. This may be the case, for example, if the possible violation leads to higher prices, a restriction of options or conditions for the consumer or reduced quality.

Economic and Social Interest

When answering the question of how great the economic and social consequences concerned with a possible violation are, the FTAC will explore the effect on the economy of Curaçao as a whole and the impact on the social functioning of the island.

The FTAC will explore the economic effect by estimating the size of the markets involved in the possible violation. If this shows that these are small, then the impact on the economy of Curaçao, in principle, will also be small. If the size of the market is relatively significant, then the FTAC will estimate the impact of the possible infringement on the relevant market in Curaçao.

The FTAC will explore the social impact by estimating the effect of the possible violation on the daily functioning of the society of Curaçao in the relevant market(s). This may be the case with certain violations, without intending to be exhaustive, in sectors such as energy, healthcare, telecom, and financial services.

Effectiveness and efficiency

To answer the question of whether an investigation of a possible violation is effective, FTAC will explore whether it is likely that, after extensive research, it will be able to identify and terminate a violation. In doing so, the requirements on the enforcement activities by the FTAC imposed by administrative law and jurisprudence are taken into account. If on the basis of an investigation it could be established that there is a violation, FTAC will need to assess the manner in which it can permanently terminate the possible violation and its adverse consequences.

To answer whether an investigation into a possible violation is efficient, the FTAC will have to see first, if they are the (governmental) authority best designated to act. For example, given the nature of the complaint, it may be more efficient to have the complaint investigated by another supervisory authority, because of its higher investigative capacity. This may also include the possibility for the complainant to end the possible violation outside the FTAC. In some instances, may the civil court be the best indicated authority. In doing so, the FTAC takes the qualification of the complainant into account. Secondly, the FTAC will have to estimate the resources needed to identify and end a violation. As relatively more resources are required, FTAC's action will generally be less efficient.

Application of prioritization criteria and accountability

As indicated, the FTAC receives more complaints and signals than it can investigate, given its investigative capacity. As a result, not every complaint or signal can be investigated. To ensure that the initiated investigations are always the most critical, an analysis of the received complaints and signals is done, based on the questions mentioned above.

Through this analysis, the FTAC ensures that the priority of all (ex officio) investigations in response to signals and investigations in response to complaints are weighed against each other. This analysis is not a mathematical exercise, and the above explanation is not exhaustive. There are circumstances that can arise, which are not elaborated above, but that may still play a role in assessing if FTAC should prioritize an investigation. FTAC will be accountable for this. FTAC will justify how it sets its priorities in individual decisions – and more so in general – in its annual report. If a complaint is rejected due to lack of priority, FTAC will state why it does not consider the effort of its investigative capacity in response to the complaint appropriate in the light of the prioritization criteria. This decision will be made public.

Willemstad, March ..., 2020
Fair Trade Authority Curaçao,

Mr. Rob van der Bergh, Acting Chairman FTAC