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Proposal for a regulation addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC

Comments by the Confederation of Swedish Enterprise

The Confederation of Swedish Enterprise is Sweden's largest business federation representing 50 sector organisations and 60 000 member companies with over 1.6 million employees.

The Confederation of Swedish Enterprise has considered the EU Commission's proposal for a regulation and the accompanying impact assessment and has the following initial comments:

Summary

The Confederation of Swedish Enterprise (henceforth Swedish Enterprise) calls for a simpler, and more modern regulatory framework for the Digital Single Market. Reducing regulatory burdens on business is necessary to promote e-commerce. All regulation must be proportional and easy to grasp. It is of particular importance, especially for SMEs, that the same regulatory framework applies to both online and offline sales and to goods and digital contents; regardless of whether this is copyright-protected or not.

Swedish Enterprise considers that equating geo-blocking with discrimination, as proposed in the title of this proposal, is erroneous since no such relationship has been established.

We also call for an improved impact assessment and complete evidence-base for the proposed regulation. It is our opinion that such a new and complete impact assessment including a cost-benefit analysis of the proposed regulation is necessary before the proposal can be further considered by the Council and the European Parliament.

Furthermore, Swedish Enterprise thinks that the proposed regulation proposal contains, and causes, ambiguities that must be clarified. We also note that reference to legislation that is neither finally decided nor implemented is incompatible with reasonable demands for predictability and legal certainty, see Annex 11 in the impact assessment.

Uncertainty as to the meaning of unjustified geo-blocking and of discrimination

The Commission states that the proposed regulation is designed to address unjustified geo-blocking and discrimination related to nationality, place of residence, or place of establishment. Swedish Enterprise's view is that for the new legislation to fulfil requirements in the 2016 Inter-institutional Agreement on Better Law-making and be designed so as to "facilitate implementation and practical application", it must be clearly defined what is meant by the terms 'unjustified geo-blocking' and 'discrimination'. This is also important from the

point of view of avoiding the type of difficulties of interpretation experienced by Member States when implementing and applying Article 20(2) of the Services Directive.

Swedish Enterprise notes that definitions of these two central terms are neither found in the text of the regulation proposal nor in the impact assessment. Annex 9 of the impact assessment contains a glossary but this also fails to provide clarification. The glossary states that 'unjustified geo-blocking' means "online discrimination based on nationality or place of residence". Meanwhile 'discrimination based on nationality or place of residence' is described as "unjustified differences in the general conditions of access to goods or services made available to the public at large, i.e. outright refusal to sell or the application of different conditions, based on customers' nationality or place of residence", but "differences in treatment do not amount to discrimination if the differences can be justified by objective criteria". The glossary thus gives no explanation to precisely what the Commission intends by 'unjustified geo-blocking' and 'discrimination'.

In this context, Swedish Enterprise is of the opinion that it is also important to separate technical geo-blocking and limitations in regard to sales. These are different processes motivated by different reasons.

The proposal lacks a complete evidence-base

Judging from the information presented in the impact assessment accompanying the proposal the Commission lacks a complete evidence-base for the proposed regulation.

Swedish Enterprise considers it of utmost that the Commission, the Council, and the European Parliament adhere to and respect the principles for better law-making established at EU level, for example in the 2016 Inter-institutional Agreement on Better Law-making. This agreement is clear in regard to the importance of having impact assessments that can be used as "a tool to reach well-informed decisions". Furthermore, impact assessments shall contain information regarding the problems to be addressed, the scope of the problem(s), and whether new legislation is indeed needed at EU level. The information shall be accurate, objective, complete and proportional. Swedish Enterprise thinks that the information in the current impact assessment fails to live up to these principles.

The reasons for a regulation are unclear, article 3

The Commission proposes to ban geo-blocking i.e. blocking or limiting consumers' access to traders' online interface or re-routing consumers from one online interface to another without their consent. As far as Swedish Enterprise can tell from the impact assessment, the evidence-base for this consists primarily of the information gathered in the 'Mystery Shopping Survey' that the Commission has carried out. According to this information, two percent of the companies surveyed deny access to or use automatic re-routing from their online interfaces. The survey also does not seem to give any information or explanation as to why these two percent of the companies surveyed use these practices. Swedish Enterprise considers against this background that there are no valid reasons to regulate this issue at EU level.

Which problems will be addressed by the new regulation? Article 4

Article 4 in the proposed regulation prohibits traders from preventing customers in other EU Member States from shopping at the company's web shop, the online interface.

