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The 'EU Legislation in Progress' briefings are updated at key stages throughout the legislative procedure. Please note this document has been designed for on-line viewing.

Single market information tool (SMIT)

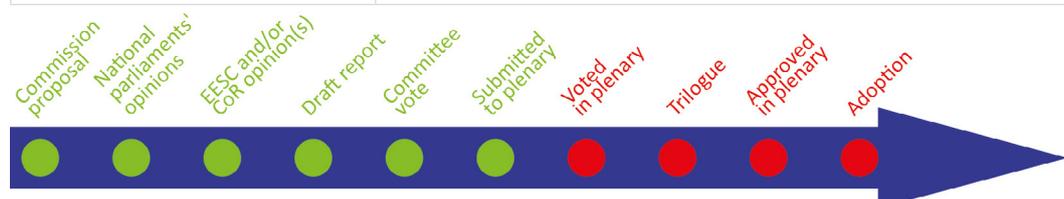
Competition and consumer protection in the single market are often undermined by price discrimination based on residency. While many market players do not cooperate with the Commission, for instance not disclosing their pricing structure, Member States often do not have the means or the tools to collect and deliver the required information to the Commission. The SMIT proposal would provide the Commission with powers such as to request business-related information (e.g. cost structure or product volumes sold), and to address market failures in a more efficient way.

The SMIT, however, has raised some criticism in the Council and EP, inter alia, because of the Commission's choice of the legal basis for the proposal. Parliament's Legal Service stated in an opinion that the correct legal basis for the Commission proposal is Article 337 TFEU: a legal basis which gives no legislative role for the EP. On 12 July 2018, the IMCO committee adopted a report which would amend the proposal's legal basis. The JURI committee subsequently adopted an opinion stating that the Commission proposal goes beyond the powers available under the proposed revised legal basis. The report was initially due to be voted in plenary in October 2018, but was taken off the agenda. As the parliamentary term has concluded, the report has now lapsed.

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, 2.5.2017, 2017/0087(COD), Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')

Committee responsible:	Internal Market and Consumer Protection (IMCO)
Rapporteur:	Eva Maydell (EPP, Bulgaria)
Shadow rapporteurs:	Maria Grapini (S&D, Romania); Richard Sulík (ECR, Slovakia); Jasenko Selimovic (ALDE, Sweden); Dennis De Jong (GUE/NGL, the Netherlands); Igor Šoltes (Greens/EFA, Slovenia); Robert Jarosław Iwaszkiewicz (EFDD, Poland); Mylène Troszczynski (ENF, France)
Next steps expected:	Further steps dependent on decisions in new parliamentary term



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Introduction

The smooth functioning of the single market is one of the key objectives of the European Commission. However, single market rules are often undermined and this, inter alia, [results](#) in:¹

- > price discrimination based on residency and unjustified geo-discrimination;
- > limited cross-border parcel delivery (e.g. delivery of online purchases to other Member States);
- > customer segmentation through unjustified territoriality of copyright licensing (e.g. access to online audiovisual content while abroad); or
- > financial market fragmentation.

When it comes to enforcing the single market *acquis*, Member States usually are the Commission's primary information source. However, Member States often cannot provide the necessary information, because: (a) they do not always have information related to the implementation and application of certain single market rules; (b) in the cross-border context, a coordinated effort in requesting information from several Member States is required; or (c), Member States do not share the data they collect with the European Commission.

The European Commission reacted to this information gap. On 28 October 2015, it announced the [single market strategy](#). The Commission outlined that it 'will propose a regulatory initiative allowing it to collect reliable information directly from selected market players, with a view to safeguarding and improving the functioning of the single market'. This was a first hint of the single market information tool (SMIT).

In the wake of the single market strategy, both the Council and the European Parliament called on the Commission to take specific action: the Council, for instance, has called on the Commission to prioritise 'smart and firm enforcement actions, targeting economically significant cases'.² Access to information, such as pricing policy, would allow the Commission to better address single market malfunction. In its [resolution](#) of 26 May 2016 on the single market strategy, the European Parliament called on the Commission to deepen its work on enforcements and to create a more level playing field in the single market.

On 2 May 2017, the Commission finally presented a '[compliance package](#)' of three proposals to enhance the practical functioning of the single market:

- (1) Action plan on the reinforcement of [SOLVIT](#): bringing the benefits of the single market to citizens and businesses (COM(2017) 255);
- (2) Proposal to establish a [single digital gateway](#) to provide information, procedures, assistance and problem solving services (COM(2017) 256); and

1 For specific examples, see pp. 10-12 of the Commission's [Impact Assessment](#) on SMIT.

2 See p. 1 of the Commission's SMIT [road map](#) (inception impact assessment).

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(3) Proposal for setting out the conditions and procedure by which the Commission may request businesses and business associations to [provide information](#) in relation to the internal market and related areas (COM(2017) 257).

