



*Committee on Legal Affairs
The Chair*

10.9.2018

Ms Anneleen Van Bossuyt
Chairwoman
Committee on the Internal Market and Consumer Protection
STRASBOURG

Subject: Opinion on the legal basis of 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)0257 – C8-0140/2017– 2017/0087(COD))

Dear Chair,

By letter dated 3 April 2018, you asked, on behalf of the Committee on the Internal Market and Consumer Protection (IMCO), the Committee on Legal Affairs (JURI), pursuant to Rule 39(2) of Parliament's Rules of Procedure, to provide it with an opinion on the appropriateness of the legal basis chosen by the Commission for 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 areas¹, also known as "SMIT".

The original proposal by the Commission 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). The single amendment adopted during the vote on the report in IMCO aims at replacing the above legal basis by Article 337 TFEU alone.

This would entail a change from the ordinary legislative procedure to a non-legislative one as referred to in the third subparagraph of point 25 of the Interinstitutional agreement on better law-making of 13 April 2016 and would require an exchange of views by the Parliament, Council and Commission. Rule 63 in conjunction with Rule 39 of the Rules of Procedure applies.

¹ COM(2017) 257 final.

I - Background

On 28 October 2015, announcing the Single Market Strategy, the Commission outlined that it would “*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.*”¹ That Single Market Information Tool would be part of a general enforcement strategy “*pursuing a holistic approach, covering all stages of policy-making from policy design, implementation, to information, in line with the Better Regulation approach. This includes better integration of evaluation and enforcement aspects in policy design, better assistance and guidance to Member States in the implementation of Single Market rules and a more consistent and efficient enforcement policy aimed at improving overall compliance with Single Market rules and EU law in general.*”

On 2 May 2017, the Commission presented a ‘compliance package’ with three proposals on enhancing the practical functioning of the Single Market, including the proposal for 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 which creates the Single Market Information Tool.

The Commission based its proposal on Articles 43(2), 91, 100, 114, 192, 194(2) and 337 TFEU.

II - Relevant Treaty Articles

The following Articles of the Treaty on the Functioning of the European Union are presented as the legal bases in the Commission proposal:

Under Title III on “Agriculture and Fisheries” of Part Three of the TFEU “Union Policies and Internal Actions”:

Article 43(2)

(ex Article 37 TEC)

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the common organisation of agricultural markets provided for in Article 40(1) and the other provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy.

Under Title VI on “Transport”:

Article 91

(ex Article 71 TEC)

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Upgrading the Single Market: more opportunities for people and business - 28.10.2015, COM(2015) 550 final, p. 17.

*1. For the purpose of implementing Article 90, and taking into account the distinctive features of transport, the European Parliament and the Council shall, acting **in accordance with the ordinary legislative procedure** and after consulting the Economic and Social Committee and the Committee of the Regions, lay down:*

(a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States;

(b) the conditions under which non-resident carriers may operate transport services within a Member State;

(c) measures to improve transport safety;

(d) any other appropriate provisions.

[...]

Article 100

(ex Article 80 TEC)

1. The provisions of this Title shall apply to transport by rail, road and inland waterway.

*2. The European Parliament and the Council, **acting in accordance with the ordinary legislative procedure**, may lay down **appropriate provisions for sea and air transport**. They shall act after consulting the Economic and Social Committee and the Committee of the Regions.*

Under Chapter 3 on “Approximation of laws”:

Article 114

(ex Article 95 TEC)

*1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting **in accordance with the ordinary legislative procedure** and after consulting the Economic and Social Committee, **adopt the measures for the approximation of the provisions** laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.*

[...]

Under Title XX on “Environment”:

Article 192

(ex Article 175 TEC)

*1. The European Parliament and the Council, acting **in accordance with the ordinary legislative procedure** and after consulting the Economic and Social Committee and the*

*Committee of the Regions, shall decide **what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.***

2. By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:

(a) provisions primarily of a fiscal nature;

(b) measures affecting:

— town and country planning,

— quantitative management of water resources or affecting, directly or indirectly, the availability of those resources,

— land use, with the exception of waste management;

(c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, may make the ordinary legislative procedure applicable to the matters referred to in the first subparagraph.

