



EUROPEAN COMMISSION

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Dear President,

The Commission would like to thank the Senat 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 Single Market Strategy of October 2015 is the European 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. Sometimes, however, these benefits do not materialise because Single Market rules are not known or implemented or they are undermined by other barriers.

When the Commission is alerted to cases where the Single Market may not be working properly, evidence is needed to demonstrate if and where European Union laws were applied incorrectly. The current regulatory framework as regards 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. Such information may be particularly important for assessing complex cases with cross-border dimension, as well as cases relating to fast-moving markets, new economic activities or new business models challenging existing economic assumptions.

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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 very specific rules, mostly contained in Union competition law (on state aid, restrictive agreements, abuse of dominant position and mergers). However, such rules cover only a small subset of all instances of potential difficulties with the application of Union Single Market law.

Ensuring compliance with the commonly agreed Union rules faster and more effectively would benefit all citizens and companies who will be able to exercise their Single Market rights in a better and quicker way.

The conditions by which the Commission may exercise its powers to request that undertakings and associations of undertakings provide information are clearly set out in Articles 4 and 5 of the proposal. They guarantee that 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. It would be a narrowly defined, case specific, most likely succinct request for information addressed to a narrow subset of usually large firms. It would not be a re-occurring reporting obligation and would significantly differ from statistical data collection or routine open public consultations or a broad questionnaire.

The Single Market Information Tool is a cross-sectoral tool intended to be applicable to problems with the application of the Single Market rules that cannot be foreseen in advance. Therefore, the conditions for its use cannot be overly prescriptive. Similar broad concepts are common in other areas of European Union economic law¹ in order to cater for diverse situations in which they could be applied. Last but not least, the exercise by the Commission of its powers under the proposal will be subject to judicial control by the Court of Justice of the European Union.

With regard to the conditions for the simple requests for information and those by Decision, it should be noted that, generally speaking, the structure of draft Article 6 parallels the corresponding provisions in Council Regulation 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union² that empower the Commission with similar information gathering powers in the domain of Union State aid law.

The type and scope of the information that would be required from the addressees of requests would be case-specific and limited only to information necessary and requested from a narrow subset of usually large firms who are able to provide the information. First and foremost, the Commission may only request information required for the performance of tasks entrusted to it. The proposal makes it clear that the Single Market Information Tool is particularly useful for ensuring the application of Union law in the area of the internal

¹ For example, 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.

² See Article 7, paragraphs 6 and 7, of Regulation 2015/1589.

market by the Commission and could also be useful after the use of other tools and sources of information has proven inadequate, for contributing to the conception or design of a regulatory solution. According to the case law of the Court of Justice, the purpose of the information sought by means of requests for information needs to be indicated by the Commission with sufficient precision, otherwise it would be impossible to determine whether the information is necessary and the Court would be prevented from exercising judicial review³. It is also settled case law of the Court of Justice that when issuing requests for information to undertakings, the Commission is bound by the principle of proportionality⁴. For illustration purposes, such information could include factual market data (e.g. market size, geographical distribution of consumers and suppliers), firm data (e.g. cost structure, profits, pricing policy, volumes, actual levels of capital, composition of liabilities, new products, ownership structure or supply contracts, warehouses and distributors, employment contracts) or overall market functioning data (e.g. regulatory and entry barriers, costs of cross-border operations, growth rate of the market or overcapacity)⁵. The proposal also makes it clear that the obligation to provide information only covers information which is at the disposal of the undertakings or associations of undertakings concerned (i.e. information which is readily available and does not require any major effort to collect and process). Finally, the existing Council Regulation 2015/1589 on which the proposal is largely modelled does not define the type and scope of information that can be required from the addressees of requests and leaves this issue for a case-by-case assessment by the Commission, subject to judicial control by the Court of Justice.

The method of checking the completeness and correctness of the information provided would be case specific and judged based on the data available on a case-by-case basis. In cases when the Commission would on the basis of such assessment adopt a Decision to impose fines on an undertaking or association of undertakings for intentionally or through gross negligence supplying incorrect, incomplete or misleading information, such Decision, and therefore the Commission's assessment of the completeness and veracity of information provided as well, would be subject to judicial review by the Court of Justice.

It could specifically be noted that the possibility to impose in this context sanctions does not imply that a responding firm's underlying business practice is infringing any Single Market rules. Instead, the proposal allows sanctions only for non-compliance with the request for information.

In the Commission's view, adequate confidentiality safeguards concerning the information collected are set out in the proposal, in particular in draft 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

³ See judgment of the Court of Justice of 10 March 2016 in case C-247/14 P Heidelberg Cement AG, paragraph 24.

⁴ See judgment of the Court of 19 May 1994 in case C-36/92 P Samenwerkende Elektriciteits-Productiebedrijven (SEP) NV.

⁵ See recital 11 of the proposal which establishes an open catalogue of type of information that can be sought.

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 of the Treaty on the Functioning of the European Union. In line with Article 16 of the proposal, the obligation of professional secrecy covers also the Member States, their officials and other servants.

The power granted to the Commission to take a decision not to protect information claimed to be confidential already exists in the State aid field. In fact, Article 7, paragraph 4, of the proposal parallels Article 9, paragraph 9, of Council Regulation 2015/1589. Decisions adopted by the Commission under Article 7, paragraph 4, would also be subject to judicial review before the Court of Justice of the European Union. As far as the protection of confidential information in general is concerned, this is guaranteed by Article 339 of the Treaty on the Functioning of the European Union applicable to all Union activities.

Conditions for storing information gathered through requests for information, including the period for which the Commission may store such information, are subject to the general internal rules within the Commission and therefore do not need to be specified in the proposal.

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

Yours faithfully,

*Frans Timmermans
First Vice-President*

*Elżbieta Bieńkowska
Member of the Commission*