



EUROPEAN COMMISSION

*Brussels, 7.12.2017  
C(2017) 8384 final*

*Dear President,*

*The Commission would like to thank the Bundesrat for its Opinion on the proposal for a Regulation of the European Parliament and of the Council setting out the conditions and procedure by which the Commission may request undertakings and associations of undertakings to provide information in relation to the internal market and related areas {COM(2017) 257 final}, also referred to as the Single Market Information Tool.*

*The Commission welcomes the Bundesrat's general support to strengthening the internal market and promoting compliance with European legislation. The Single Market Strategy of October 2015 is the Commission's plan to unlock the full potential of the Single Market. The Single Market is at the heart of the European project, enabling people, services, goods and capital to move more freely, offering opportunities for European businesses and greater choice and lower prices for consumers. But sometimes, these benefits do not materialise because Single Market rules are not known or implemented or they are undermined by other barriers.*

*In response to the specific comments in the opinion, the Commission would like to refer the Bundesrat to the attached annex.*

*The points made in this reply are based on the initial proposal presented by the Commission which is currently in the legislative process involving both the European Parliament and the Council.*

*The Commission hopes that these clarifications address the issues raised by the Bundesrat and looks forward to continuing the political dialogue in the future.*

*Yours faithfully,*

*Frans Timmermans  
First Vice-President*

*Elżbieta Bienkowska  
Member of the Commission*

*Mr Michael MÜLLER  
President of the Bundesrat  
Leipziger Straße 3 - 4  
D – 10117 BERLIN*

## ANNEX

*The Commission has carefully considered the issues raised by the Bundesrat in its Opinion and is pleased to offer the following clarifications.*

### General background

*When the Commission is alerted to cases where significant difficulties in the establishment and functioning of the internal market are met, evidence is needed to find and accurately define such difficulties. As the Bundesrat rightly mentions, the Commission already has different means of obtaining relevant information: either from the Member States, who are under a duty to cooperate with the Commission pursuant to Article 4(3) of the Treaty on European Union, or via currently available tools, including the Internal Market Information System, as referred to in the Bundesrat's opinion. This current regulatory framework regarding the Commission's means to obtain information for addressing difficulties to the establishment and functioning of the Single Market works efficiently in the majority of cases. However, challenges arise in specific situations where detailed, comparable, up-to-date, and often confidential, specific market data are necessary within a limited time frame. In such cases, it may be difficult for the Commission to obtain sufficient and comparable information<sup>1</sup>, which is particularly important for completing the assessment of complex cases with a cross-border dimension, as well as cases relating to fast-moving markets, new economic activities or new business models challenging existing economic assumptions.*

*When enforcing Union law, the Commission is largely reliant, inter alia, on the information provided by the Member States. Nevertheless, Member States may not always have access to the relevant market information that the Commission would need to perform its tasks or their national rules may prevent them from disclosing the information collected.*

*At present, when safeguarding the functioning of the Single Market, the Commission has no powers to request information directly from market players other than in the domain narrowly prescribed by Union competition law. However, European Union rules on State aid, restrictive agreements, abuse of dominant position or mergers constitute only a small subset of all instances of potential difficulties with the application of Union Single Market law.*

*The establishment of an internal market is one of the Union's main objectives in cooperation with the Member States, as set out in Article 3(3) of the Treaty on European Union (TEU). To that end, the internal market is underpinned by the fundamental treaty provisions on free movement of goods, services, persons and capital as well as on non-discrimination on grounds of citizenship/origin. As the Bundesrat rightly notes, Member States' authorities are responsible for the implementation of Single Market legislation into national law and its correct enforcement in their respective territory. At the same time, the Commission also has the*

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<sup>1</sup> Whereas the Internal Market Information System reinforces administrative cooperation and allows for information exchange between different authorities, it does not empower such authorities to gather information directly from market participants.