The third proposal concerns the single market information tool (SMIT), the aim of which is to provide the Commission with 'additional fact-finding ability', as well as to improve the enforcement of existing single market rules and effective policy intervention. SMIT would allow the Commission to request business-related information (e.g. cost structure, profits and pricing policy, employment contracts) directly from market participants.

According to the Commission, and drawing on its [experience](#) with EU competition policy, 'targeted and timely access to comprehensive, reliable, and accurate information is important to ensure compliance with EU law, as well as to identify regulatory and market failures.'

Context

The SMIT proposal is [based](#) on Articles 43(2), 91, 100, 114, 192, 194(2) and 337 of the [Treaty on the Functioning of the European Union](#) (TFEU).

Articles 114 and 337 TFEU were used jointly as the legal basis in a previous EU legislative act, entrusting the Commission with information collection powers in the internal market area: [Directive \(EU\) 2015/1535](#), laying down a procedure for the provision of information in the field of technical regulations and of rules on information society services.

The intention of SMIT is [not to create](#) new powers for the Commission. Instead, it implements existing powers conferred by Treaty (Article 337 TFEU). The Commission is therefore already able to collect sensitive company data to enforce single market rules. In this context, SMIT is not a new enforcement procedure, but a tool that can be used within the current infringement procedure under Article 258 TFEU, and as a last resort. Such information is, for instance, collected from companies to examine antitrust and mergers cases, or from Member States for the purposes of state aid control.

The Commission has offered assurances that the single market information tool would not be 'used as a matter of routine', but mostly when other information sources are insufficient and only in the context of cross-border single market malfunction (following a case-by-case assessment).

The Commission will review its policy five years after the adoption of the proposal.

Existing situation

According to the Commission, currently no adequate tool to collect information directly from private undertakings exists. In this context, national authorities may not possess the required company-level information, or their national rules on information collection may prevent them from sharing it with the Commission or with other Member States. To complement the information received from national authorities, the Commission relies on voluntary information from interested parties. Furthermore, although

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some data is collected at national and European level (e.g. statistical offices), there is a production delay and they are often insufficiently detailed or disaggregated for enforcement and policy preparation purposes.

According to the European Commission, only [three out of ten](#) Member States that replied to public consultation reported having powers that allow them to ask market participants for information on an *ad hoc* basis: a United Kingdom authority is able to ask for information (e.g. staff salaries) for the purpose of law enforcement. A regional authority in Spain has powers to collect information for the purpose of policy development. An authority in France has powers to ask for information for the enforcement of existing rules and preparation of policy (in the fields of competition, product safety, taxation). Three Member States, i.e. the Czech Republic, the Netherlands and Sweden, and one German regional government indicated they have no such powers.

The French authority has powers to sanction firms for noncompliance with information requests. It reported that in areas where sanctions are not possible, company participation is impacted negatively. The Spanish regional authority reported that the quality of delivered data was not affected, despite the voluntary nature of its information requests. Both Spanish and French authorities would be able to share their data with the Commission, whereas the United Kingdom authority could not.

Parliament's starting position

The European Parliament, in its [resolution](#) on the single market strategy of 26 May 2016, supported the overall objectives of the Commission's strategy. The Parliament, inter alia, called on the Commission to deepen its enforcement work and to create a more level playing field in the single market. It urged the Commission to address economically significant cases of unjustified or disproportionate barriers. The Parliament welcomed the Commission's intention to achieve zero tolerance of infringements, and called on the Commission to clarify how the proposed market information tools would work in practical terms.

Council starting position

In its [conclusions](#) on the single market strategy (adopted on 29 February 2016), the Council welcomed the single market strategy and its key objectives. The Council emphasised that implementation, compliance and enforcement should be further improved, to enhance consumer and business confidence in the single market. It called on the Commission to prioritise 'smart but firm enforcement actions, based on transparent and objective criteria, targeting the most economically significant cases of unjustified or disproportionate barriers, and drawing on dedicated, ring-fenced resources.'

In its 17 January 2017 [meeting](#), the Council's High Level Working Group on Competitiveness and Growth made the following statement on SMIT: 'Although SMIT aims to empower the European Commission to ensure the compliance with the single market rules by providing the Commission with an information-gathering tool, the reactions of Member States and companies reflect caution when it comes to the necessity of such new instrument. This caution implies SMIT tool needs to be carefully calibrated.'



