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**2023/0587/SE – STAKEHOLDER CONTRIBUTION REGARDING THE PUBLIC HEALTH AGENCY OF SWEDEN’S PROPOSAL FOR REGULATION ON SELF-MONITORING PROGRAMMES FOR THE SALE OF TOBACCO PRODUCTS, ELECTRONIC CIGARETTES AND REFILL CONTAINERS**

Following the Swedish Public Health Agency’s (the “**Agency**”) notification of a new regulation on self-monitoring programmes (the “**Draft Regulation**”) to the European Commission, Haypp Group AB (publ) (“**Haypp Group**”) submits this stakeholder contribution to make the European Commission aware of the barriers to trade that will be arise if the Draft Regulation is ultimately adopted and enters into force.

Haypp Group is an e-commerce actor active within the sales of smoke-free alternatives to cigarettes with the vision of inspiring healthier enjoyment for millions and working for a global transformation from smoking to healthier product alternatives. Haypp Group has several e-commerce brands and is active in seven countries with close to 800,000 active consumers during 2022.

*Background – the Swedish legislative framework for sales of tobacco and tobacco-free nicotine products and the Draft Regulation*

In order to sell tobacco products on the Swedish market, a retail sales permit from the relevant municipality is required. In relation to tobacco-free nicotine products, the retailer must notify the relevant municipality of such sales. Retailers based in other Member States engaging in cross-border sale of tobacco products and tobacco-free nicotine products to the Swedish market must register with the Agency (see Chapter 5, Section 15 of the Swedish Tobacco Act (2018:2088) and Section 17 of the Swedish Nicotine Products Act (2022:1257). All retailers selling the relevant products in or into Sweden must exercise self-monitoring over its sales activities and a self-monitoring programme must be submitted to the municipality, or the Agency as applicable, either as part of the application for a sales permit or in connection with the notification or registration of the sales activity.

During the approval process for a sales permit for tobacco products, the municipality will evaluate the self-monitoring programme and whether it is compliant with relevant legislation, including the retailer’s description of how it ensures proper age verification in accordance with the legislation, in order to determine whether a sales permit will be granted.

The Tobacco Act and the Nicotine Products Act both set out a requirement on age verification. According to Chapter 5, Section 17 in the Tobacco Act and Section 19 in the Nicotine Products Act, the products may not be sold or in another manner handed out within business activities to someone that has not turned 18 years old. The legislative text does not require that age verification is performed more than once. Older preparatory works to the Swedish legislation indicate that the objective has been to ensure that one age verification is made regardless of the type of transaction. There is a criminal liability for

anyone who intentionally or by negligence sells or hands out tobacco and tobacco-free nicotine products to underage persons. The consequences may be a fine or imprisonment for up to six months for the individual (Chapter 10, Section 2 in the Tobacco Act and Section 45 in the Nicotine Products Act).

The Agency has been granted power to issue regulations on the content of the self-monitoring programme. However, it does not have the power to issue guidelines in relation to the age verification provisions in the relevant acts.

The main issue in the Agency's Draft Regulation is that it introduces a new requirement for a double age verification in relation to distance sales of tobacco products and tobacco-free nicotine products. In relation to distance sales, a double age verification is required whereby age must be verified at the time of sale and at the time of delivery. The new requirement is not included as a clear requirement in the relevant legislation but is hidden in the Draft Regulation in combination with impact assessment considerations by the Agency when it sets out what information retailers must include in their self-monitoring programmes.

As the Agency has noted in its impact assessment, for in-store purchases the time of purchase and the handing over of the products takes place simultaneously. Therefore, the new requirement will only have effect for distance sales of tobacco and tobacco-free nicotine products.

Already in the Agency's own public consultation relating to the Draft Regulation, many stakeholders raised the issue that the Draft Regulation and the new requirement for age verification to be performed at two occasions for distance sales would lead to a hinder of the free movement of goods and of services and constitute a barrier to trade that had not been adequately analysed by the Agency. Through the notification of the Draft Regulation to the European Commission, it is evident that the Agency has not considered these aspects.

#### *Summary of the implication of the Draft Regulation*

The indirect requirement for double age verification will affect market players active in cross-border sales of tobacco and tobacco-free nicotine products and logistics providers and constitute a barrier to trade for the following reasons.

