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Position on the European Commission's initiative on identifying and addressing barriers to the single market

SUMMARY

In March 2020 the European Commission (EC) launched a communication[1] on identifying and addressing barriers to the single market aiming to highlight the most relevant areas of concern for businesses and consumers, to identify their root causes and set out ways to address them. This initiative is intended to strengthen the basis on which the EC can ensure that Europe can deliver growth, prosperity and stability for its citizens and businesses at home and globally. A year before the European Council called on the EU and the Member States to remove remaining unjustified obstacles to the single market, while stressing that no new barriers should be created.[2]

According to the EC, the main root causes for the barriers to the single market relate to regulatory choices at the EU and national level, transposition, implementation and enforcement of legislation, the administrative capacity and practices in the Member States, and the general business and consumer environment. The EC suggests a mix of measures at both the EU and national levels to address these barriers, such as digitalisation of public administration and better communication to help businesses and citizens or better legislation, implementation and enforcement. The EC urges the Member States to take responsibility to address burdensome regulations and procedures that are within their remit and to ensure that their negative impact on the single market is compliant with EU law.

While e-government, reduction of bureaucracy, regulatory impact assessment and the application of mutual recognition principle are much needed and welcome initiatives, such policies as tax harmonisation, restrictions on the posting of workers and banning of geo-blocking undermine the four freedoms and damage the single market and free trade.

MINIMIZING THE REGULATORY AND ADMINISTRATIVE BURDEN

Complex administrative procedures are named as one of the most serious obstacles to the single market for businesses. Since regulatory challenges affect SMEs particularly heavily, the EC emphasizes the importance of assessing the impact of new regulations on SMEs. Administrative burden is only a fraction of all regulatory burden which is faced by businesses. It is needed to refuse excessive regulations which especially reduce productivity and profitability of SMEs.

[1] Identifying and addressing barriers to the single market: https://ec.europa.eu/info/sites/info/files/communication-eu-single-market-barriers-march-2020_en.pdf

[2] Objectives, approach, and caveats, Identifying and addressing barriers to the single market: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020SC0054

A lack of impact assessment, frequent legislative initiatives and changes are a serious source of the growth in the regulatory burden. In Lithuania, for example, impacts are required to be assessed for any legislative acts. However, according to OECD, regulatory impact assessment "remains a largely formal exercise to justify choices already made, rarely based on data or analysis of alternative options. Around two-thirds of about 900 draft laws submitted to the Seimas every year are parliamentary drafts with similar requirements for conducting RIA and public consultations as for those developed by the executive, however, without any oversight".[3] A lack of ex-post assessment is another source of concern. According to the National Audit Office of Lithuania, from 2014 to 2016 ex-post impact assessment was performed for a mere 0.06 percent of legal acts. As many as 98 out of 110 state institutions charged with this task failed to accomplish it for supposedly non-existent problems in the designated areas of oversight.[4]

An increase in the regulatory burden is largely associated with weaknesses across the law-making process. In Lithuania, for example, as many as one in five laws are adopted as a matter of urgency, minimizing the opportunity for stakeholder engagement, impact assessment and compliance with the principles of expediency and proportionality of law[5]. By comparison, in Finland and Sweden the urgent law-making procedure occurs only in 0.5 percent of cases, in Estonia, 10 percent.[6] In general, the number of legal acts has been growing by one fifth per parliamentary term in Lithuania[7]. A total of 45 percent of legislative changes are debated in government within merely a year after the latest submission. Analysis shows that changes to the main tax laws are passed almost every other week.[8]

Small firms have a harder time coping with a growing regulatory burden. A 10 percent increase in regulatory restrictions on a particular industry is associated with a decrease of about 0.5 percent of the total number of small firms within that industry, according to the Mercatus Center.[9] By contrast, there is no similar change in the number of large firms associated with

[3] OECD (2019), Indicators of Regulatory Policy and Governance EUROPE 2019: Lithuania: http://www.oecd.org/gov/regulatory-policy/indicators-of-regulatory-policy-and-governance-2019-lithuania.pdf

[4] The National Audit Office of Lithuania (2018), Valstybinio audito ataskaita: Teisėkūros procesas https://www.vkontrole.lt/pranesimas_spaudai.aspx?id=24464&fbclid=IwAR12Q4it2zXy2sTRG6gxncFDljsE5v3Ft54POOjJ5B0TX5GJBCaKJZwYMT8