Proposal

Preparation of the proposal

The European Commission [conducted](#) an impact assessment of the SMIT proposal and compared four legislative and one non-legislative policy option. Option 1, the non-legislative option, would involve Member States and the Commission in exchanging best practices and developing guidance on collecting business information.

One legislative option aimed to remove national rules preventing national authorities from sharing business data they already possess or can access under existing EU/national law with the Commission and other Member States (Option 2). Option 3 proposed to introduce investigative powers through single market information tools on national level. Option 4 intended to introduce an EU-level single market information tool (SMIT). Option 5 was a hybrid of Options 2 and 4.

The Commission stated that SMIT, i.e. Option 4, was the preferred option. This option would score 'highest in terms of subsidiarity and proportionality and be the most effective and cost-efficient option'. In the case of complex cross-border issues, SMIT could help Member States to overcome legal problems.

The idea of expanding European statistics coverage (EUROSTAT), or introducing regular reporting obligations under the [Accounting Directive](#) to collect business data from selected market players, was abandoned for proportionality reasons.³

SMIT will impact firms in terms of [costs and additional bureaucracy](#). For large firms, costs would range from €1 200 to €4 400. For small and medium-sized enterprises (SMEs), costs would range from €300 to €1 000. If firms seek legal advice to comply with the information request, they would incur an additional cost ranging from €1 000 to €4 000. 'Micro-undertakings' will be exempt from the SMIT Regulation.⁴

On the other hand, the Commission calculates some non-material and material benefits. In its [impact assessment](#), the Commission outlined that having reliable data on malfunctions in the single market would enable the Commission (and national authorities) to ensure greater compliance, limit the number of formal infringement cases against Member States, better design EU policies, and create more consumer trust in

3 This idea was initially outlined on p. 3 in Commission's SMIT [road map](#) (inception impact assessment). On page 117ff of its [impact assessment](#) on SMIT, however, the Commission explains why it abandoned the idea of introducing a regular reporting obligation via the Accounting Directive or enhancing the coverage of European statistics. Regarding the latter option, the Commission states: '[...] the Structural Business Statistics (SBS) provides the most sector disaggregated economic data in Eurostat (offering many economic variables, including auxiliary dimensions not available in national accounts) but no information about individual firms. Moreover, preliminary data are published about one year and final data about 20 months after the end of the reference year, thus often being not suitable to inform a timely policy response. In addition, some surveys are conducted infrequently: for example, the Eurostat Labour Cost Survey and Structure of Earnings Survey are conducted only every four years [...]'. See page 20 of the Commission's [impact assessment](#) on SMIT.

4 According to [Directive 2013/34/EU](#), 'micro-undertaking' are defined as undertakings that do not exceed the limits of at least two of the three following criteria on their balance sheet dates: (a) balance sheet total: €350 000; (b) net turnover: €700 000; (c) average number of employees during the financial year: 10.



the single market. One example is the *Euro Disney case*.⁵ In summer 2015, German and British consumers complained about Euro Disney's online pricing practices. Following this infringement investigation, the Commission proposed to amend the regulation on unjustified geo-blocking by adding an emphasis on price discrimination based on nationality or residence.⁶

In terms of material benefits: the Commission was able – due to its investigative powers in the state aid domain, which are similar to SMIT (since 2013) – to collect indispensable firm-level information in two major impact cases (the *Fiat case* and the *Starbucks case*). These resulted in a recovery of unpaid taxes of a total of €48.7 million.⁷ Furthermore, the potential savings on one concessions case (e.g. in the context of large infrastructure projects) could exceed €3 billion. Evaluating the extension of the geo-blocking regulation to copyrighted content could result in recovery of €9 billion in tax (equal to 1 % of copyright intensive industries' revenue).⁸

The Ex-Ante Impact Assessment Unit (IMPA) of the European Parliamentary Research Service (EPRS) has prepared an [initial appraisal](#) of the Commission's impact assessment accompanying the SMIT proposal.

The changes the proposal would bring

Article 2 of the [Commission proposal](#) for a regulation outlines the scope of SMIT. The regulation shall apply in the internal market, including the agriculture and fisheries; transport; environment; and energy areas.

Article 4 outlines the Commission's power to request information from undertakings and associations of undertakings: 'Where a serious difficulty with the application of Union law risks undermining the attainment of an important Union policy objective, the Commission may request information from undertakings or associations of undertakings, [...], for the purpose of addressing the above-mentioned difficulty.'

