

HAYPP GROUP'S COMMENTS ON THE SWEDISH CONSUMER AGENCY'S GENERAL ADVICE ON THE MARKETING OF TOBACCO (KOVFS 2019:3) TO THE NATIONAL BOARD OF TRADE SWEDEN

1. THE SWEDISH CONSUMER AGENCY'S GENERAL ADVICE (KOVFS 2019:3)

In December 2019, the Swedish Consumer Agency adopted new general advice on the marketing of tobacco products to consumers. The general advice is notified as a technical regulation as the advice comprises of proposed rules that may affect trade between Member States under directive 2015/1535. The notification procedure for technical regulations is intended to ensure that Member States do not adopt regulations which constitute barriers to trade and, if such regulations lead to barriers to trade, that the barriers are necessary to protect objectives of general interest, but also that they are proportionate. Restricting marketing can constitute both a barrier to the free movement of goods and the free movement of services. The Swedish Consumer Agency's general advice KOVFS 2019:3 has been notified to the Commission as a technical regulation in relation to the Services Directive, Directive 2006/123, and articles 15.7 and 39.5 thereof. According to article 15.3 of the Services Directive, the requirements set out in the technical regulations must comply with the requirements of non-discrimination, necessity and proportionality. Below we explain why the Swedish Consumer Agency's general advice does not meet these requirements.

2. THE SWEDISH CONSUMER AGENCY'S GENERAL ADVICE HINDERS THE FREE MOVEMENT OF GOODS

2.1 Introduction

Sweden has legal obligation according to EU law not to introduce anti-competitive rules. According to article 3.3 of the Treaty of the European Union (the "Treaty") *"The Union shall establish an internal market"*. Protocol 27 to the Treaty is linked to this provision, which provides that *"the European Union includes a system ensuring that competition is not distorted"*. Article 4 of the Treaty provides a general duty of loyalty for the Member States vis-à-vis the EU. The article states, *inter alia*, that Member States should *"refrain from any measure which could jeopardise the attainment of the Union's objectives"*. One of the Union's objectives is to introduce an internal market in which competition is not to be distorted. The general advice, and in particular section 3.1, leads to that the competition between e-commerce and physical sales is distorted, as marketing of tobacco products on the Internet is more restricted than sales in physical stores. As a result, it will be harder for operators from other Member States to turn to Swedish customers compared to domestic operators. In addition, e-commerce operators are discriminated in comparison to operators who conduct physical sales, without there being a substantive reason for this and without the support of law for such an arrangement.

2.2 The requirement of non-discrimination

According to article 15.3 (a) of the Services Directive, non-discrimination means that *"the requirements must be neither directly nor indirectly discriminatory according to nationality nor, with regard to companies, according to the location of the registered office"*.

The Swedish Parliament rejected the Swedish Government's proposal for changed marketing rules for tobacco, as the proposal entailed a distinction between marketing in physical stores versus e-commerce stores. Since e-commerce is the simplest way for a new entrant to establish itself in the market today, operators from other Member States that sell tobacco and who want to establish themselves in Sweden will have a hard time establishing themselves in the market. A direct application of the Swedish Consumer Agency's general advice would lead to that the right of e-commerce operators to conduct business is restricted without the Swedish Consumer Agency being authorized to restrict this right. By limiting the ability of e-commerce operators to market their products, the right to conduct business can also be regarded as erroneously reduced, since the restriction means that other operators, in particular those who sell only tobacco products in physical stores, will benefit financially.

2.3 The requirement of necessity

According to article 15.3 (b) of the Services Directive, the requirement of necessity means that "*the requirements must be justified by an overriding reason relating to the public interest*". The strict regulations regarding the marketing of tobacco products to consumers on the Internet, which the Swedish Consumer Agency introduces through the general advice, are not supported by law and are, in addition to this, allowed for the operators who conduct sales in physical stores. Thus, the requirement of necessity can not be considered to be fulfilled, since it has not been deemed justified on the grounds of compelling public interest to introduce these restrictions in Swedish legislation and since, in any case, such restrictions do not apply to sales in physical stores. Today, most of the tobacco is still sold in traditional physical stores, hence the restriction of internet marketing does not cater for a general interest, e.g. public health or consumer protection.