Swedish Enterprise cannot find any information in the impact assessment about problems that have arisen when customers have attempted to buy a product and have it delivered to

an address or pick-up place in the trader's place of establishment or Member State. Still this is the type of problem that the proposed regulation is meant to address, not problems arising when customers try to buy and have a product delivered cross-border. The supporting evidence for the regulation is all about cross-border purchases.

The information in the impact assessment is also unspecific and incomplete in regard to the scope of problems related to purchasing of services "to be provided at the premises of the trader or in a physical location where the trader operates, in a Member States other than that of which the customer is a national or in which the customer has the place of residence or the place of establishment". The Commission is basing the decision to regulate in this area on two cases. The first case were three car rental companies that previously had practices that prevented customers from accessing best available prices. The second case is about an amusement park accused of price discrimination but where discrimination has not been finally determined. The information is thus incomplete. The Commission nonetheless states that these two cases show that price discrimination **may** arise within the Single Market, but does not provide evidence that this is actually the case. Unfortunately, improper business practices do sometimes exist, but this does not motivate that all companies that sell online in the EU should be burdened with new prohibitions and regulations.

The Commission further states in its impact assessment that it has not been possible to determine whether the complaints database referred to contains cases of actual discrimination of consumers. This is because the information contained therein is insufficient: "it is not possible to draw any conclusions as regards the percentage of discrimination cases among the complaints" (page 127 in the impact assessment).

Swedish Enterprise has reacted against that the different surveys and studies used by the Commission as evidence-base to motivate the new regulation, all show only that consumers have expressed that they have experienced discrimination, not that cases of discrimination have actually been determined. Basing new legislation on approximately 1,500 "alleged cases of discrimination" (in a market of 500 million potential consumers) is at odds with the principles for better law-making. The evidence-base also shows considerable short-comings in that the companies that stand accused of discriminating against consumers are not represented and have not had the opportunity to explain the reason for their decisions not to engage cross-border trade in the Single Market. This leaves a one-sided and biased documentation.

Factors that explain different treatment of consumers

Policy-makers and civil servants involved in making decisions in the area of discrimination of consumers, should have their starting-point in the understanding that traders' and companies' 'raison d'être' is to sell their goods or services, and to sell at a profit. Companies, therefore, adapt their business strategies to applicable laws and regulations for this purpose. The Commission, however, argues that European businesses attempt, in various ways, to avoid selling, and that they seek, or even "feign" reasons to be able to refuse selling, as expressed in the impact assessment. Such absurd statements demonstrate a complete lack of understanding of the market economy, entrepreneurship and business.

The Single Market project is still not complete, and many barriers to trade and national rules fragment the market. This naturally impacts traders' decisions regarding whether to engage in cross-border trade in the Single Market or not.

The language contained in recital 95 of the Services Directive about the objective reasons that may justify different treatment of consumers in the provision of services, such as

- higher actual costs due to distance;
- technical characteristics related to provision of the service;
- varying market conditions;
- seasonal variations in demand;
- different vacation periods in the various Member States;
- pricing by different competitors;
- greater risks related to rules differing from those of the Member State of establishment, and
- a lack of required intellectual property rights in a particular territory,

matches to a large the factors that Swedish Enterprise's member companies describe as affecting their business strategies. Several of these factors are linked to remaining barriers to trade and specific national regulations that remain in the Single Market.

Rather than taking the opportunity to address these factors that actually prevent cross-border trade in the Single Market, the Commission has chosen to assert that it is the responsibility of traders to counteract fragmentation of the Single Market, and that it is the companies themselves who intentionally discriminate against consumers.

Ambiguities in regard to application and interpretation

If the Council and the European Parliament chooses to proceed with adoption of the proposed regulation, Swedish Enterprise is of the opinion that not only should a complete and relevant impact assessment be drawn up, but the following aspects have to be clarified:

- Which consumer legislation will apply to the sale of goods and services in which cases? Currently, traders who sell only within their own Member States (and not across borders) should be able to choose which legislation that applies to their contracts. Swedish Enterprise wants to express its concern that difficulties in interpretation may arise in regard to the Rome I Regulation. Compliance with the proposed regulation could be interpreted to mean a trader is directing his/her operations towards another Member State, even though that trader has not directly chosen to do so but does so due to regulatory requirements. The proposal that foreign customers should be able to trade on equal terms as domestic customers involves the customer is responsible for receiving the product from a local postal service agent or at the delivery address. It is very important that it is entirely clear what applies for cases where the customer later withdraws his/her purchase and returns the product.
- The relation of the proposed regulation to 'after-sales service' such as warranties and service agreements must be clarified. The proposal must specify that customers will not be able to make demands on service in their own Member State, but only in the country from which the product was purchased. The current formulations in the proposal fails to clarify this sufficiently well.
- In regards to payments and terms of payment, it is very important that companies have the freedom to choose themselves which types of payment solutions they offer, and that they may implement systems to protect themselves against fraud. Article 5 of the proposal is partially designed around legislation (Directive (EU) 2015/2366) that is still not implemented and applied in Member States, which clearly creates uncertainty.