The Commission shall only use its power to request information, if the data (a) is not included in a publicly-available source; (b) has not been provided by a Member State upon request by the Commission; or (c) has not been provided by a legal or a natural person (Article 5).

The Commission proposal also includes safeguards and guarantees to protect business secrets, e.g. Article 7 (protection of confidential information), Article 16 (professional secrecy) or Article 8 (protection of personal data).

The Commission would be empowered to impose monetary sanctions, as in the EU competition law domain. In case a market participant does not provide the requested information or supplies incorrect, incomplete or misleading information, the Commission may, 'where deemed necessary and proportionate,

5 See p. 11 of the Commission's [impact assessment](#) on SMIT.

6 The Commission suggested, inter alia, amending Recital 20 of the [draft regulation](#) 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 (2016/0152 (COD)).

7 See p. 85 of the Commission's [impact assessment](#) on SMIT.

8 See p. 40 of the Commission's [impact assessment](#) on SMIT.



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impose on undertakings or association of undertakings fines not exceeding 1 % of their total turnover in the preceding business year where they intentionally or through gross negligence' (Article 9).

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Views

Advisory committees

Consultation of the European Economic and Social Committee (EESC) as well as the European Committee of the Regions (CoR) is [mandatory](#) on this proposal. The Committee of Regions (CoR) decided not to issue an opinion on the proposal. The EESC [appointed](#) Hernández Bataller (Various interests – Group III, Spain) to draft an opinion on the Commission's 'compliance package' (INT/825). The [opinion](#) was adopted in plenary on 18 October 2017.

Within the EESC, there was divergence in the positions of the various civil society organisations, Organisations representing businesses call the proposal into question on the grounds that it is largely targeted at business, while it is the Member States that are responsible for persistent barriers to the single market. Organisations representing civil society bodies on the other hand welcome the proposed regulation. Consequently, in the event that the proposal for a regulation is adopted within the envisaged timeframe, the EESC requests that this tool be used by the Commission, exercising maximum proportionality, for cases with a strong cross-border dimension, where necessary and at the same time ensuring respect for the fundamental rights of those concerned, especially as regards the protection of confidential information.

National parliaments

The [deadline](#) for the submission of 'reasoned opinions' on the grounds of subsidiarity was 18 July 2017. While no parliamentary chamber delivered a reasoned opinion, a number opened political dialogue with the Commission on the proposal.

Stakeholders' views⁹

Within the framework of its better regulation instruments, the Commission launched an online [public consultation](#) with stakeholders which ran from 2 August 2016 until 7 November 2016. Stakeholders were invited to contribute on the utility and design of SMIT. The target groups were mainly:

- > enterprises, business professionals, and business associations or organisations;
- > institutions of national authorities;
- > consumer organisations, research and academic institutions, and individual citizens.

In addition, the initiative was discussed with Member States in the Council's preparatory bodies.

⁹ This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'EP supporting analysis'.



Advisory committees

National parliaments

Stakeholders' views

During the consultation, the Commission received [71 statements](#) from stakeholders: 44 replies from firms, including 13 individual firms and 31 business associations, which altogether represent more than 20 million companies. 16 replies came from citizens (including 4 replies from organisations representing consumers, civil society, or non-governmental organisations), and 11 replies from authorities representing 10 Member States (including 9 national and 2 regional level). The replies came from 18 EU Member States (Belgium, Czech Republic, Denmark, Germany, Greece, Spain, France, Italy, Cyprus, Malta, the Netherlands, Austria, Poland, Portugal, Romania, Finland, Sweden, and the United Kingdom), a [European Economic Area](#) (EEA) country (Iceland), and a non-European country (Egypt).¹⁰

The public consultation revealed [mixed views](#) on SMIT:

Most undertakings say that, in the future, they would prefer to share information voluntarily, i.e. they prefer the Commission take a non-legislative approach. If SMIT is implemented, however, it should safeguard data confidentiality and be used only as a last resort. Only readily-available information should be requested.

All participating consumer organisations supported the introduction of SMIT, as long as the information was essential for defending the rights of consumers or businesses.

Of the ten Member States that responded, four support SMIT, and two do not. Authorities from two Member States would prefer that the Commission coordinate information requests, while two would rather be given the power to request information from firms in any Member State directly, without the involvement of the Commission.¹¹

¹⁰ See p. 57 of the Commission's [impact assessment](#) on SMIT.

¹¹ See p. 61ff of the Commission's [impact assessment](#) on SMIT.



Legislative process

In the Council, the [Working Party](#) on Competitiveness and Growth has been preparing the Council's position. It started its work, inter alia, with the examination of the impact assessment of the SMIT proposal.