2.4 The requirement of proportionality

According to article 15.3 (c) of the Services Directive, the requirement of proportionality means that "*requirements must be suitable for securing the attainment of the objective pursued; they must not go beyond what is necessary to attain the objective and it must not be possible to replace those requirements with other less restrictive measures which attain the same result*". The purpose of tobacco legislation, both at EU level and in Sweden, is to protect public health by setting certain requirements, for example regarding labelling and restrictions on marketing. The tobacco legislation's rules on the marketing of tobacco products are comprehensive and include all operators in the market. Consequently, it cannot be considered proportionate to impose stricter requirements on e-commerce operators through general advice, since such a special regulation does not ensure that the desired goal, the protection of public health, is achieved. This is especially the case in light of the fact that most of all tobacco is still sold in physical stores. A higher public health protection would then be achieved if the stricter requirements solely applied to the dominant form of sales (in physical stores) or in any case that all forms of sale be treated equally, which is not the case. In addition, the special regulation regarding e-commerce operators leads to distortion of competition in the market.

3. LEGAL IMPACT OF THE SWEDISH CONSUMER AGENCY'S GENERAL ADVICE

The Swedish Consumer Agency's general advice involves a misinterpretation of the rules on the marketing of tobacco, and a risk of incorrect application of the law, in contravention of the legislation which the Swedish Parliament has stated shall apply. In addition, the general advice leads to a restriction of the freedom of trade for operators active in the market.

3.1 The general advice contributes to the misinterpretation and application of the rules

As the regulatory authority supervising the rules on the marketing of tobacco products, the Swedish Consumer Agency has the task of supervising the operators' marketing, but also to give advice on how the marketing can be designed to be compatible with applicable legislation. The adopted general advices are intended to make recommendations to the market participants on the basis of current legislation and practices of the courts. The legislative rules themselves are not detailed, which is why many market participants seek guidance from the general advices issued as they aim to provide practical recommendations on e.g. the design of commercial messages. In general, the general advices are good for market participants as they provide practical guidance, but there are obvious difficulties when the general advices issued do not reflect the legal situation correctly. With regard to the Swedish Consumer Agency's general advice for marketing tobacco products to consumers, KOVFS 2019:3, the Swedish Consumer Agency has taken obvious liberties to restrict the possibility of using commercial messages by law and to narrowly define the concept of "place of sale". The Consumer Agency's general advice, KOVFS 2019:3, reflects the Agency's view and recommendation on how applicable legislation should be interpreted and applied. Various parties turn to the authorities' general advice for guidance on the interpretation and application of the legislation. Therefore, there is an obvious risk that market participants will comply with the general advice, even when they do not correctly reflect the applicable rules, and thereby incorrectly hinder in their marketing on the Internet. This also means that the Swedish Consumer Agency's general advice lead to a disproportionate restriction on the freedom of trade for the operators who sell tobacco products on the Internet.

3.2 Restriction of freedom of trade

Freedom of trade means that the right to conduct a business can only be limited for the purpose of protecting "*urgent public interests*" (in accordance with chapter 2, section 17 of the Swedish Government Form (*Swe. Regeringsformen*)). Restrictions on freedom of trade must not be implemented for the sole benefit of other certain persons or companies financially. The freedom of trade is also codified in article 16 of the EU Charter of Rights and forms part of the protection of property in article 1 of the First Additional Protocol of the European Convention on Human Rights. In accordance with the main rule in chapter 8, section 2 of the Government Form, restrictions on freedom of trade shall be decided by law, but it is possible to delegate the normative competence to e.g. the Government. There has been no delegation of competence to decide on these issues to the Swedish Consumer Agency. On the contrary, the Swedish Parliament, which is the highest decision-making assembly in Sweden, has commissioned the Government to propose rules on internet marketing. Thus, the Consumer Agency does not have the power to issue rules that restrict the operators' freedom of trade. Only in cases where the Swedish Consumer Agency has been delegated the normative competence in accordance with chapter effect 8 of the Government Form may the Agency issue

regulations which have binding effect. By issuing the general advice, the Swedish Consumer Agency can be considered to have introduced a ban on the marketing of tobacco products on the Internet that is not supported by law. Hence, the Swedish Consumer Agency must be considered to exceed its competence, since the Agency does not have the authority to amend a law and thus impose such a ban. As an authority, the Swedish Consumer Agency can also be considered to exceed its powers, since the Agency may not formally do so either. The Swedish Parliament is the body that establishes laws in Sweden. The Swedish Parliament can delegate normative competence but in this case no power has been delegated to the Swedish Consumer Agency. The Swedish Consumer Agency thus lacks the normative competence to restrict the freedom of trade.

4. CONCLUSION

The Swedish Consumer Agency's general advice on marketing tobacco to consumers, KOVFS 2019:3, does not fulfil the formal requirements of non-discrimination, necessity and proportionality provided in the Services Directive. In addition, the adoption and, in particular, the application of the general advice means that the competition in the market is distorted and that the free movement of both goods and services is hindered. In summary, this means that the general advice should not be accepted as a technical regulation.