*responsibility, as defined by Article 17(1) of the TEU, is to ensure that the Treaties, as well as secondary rules adopted pursuant to them, are fully and correctly applied in order to, inter alia, make the Single Market a reality.*

*The Commission may take legal actions against Member States in the form of infringement proceedings under Article 258 of the Treaty on the Functioning of the European Union (TFEU). Those proceedings allow the Commission to ensure that Union law is correctly applied. In those proceedings, the Commission has the burden of proof to place before the Court all the factual information needed to enable the Court of Justice of the European Union to establish that an obligation has not been fulfilled by the Member State concerned. In addition, the Commission has the sole competence to make legislative proposals aiming at giving effect to Treaty rules, including in the area of single market. It may also make further policy initiatives such as communications and recommendations.*

### *On the proposal for a Regulation*

*Ensuring compliance with the commonly agreed Union rules faster and more effectively would benefit all citizens and companies who would then be able to exercise their Single Market rights in a better and quicker way. The purpose of the proposal for a Regulation is therefore to help the Commission to monitor and enforce the internal market rules by enabling it to timely obtain comprehensive and reliable information from the market through narrowly targeted information requests and therefore ensure a better functioning of the internal market. In order to cover the internal market-related fields that rely on specific provisions in the Treaty on the Functioning of the European Union for legislative action and areas related to the internal market, the proposal stipulates that the Regulation should also apply to agriculture and fisheries (other than the conservation of marine biological resources), transport, environment and energy.*

*With regard to agriculture, the Bundesrat rightly points out that there are already specific reporting obligations in this area. In particular, Regulations 1307/2013<sup>2</sup> and 1308/2013<sup>3</sup> and the acts adopted on the basis of those Regulations lay down a wide range of obligations on Member States to notify information and documents to the Commission. The Commission delegated Regulation (EU) 2017/1183<sup>4</sup> supplements Regulations (EU) No 1307/2013 and (EU) No 1308/2013 with regard to the notifications to the Commission of information and documents. The Commission would like to stress that as long as it is possible to gather data on the basis of the above-mentioned Regulations or other instruments, the information tool provided in the proposal shall not be used. Indeed, the Single Market Information Tool is a*

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<sup>2</sup> Regulation (EU) No 1307/2013 of the European Parliament and the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009.

<sup>3</sup> Regulation (EU) No 1308/2013 of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007.

<sup>4</sup> Commission delegated Regulation (EU) 2017/1183 of 20 April 2017 on supplementing Regulations (EU) No 1307/2013 and (EU) No 1308/2013 of the European Parliament and of the Council with regard to the notifications to the Commission of information and documents.

*measure of last resort, applied ad hoc with a view to addressing a serious difficulty with the application of Union law, meant for instances where undertakings-related data that are necessary for enforcing the rules are not available through other means.*

*With regard to the Bundesrat's concerns about possible discordance with Article 337 of the TFEU, the Commission would like to point out that this proposal aims to establish a system to collect information in order to ensure in particular the functioning of the internal market within the meaning of Article 26 of the TFEU. For this reason and in light of the case-law<sup>5</sup> the Commission considers that it has rightly based the proposal on Article 337 supplemented by Article 114 as well as other articles of the TFEU in order to cover the internal market-related fields that rely on specific articles in for legislative action.*

*The Commission notes the Bundesrat's concerns about proportionality but considers that the proposal is proportionate to the objectives pursued and does not go beyond what is necessary to achieve them for the following reasons. First, in order to launch requests for information to companies the Commission would need to demonstrate a serious difficulty with the application of Union law that risks undermining the attainment of an important Union policy objective in the areas covered by the scope of the proposal. Second, the Single Market Information Tool would be a measure of last resort, meant for cross-border instances where firm-level data necessary for enforcing Single Market rules are not easily available through other means. Third, given the targeted nature of the tool, requests for information under this proposal would be narrowly defined, case specific, most likely succinct, and addressed only to a subset of usually large firms. It would not be a re-occurring reporting obligation and should not be confused with statistical data collection or routine open public consultations.*