On 13 October 2017, the working party published a document from 12 delegations, the 'Non-Paper on the European Commission's proposal for a Regulation on the Single Market Information Tool – Contribution by the AT, CY, DE, EL, ES, FR, HR, HU, LV, PL, RO, SK delegations'. The 12 Member States state that, it is 'unclear' whether and how the SMIT would deliver a 'true added benefit' to the single market, since the European Commission already has 'sufficient competences through the enforcement of competition and state-aid regulations to obtain information and address market distortion caused by market players'. According to the non-paper, the European Commission has failed to provide compelling evidence of cases in which the existing information requirements or the information obtained are insufficient. Furthermore, the participating Member States doubt that the proposal is 'in fact lawful' because of conflicts with the Charter of Fundamental Rights (infringement of the principle of freedom to conduct a business under Article 16).

In the European Parliament, the Internal Market and Consumer Protection (IMCO) Committee is the [lead committee](#) on SMIT. On 30 May 2017, the IMCO committee appointed Eva Maydell (EPP, Bulgaria) as rapporteur. The Economic and Monetary Affairs Committee (ECON) and the Legal Affairs Committee (JURI) have decided not to provide opinions on the file.

The European Commission made presentations on the 'compliance package' and the SMIT proposal to the IMCO committee on 21 June 2017 and on 11 October 2017.

The draft report was presented in the IMCO committee on 21 November 2017. In her [report](#), the rapporteur, inter alia, welcomed the 'continuous work of the European Commission in enhancing the compliance and strengthening the functioning of the single market through the Single Market Strategy, including with the presented Compliance Package'. The rapporteur, however, expressed some concerns regarding various provisions in the proposal. She suggested, for instance, to strengthen the confidentiality of sensitive information. In addition, considering the expected significant costs for data gathering for small and medium-sized enterprises, she proposed to amend the compliance rules for SMEs. The rapporteur suggested, for instance, that when issuing requests for information to small and medium-sized undertakings, the Commission should use the simple request procedure as outlined in Articles 5(3) and 6(1) of the proposal.

As the SMIT proposal had raised some criticism, on 1 February 2018, the European Commission sent a non-paper to the IMCO committee defending its choice of the legal basis for the proposal. Meanwhile, responding to a request from the IMCO committee, Parliament's Legal Service delivered an opinion regarding the legal basis for the proposal on 27 February 2018. The opinion of the Legal Service is that the correct legal basis for the Commission proposal is Article 337 TFEU, and not – as proposed by the Commission – Articles 43(2), 91, 100, 114, 192, 194(2) and 337 TFEU.¹² As the Legal Service notes, this legal basis does not provide for any legislative role for the European Parliament.

¹² [Article 337 TFEU](#) reads as following: 'The Commission may, within the limits and under conditions laid down by the Council acting by a simple majority in accordance with the provisions of the Treaties, collect any information and carry out any checks required for the performance of the tasks entrusted to it.'



While the deadline for amendments in the IMCO committee was postponed to 27 March 2018, IMCO decided also to request the opinion of the JURI committee on the legal basis of the proposal, under Rule 39(2) of Parliament's Rules of Procedure.

At its July 2018 meeting, the IMCO committee considered the [amendments](#) to the report. Among other things, three amendments rejecting the Commission's proposal were tabled, and four amendments to the legal basis for the proposal. Two of these amendments followed the opinion of Parliament's Legal Service, namely that Article 337 TFEU is the appropriate legal basis for the proposal.

On 12 July 2018, the IMCO committee voted on the [report](#). With 31 votes in favour, four against and two abstentions, IMCO followed the opinion of Parliament's Legal Service, namely voting to amend the legal basis of the proposal to Article 337 TFEU alone.

Subsequently, the JURI committee adopted its [opinion](#) on the legal basis, on 10 September 2018, with 12 vote in favour, none against and two abstentions. The JURI opinion concurs that the proposed legal bases, other than Article 337 TFEU, are not appropriate. However, it also states that the aim and content of the proposal go beyond the powers set out in Article 337 TFEU.

The report had been due to be voted in plenary during the October I 2018 part-session, but was taken off the agenda. With the conclusion of the parliamentary term, under the EP rules of procedure concerning 'unfinished business', the report has now lapsed.



References

EP supporting analysis

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[Conditions and procedure by which the Commission may request undertakings to provide information in relation to the internal market](#), European Parliament, Legislative Observatory (OEIL), 2017.

European Parliament [resolution](#) of 26 May 2016 on the single market strategy (2015/2354(INI)).

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