- All actors selling or distributing tobacco and tobacco-free nicotine products on the Swedish market must adhere to certain rules in relation to its sales or distribution of products in or into Sweden and must adapt their activities specifically for the Swedish market. This could make it less attractive to provide the products or services on the Swedish market.
- The Draft Regulation requires that current contracts are renegotiated to include obligations to perform a double age verification, but the Agency has underestimated the consequences of this requirement and the practical effects for retailers and logistics providers in several respects.
- Under Swedish case law, the self-monitoring of age verification cannot be transferred to a third party to a large extent at the same time as the Draft Regulation requires that age verification is performed at the time of delivery. It is not clear if and how the new requirement, under Swedish legislation, can be performed by an entity other than the retailer.
- In order to ensure compliance with the Draft Regulation, operators from other Member States will not only need to monitor legislative changes in Sweden but will also need to keep themselves informed of the developments in Swedish case law.

- The extended risk of criminal liability for employees of the logistics provider could result in logistic service providers refraining from distributing tobacco and tobacco-free nicotine products on the Swedish Market.
- Further, the Agency has not identified or adequately analysed the implications of the Draft Regulation and the new requirement for double age verification. There is therefore no information provided on how, or *if*, the barrier to trade could be justified by Sweden.

For the reasons set out above, and as Haypp Group will further elaborate on, operators from other Member States will, in fact, be in a worse situation due to the administrative burden in relation to pure domestic operators if the Draft Regulation is adopted.<sup>1</sup>

#### *Implications for retailers*

The double age verification that the Agency wants to impose through the Draft Regulation provides that the retailer must ensure that the age of the purchaser is verified at two points in time, first at the time of purchase and second at the time of physical delivery. To this end, a retailer that wishes to sell its products to Swedish customers must establish and implement new procedures in the business operations to adapt to the new Swedish requirement.

*First*, the retailer's agreement with its logistics provider must be tailored to the Swedish market requirements as the retailer will need to impose on its logistics providers an obligation to perform age verification. Such additional obligation will also likely require renegotiations of other terms, such as overall liability and price for the service in particular given the risk of criminal liability for the logistic service providers' employees. The retailer will therefore have to renegotiate core terms in the agreement with the logistics provider concerning both liability and pricing of the service. The negotiations may be more complex if the retailer is active also in other Member States and has agreement(s) with logistics provider(s) covering also other Member States. The retailer will then either need to negotiate and implement specific terms only applicable to the activities in Sweden or adapt the overall contract for its activities also in other Member States to comply with the Draft Regulation.

Further, if there are more than one logistics provider involved in the distribution chain, contracts will need to be renegotiated not only between the retailer and its main logistics provider but throughout the distribution chain. In this situation, the negotiations and amended contracts will need to also ensure that the liability is clear throughout the distribution chain and include language to ensure that relevant information about a delivery is provided so to avoid miscommunication and the risk of the end logistic service provider delivering the product without a proper age verification. Haypp Group notes that the Agency has not addressed who will be responsible in the event that age verification was not performed upon delivery as a result of miscommunication between the retailer and the logistics provider or between several logistics providers performing parts of the in the distribution chain, each performing parts of the delivery.

The above will imply increased costs for the retailer, both in terms of costs for negotiations and increased prices for the services, as an extra administrative burden for age verification is put on the logistics provider.

The Draft Regulation and the new requirement for age verification will therefore make it less attractive for retailers established in other EU Member States to offer its products to Swedish customers due to the Draft Regulation. To this end, it is also possible that the retailer cannot use its normal logistics

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<sup>1</sup> Case C-108/09, *Ker-Optika*, ECLI:EU:C:2010:725, para. 51.

provider as it cannot meet the requirement for these particular goods or if it does not wish to take on the additional responsibility, including the extended risk of criminal liability for its employees.

It should also be noted that an agreement may typically not be amended unilaterally by one party. The requirement to impose a new obligation on the logistics providers may therefore put the retailer at a disadvantage in the negotiations as the retailer is dependent on an agreement for such obligation in order to continue its operations and supply its customers with the products.

*Second*, according to the Agency's impact assessment, it is the Agency's view that it is acceptable that a service provider, i.e. the logistics provider, can perform the age verification at the time of delivery. The Agency states in the impact assessment that "[r]etailers wishing to engage in distance trading may need to agree on new services with subcontractors and dispensing points in order to ensure that the activities comply with the requirements of the Act through the clarifications made in the regulations".

However, under Swedish case law it is not possible to transfer (*Sw. överlåta*) to a large extent the retailers obligation of self-monitoring in relation to performing age verification as the retailer in such a situation does not itself, by definition, perform the self-monitoring required (e.g. judgment by the Administrative Court of Appeal in Sundsvall in case no. 2752-20). Swedish courts have e.g. concluded that it is not sufficient that a retailer purchases additional services from its logistics provider for *both* additional age verification as well as additional identity verification at the point of delivery to fulfil the retailers obligation to self-monitor its age verification process. The Agency's impact assessment does not address how the new requirement for a double age verification shall in fact be handled by the operators in the light of Swedish case law.