[5] Parliament of the Republic of Lithuania (2020), 2016–2020 m. kadencijos Lietuvos Respublikos Seimo veikla teisėkūros srityje (I–VIII sesijų statistinių duomenų apžvalga): https://www.lrs.lt/sip/getFile3?p_fid=23804&fbclid=IwAR3fTzRg0blN5FWmEc73TCFL-f3T1tp3QW2t0uNskydZiBVwsB1vMrkkzgA

[6] The National Audit Office of Lithuania (2018), Valstybinio audito ataskaita: Teisėkūros procesas https://www.vkontrole.lt/pranesimas_spaudai.aspx?id=24464&fbclid=IwAR12Q4it2zXy2sTRG6gxncFDljsE5v3Ft54POOjJ5B0TX5GJBCaKJZwYMT8

[7] Parliament of the Republic of Lithuania, https://www.lrs.lt/sip/getFile3?p_fid=14709. https://www.vkontrole.lt/pranesimas_spaudai.aspx?id=24464&fbclid=IwAR12Q4it2zXy2sTRG6gxncFDljsE5v3Ft54POOjJ5B0TX5GJBCaKJZwYMT8

[8] Lithuanian Free Market Institute (2019), Lietuvos mokesčių įstatymai: iniciatyvų daug, kokybės trūksta, https://bit.ly/2RPKwiv https://www.vkontrole.lt/pranesimas_spaudai.aspx?id=24464&fbclid=IwAR12Q4it2zXy2sTRG6gxncFDljsE5v3Ft54POOjJ5B0TX5GJBCaKJZwYMT8

[9] Mercatus Center (2018), Regulation, Entrepreneurship, and Firm Size: https://www.mercatus.org/publications/regulation/regulation-entrepreneurship-and-firm-size

such an increase in regulation. Importantly, small businesses tend to be more common in low-income regions or smaller towns, therefore a growth in their regulatory burden is likely to have the consequence of diminished economic mobility for the poor.

Additional efforts should be taken in line with the EC's Regulatory Performance and Fitness programme (REFIT) to reduce the administrative and regulatory burden. When a new regulation is introduced, the EC's proposed principle of "one in, one out" can serve as an effective tool to achieve the objectives set out by the EC. The ambition should be that all future legislation, at the European and national levels, should be formulated with the end user in mind, identifying potential administrative and regulatory challenges and mitigating them early on in the policy making process.

GOLD PLATING

Evidence suggests that transposition of EU law is associated with a substantial degree of gold plating, increasing the level of the regulatory and administrative burden that is adopted at the national level beyond the minimum requirements of the EU legislation.[10] Excessive rules, however, do not only increase compliance costs[11] but also undermines the business environment and reduces competitiveness and growth. While in matters falling into the ambit of the application of EU law, Member States must comply with EU law and the four freedoms enshrined in the Treaty, the EC notes that additional national requirements must be justified by an overriding reason of public interest, be non-discriminatory, proportionate, easy to understand and compliant with the harmonized minimum rules.

Member States should embrace policy frameworks and measures to minimize the incidence and impacts of gold plating. Such measures may include:

- foregoing national regulatory demands which are more complex than EU requirements;
- disallowing enforcement prior to the EU required schedule;
- disallowing more stringent sanctions or enforcement mechanisms than what is necessary for adequate implementation of EU rules,
- applying exemptions to the extent possible.

Sweden is one of the countries that provides a noteworthy example of policy approaches designed to tackle the risks associated with gold plating.

TAX HARMONISATION – WAY TO A NON-COMPETITIVE EUROPE

According to the EC, further efforts should be undertaken to reduce divergences in the tax systems. One of the main advantages mentioned is that tax harmonisation would increase cross

[10] F. A.Hayek Foundation, Lithuanian Free Market Institute (2015), The Gold-plating: identification of problems in Slovakia and Lithuania and possible solutions for EU member states: http://4liberty.eu/wp-content/uploads/2015/05/Gold_Plating.pdf

[11] For example, Sweden reported that over half of the administrative costs that Swedish companies incurred stemmed directly from the effects of EU legislation. Ibid.

border activity. The EC is considering harmonization in the areas of value added and business income taxation.

A diversity of tax systems is not a roadblock to free trade. Quite the opposite, differences in tax systems might serve as a stimulus to trade. Taxes constitute a significant share of costs and a large share of the price of factors of production, labour in particular. It is tax diversity, which is largely determined by the necessity to adjust to local conditions and traditions, that often provides opportunities to produce cheaper goods and services and offer them on the international market. Thus an absence of centralised tax harmonisation encourages mutually beneficial trade rather than undermining it.