*The criterion of "a serious difficulty with the application of Union law [that] risks undermining the attainment of an important Union policy" in Article 4 of the draft Regulation is a demanding requirement, ensuring that the instrument is used only in exceptional instances. At the same time, this criterion ensures the horizontal nature of the proposal, encompasses possible future problems with the application of the Single Market rules, and is therefore not overly prescriptive. Broad concepts are applied in other areas of EU law (e.g. prevention, restriction or distortion of competition within the internal market in antitrust, impediment to effective competition in the common market or in a substantial part of it in merger control, effect on trade in state aid control or significant market power in network industries regulation). It is also to be noted in relation to the Bundesrat's concerns about legal certainty that this requirement is just the first of a series of conditions that need to be met before an information request under this proposal can be issued. Last but not least, the existence of a serious difficulty with the application of Union law is not exclusively left to the appreciation by the Commission because the compliance with this condition, as well as with other conditions specified in Article 5 or other provisions of the proposal, would be subject to judicial review before the Court of Justice of the European Union.*

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<sup>5</sup> See judgments of the Court of Justice of 9 November 1995 in case C-426/93 *Germany v Council* and of 6 September 2012 in case C-490/10 *Parliament v Council*.

*The proposal involves Member States' participation at different stages according to the principle of sincere cooperation. It has been conceived as a procedure where the Commission and Member States enforce single market rules in a partnership-based manner. First, any Commission decision stating its intention to use the power to request information will be notified to the Member State(s) concerned. Second, the Commission will inform Member States of the requests for information sent to market participants established in their territory. Where the Commission has launched a formal infringement procedure under Article 258 of the TFEU, it shall provide the Member State(s) concerned by the procedure with a copy of all requests issued in the context of that procedure, irrespective of where the registered seat of the recipient is situated.*

*Moreover, the proposal establishes mechanisms for sharing information between the Commission and the Member State in relation to the replies to requests for information. In the context of a formal infringement procedure, the Commission could transfer in full the replies received to the Member State concerned unless the responding firm marks business secrets/sensitive information and provides in addition a non-confidential version of the reply that could be shared with the concerned Member State.*

*In the Commission's view, the proposal lays down adequate confidentiality safeguards concerning the information collected, in particular in its Articles 7, 8 and 16. In particular, the Commission is obliged to give the undertakings and associations of undertakings the opportunity to indicate which information it considers to be covered by the obligation of professional secrecy. Furthermore, the use of confidential information is restricted only to three narrowly defined cases: (a) where such information is in summary or aggregated form or in any event in a form such that individual undertakings or associations of undertakings cannot be identified; (b) where the Commission has previously obtained the agreement of the respondent to disclose such information; (c) where the disclosure of such information to a Member State is necessary to substantiate an infringement of Union law within the scope of this Regulation provided that the respondent has had the opportunity to make his views known before a decision is taken and to make use of available judicial remedies before disclosure. Finally, the obligation of professional secrecy of the Commission, its officials and other servants stems directly from Article 339 TFEU. In line with Article 16 of the proposal, the obligation of professional secrecy covers also the Member States, their officials and other servants.*

*As explained above, requests under the Single Market Information Tool would be launched when other avenues of obtaining the relevant information have been exhausted. Ensuring that these would only concern data easily available to the replying undertakings (i.e. acquiring such information would not require extended research or a major effort to retrieve) will minimise the administrative burden on the firms and public authorities involved. To this end, as more informative of the functioning of the single market, larger firms would be more likely addressees than small and medium-sized enterprises. In any case, when issuing requests for information and as explicitly recognised in the proposal, the Commission will take due account of operational abilities and the principle of proportionality, particularly in case of small and medium-sized enterprises.*

*Last but not least, while kept to the minimum and duly monitored, the administrative burden should not cloud the potential benefits of the instrument: a better functioning single market through more effective application of single market rules and principles. The Commission would be precluded from issuing requests for information to micro-enterprises and the information gathered from small and medium-sized enterprises could still alert the Commission about single market difficulties which small and medium-sized enterprises might suffer from while not incurring any significant additional costs of data gathering in response to this tool. In this context it is pertinent to mention a comparable instrument available in State aid control, the Market Investigation Tool. Even if only applied on a few occasions since its introduction in 2013, and addressed to a handful of (larger) market players, it permitted correction of a significant difficulty with the application of the single market and recover close to EUR 50 million of unpaid taxes.*