Haypp Group can conclude that given the current Swedish case law, it may in practice be impossible for a retailer active in distance sales from another EU Member State to sell to Swedish customers as the distributor itself cannot verify the age of the customer at the time of delivery without setting up its own distribution network in Sweden. As such, the requirement will have a greater impact on retailers in other EU Member States than on Swedish retailers.

Further, in order to ensure compliance with the Draft Regulation, retailers will not only need to monitor legislative changes in Sweden but will also need to keep themselves informed of the developments in Swedish case law. The Draft Regulation will also for this reason have a greater impact on operators from other Member States.

#### *Impact for logistics providers*

The Draft Regulation will also have an impact on logistics providers. The Agency has however not considered the effects for this sector at all in the impact assessment.

The Draft Regulation has two main impacts on logistics providers.

*First*, logistics providers active on the Swedish market will have to implement new routines for age verification. This implies that the companies will have to adjust its business activities specifically for the Swedish market. The logistics providers will have to gain detailed knowledge about the Swedish regulatory aspects and allocate significant resources to monitor compliance of the routines with the applicable laws and regulations. This will make it less attractive for a company to offer cross-border logistics services to the Swedish market.

*Second*, also logistics providers will have to alter its current customer agreements with retailers active within sales of tobacco and nicotine products. As mentioned above, this involves significant time and

efforts to negotiate core terms concerning liability and pricing of the service. Further, if the logistics provider only handles part of the delivery and has agreements with one or more subcontractors for the delivery to the end consumer, the logistics provider will also need to renegotiate its agreement with its subcontractor(s) (see above under the *Implications for retailers*). The Draft Regulation may therefore trigger a chain of complex, time-consuming and costly renegotiations which may refrain logistics providers from continuing to offer these services where the end recipient is a consumer in Sweden.

*Third*, the new requirement will result in a risk of criminal liability in cases of an insufficient age verification. An employee of the logistics provider thus risks being sentenced to a fine or imprisonment if it does not verify the age of the person to whom it hands over the parcel. This constitutes a barrier to trade as it makes it much less attractive for logistics providers to provide its services on the Swedish market as it will entail criminal liability for all of its employees.

In practice, the increased administration and costs, and not least the risk of criminal liability which the proposal may result in, may have an inhibiting effect on online sales. The result may be that operators active within online sales and logistics operators refrain from delivering to the Swedish market (or performing parts of the delivery where the end customer is a Swedish consumer) or that such deliveries become more expensive. This may in turn mean that online retailers will find it difficult to market and supply their products to Swedish consumers and that Swedish consumers will have to pay more for deliveries. Overall, the proposal therefore does not benefit a well-functioning market, operators, or the Swedish consumers. This means that the distribution of the relevant products, which are inherently, are impracticable in practice, which could result in a de facto ban on business operations is introduced by the Draft Regulation.

Given the serious consequences of the Draft Regulation for the logistics providers, the effects of the Draft Regulation on this sector should have been analysed by the Agency in its impact assessment.

*The PHAS has not made a proper impact assessment and has not considered possible barriers to trade*

It follows from both Swedish and EU law that whenever new national legislation is proposed, regardless at what level, an impact assessment that also considers possible EU law aspects shall be carried out. A proper procedure is therefore to, as a first step, identify any barriers to trade that may arise due to the proposed regulation and, as a second step, to analyse the trade barriers and consider whether or not they can be justified due to the aim that shall be achieved with the legislation. Moreover, an analysis if there are less restrictive alternatives that can achieve the same objective shall also be considered.

According to article 18(4) of the second tobacco products directive<sup>2</sup> only one age verification at the time of purchase is required. The imposition of a double age verification requirement must therefore be notified to the European Commission under the technical regulation directive. However, the Agency has only considered that it is the language requirement concerning the self-monitoring programme, the fact that it must be in either Swedish or English, that must be notified. Consequently, as there are additional – and more serious barriers to trade, the Agency has not fulfilled its task to identify and analyse all relevant possible barriers to trade.

Therefore, the proposed regulation cannot be adopted in its current form and should be subject to further analysis. This analysis should be done in consultation with market operators to ensure that the impact of the proposal on them is properly understood.

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<sup>2</sup> EU Directive 2014/40.

Kind regards,

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