Countries have always competed using their exogenous factors (e.g. the amount of land, population, proximity to waterways, etc.) as well as endogenous one (e.g. the level of corruption, political stability, the level of bureaucracy and taxation).[12] Competition by endogenous factors (e.g. taxation) should not be perceived as "unfair" or "unnatural." Tax competition is no different than competing for investment by cutting red tape, lowering bureaucracy and other factors that depend on national governments.

Tax harmonisation would undermine the competitiveness of the European Union and bring negative consequences for economic, societal and technological development. While tax harmonisation might have the advantage of eliminating the need to scrutinize different rules of computing the corporate tax base. However, there is a high probability that a reduction of the administrative burden would be offset by an increase in taxes after the harmonisation. Tax harmonisation would create considerable compliance costs in the transition period, especially for SMEs operating within the market of only one Member State. Also, differences in the tax bases in various Member States may still remain as some leeway is usually left even in the case of strict harmonisation.

ISSUES OF GEO-BLOCKING[13]

Geo-blocking is one of the most commonly reported consumer problems and the EC put an end to unjustified geo-blocking rules. Geo-blocking, or geographically based restrictions on online shopping and cross-border sales, may result in some consumers' being unable to obtain desired services or content, and customers being charged different prices for the same goods or services when being located in different places. Proponents of this regulation argue that this is an unfair practice which is incompatible with single market rules.

It is important to note that producers should be able to decide where and how they market their goods and how much they cost it. This includes the right to execute contractual and licensing agreements as it is profitable for them and their business. Geo-blocking may also be considered

[12] Lithuanian Free Market Institute (2016), The Effect of Corporate Tax Base Harmonization in the EU: https://en.llri.lt/wp-content/uploads/2016/11/CCCTB-November-21.pdf

[13] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC.

as a form of price discrimination which can benefit consumers because of costs variations and business model differences.[14] By differentiating prices across countries digital businesses can expand the number of consumers. Geo-blocking should not be banned because it would diminish abilities for firms to take optimal strategies and responses to changes in the market and in the end consumers would be worse off.

MINIMUM FOR THE WEST, MAXIMUM FOR THE EAST

The EU has set objectives to strengthen free movement and protection of workers' rights in order to reduce fragmentation of the single market through a common EU legal framework. To achieve this, the EC mentions the Posting of Workers Directive[15] which is intended to facilitate the freedom of movement of workers, freedom of establishment and freedom to provide services. Nevertheless, adopting a common set of rules of the Directive at the EU level is incompatible with the single market.

This Directive does not contribute to the principle of the free market and the biggest concern is because of "equal pay for equal work in the same place" principle, meaning that posted workers should not receive wages lower than the minimum wage of the recipient country. Lower minimum wages in NMS were presented as social dumping, while differences in labour market regulation as unfair competition. The principle of "equal pay for equal work in the same place" is incompatible with the single market as pay rate differences constitute a legitimate element of competitive advantage for service providers, that is claimed by New Member States (NMS) too. In all EU Member States workers of the same occupation or sector receive widely different salaries. Although minimum wages are lower in NMS, it is neither a consequence of different mentality or social policy nor a deliberate attempt by NMS to gain an unfair competitive advantage. In fact, the nominal minimum wage across Member States varies due to differences in economic development and therefore related policy options should be compared with regard to the ratio between the minimum wage and the average wage. This means that the principle of "equal pay for equal work in the same place" does not exist even in individual Member States.

Punishing NMS for having lower nominal minimum wages is tantamount to penalizing companies from different countries for different prices. This goes against fundamental principles of the single market where price competition is explicitly allowed or even encouraged. The Posting of Workers Directive should be revised with regard to these considerations.

CONCLUSION

In general, addressing and diminishing barriers to the single market in the EU is a much welcome initiative. The initiatives to decrease bureaucracy, to step up efforts to comply with

[14] EPiCENTER, The EU goes digital (sort of): http://www.epicenternetwork.eu/wp-content/uploads/2016/06/EPICENTER-Wednesday-Briefing-5-EU-goes-digital-1-June-2016.pdf?fbclid=IwAR2_8w4jJt47ajXX-2nFRYxVc3jUAo1QRVsPhKTEq-t7_mfmCo5BcGu8vzw

[15] On the Posting of Workers Directive https://ec.europa.eu/social/main.jsp?catId=471

EU law, to evaluate the effects of new regulations on SMEs in impact assessments, and mutual recognition are important steps in promoting growth, free trade and consumer rights. At the same time, such policies as tax harmonization, geo-blocking and regulatory restrictions on the posting of workers threaten to bring adverse effects on the single market and competitiveness of the EU economy.