- In regard to ensuring equal terms and prices for the sale of services provided in the premises of the trader or in a physical location where the trader operates, clarification is necessary as to what will apply for the trader, and his/her right to use targeted offers and differing terms and conditions, including through the setting-up of country-specific online interfaces (as expressed in recital 17). The possibility that the trader will be accused of discrimination is readily apparent for when customer A fails to find an equally beneficial offer as customer B, who bought from a different website. Swedish Enterprise, therefore, requests clarification as to how such cases will be considered.
- Handling value-added tax and VAT payments is something that businesses often describe as very burdensome. The Commission claims that there is no problem in relation to the sale of digital services/contents since the MOSS reporting procedures have been introduced. Still, the Commission states that only 12,000 companies are registered for MOSS and that the system will be further developed and changed at the same time as the Commission has presented its 2016 VAT Action Plan for future VAT systems. This will require clarification regarding what will apply in this area, and most likely additional information activities, since companies who normally do not operate across borders will not be aware of MOSS.

Lack of proportionality assessment

The principles of freedom of trade and freedom of contract are fundamental to enabling businesses to run their operations, change their product offering to match demand, and create growth and jobs. Legislative restrictions to these fundamental freedoms cannot be reasonably imposed unless for very special motives and only after a thorough assessment of all other alternatives. A proportionality assessment of the problem to be solved by new legislation and the extent and probable effects of such legislation must be carried out for and accompany any new legislative measure. Swedish Enterprise does not think that the Commission has provided a sufficient proportionality assessment for the current proposal.

Unlikely harmonisation

The Commission states that it has chosen a regulation with the justification that this would guarantee that the new legislation will be implemented and applied fully in all Member States. Thus the appropriate uniformity and legal clarity is achieved for all stakeholders. However, the Commission still leaves certain details up to each Member State to decide how they will handle at implementation stage. These are details with central importance to businesses as they include enforcement, inspection and sanctions levels, allowing the significant possibility of further fragmentation of the Single Market.

Lack of predictability and legal certainty

In Annex 11 of the impact assessment, the Commission addresses certain factors that traders identify as affecting their decisions to refrain from cross-border trade. The Commission claims that these factors cannot be considered as justification for such decisions. To back up this claim, the Commission refers to separate EU legislation that has either not yet been implemented, or in some cases even adopted. This includes consumer legislation, cross-border payments, handling value-added tax, and difficulties and high costs in relation to cross-border deliveries.

Swedish Enterprise is of the opinion that this presents companies with the unreasonable expectation of relying on legislation that has not yet been implemented and applied when making important and strategic decisions for their business operations. The Commission

should, therefore, not have acted on the proposed legislation regarding geo-blocking and discrimination until after other related legislation is adopted, introduced, applied, and the effects thereof have been fully assessed. Only then would it be possible to determine if the current proposal is actually necessary and appropriate.

In regard to national rules, such as for products, labelling, and sales, it is positive that the Commission notes that such rules often affect decisions regarding cross-border trade, primarily because they cause greater direct costs, as well as indirect costs related to obtaining information as to the applicable requirements. The Commission also shows certain understanding of the factors affecting companies' capabilities and possibilities to sell to consumers in other Member states, for example in regard to after sales services and legislation that prevents companies from selling to customers in other Member States (such as prohibition of selling 'snus' outside of Sweden).

The Commission clearly states that it considers that Member States have not implemented and applied the Services Directive sufficiently, in particular in regards to Article 20 (2). Swedish Enterprise questions whether this is actually a sufficient reason to introduce new EU legislation that partially invalidates the Services Directive. It would more likely appear that the difficulties with the Services Directive are caused by the Commission's failure to clarify how the Directive should be applied, as well as by a lack of resources for applying the directive at Member State level. Therefore, a more reasonable approach would be to address these difficulties before introducing additional legislation that in itself fails to overcome the known problems of interpretation related to the Services Directive in regard to what can be considered discrimination of consumers and what are justified and objective differences of treatment of consumers.

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