3. General action programmes setting out priority objectives to be attained shall be adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.

The measures necessary for the implementation of these programmes shall be adopted under the terms of paragraph 1 or 2, as the case may be.

[...]

Under Title XXI on “Energy”:

Article 194(2)

*2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, **acting in accordance with the ordinary legislative procedure**, shall establish the **measures necessary to achieve the objectives in paragraph 1**. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions. Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).*

Under Part Seven of the TFEU entitled “General and final provisions”:

Article 337

(ex Article 284 TEC)

*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.

In addition, given the cross references made, the following Articles should be looked at:

Article 26

(ex Article 14 TEC)

- 1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.*
- 2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.*
- 3. The Council, on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.*

Article 90

(ex Article 70 TEC)

The objectives of the Treaties shall, in matters governed by this Title, be pursued within the framework of a common transport policy.

Article 191(1)

(ex Article 174 TEC)

- 1. Union policy on the environment shall contribute to pursuit of the following objectives:*
- preserving, protecting and improving the quality of the environment,*
 - protecting human health,*
 - prudent and rational utilisation of natural resources,*
 - promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.*

Article 194(1)

- 1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:*
- (a) ensure the functioning of the energy market;*
 - (b) ensure security of energy supply in the Union;*
 - (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and*
 - (d) promote the interconnection of energy networks.*

III – CJEU case law on the choice of legal basis

The Court of Justice has traditionally viewed the question of the appropriate legal basis as an issue of constitutional significance, guaranteeing compliance with the principle of conferral of powers (Article 5 TEU) and determining the nature and scope of the Union's competence.¹ The choice of a legal basis is therefore not discretionary. According to settled case law of the Court of Justice, "*the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and content of the measure*".² The choice of an incorrect legal basis may therefore justify the annulment of the act in question. In this context, the choice of the legal basis may not depend simply on the institution's conviction as to the objective pursued. The institution's wish for more active participation in the adoption of a given measure, the circumstances in which a measure was adopted as well as the work that has been done in other aspects within the scope of action covered by a given measure are also irrelevant for the identification of the right legal basis.³

If examination of a measure reveals that it pursues a twofold purpose or that it has a twofold component one of which is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be based on a single legal basis, namely that required by the main or predominant purpose or component.⁴ However, where a measure has several contemporaneous objectives or components, which are indissociably linked, without one being secondary and indirect in relation to the other(s), such a measure will have to be based on the various corresponding legal bases,⁵ if procedures laid down for the respective legal bases are not incompatible with and do not undermine the right of the European Parliament.⁶

IV - Aim and content of the proposal

The aim of the proposal, as stated by the Commission in its explanatory memorandum, is "*to help the Commission monitor and enforce internal market rules by enabling it to timely obtain comprehensive and reliable quantitative and qualitative information from selected market players through narrowly targeted information requests.*" The Commission follows by saying that "*[t]his initiative aims to improve the Commission's access to market information necessary to carry out its tasks under Article 17 TEU, in order to address serious problems with the application of internal market rules.*"

Recital 23 states that the objective of the proposal is to "*facilitat[e] the Commission's access to market information necessary for carrying out its tasks in order to achieve a smooth-functioning of the internal market*".

The Commission explains in recital 1 that "*in certain cases, suboptimal information affecting the action by the Commission on the application of Union law in the area of the internal market increases the risk of the emergence of difficulties to trade in the internal market resulting from uncoordinated national enforcement activities or multifarious development of*

¹ *Opinion 2/00* [2001] ECR I-9713, para 5.

² Case C-411/06 *Commission v. Parliament and Council* [2009] ECR I-7585, paragraph 45

³ Case C-269/97 *Commission v Council* [2000] ECR I-2257, para 44.

⁴ Case C-491/01, *British American Tobacco (Investments) and Imperial Tobacco*, EU:C:2002:741, para. 94; T-526/10, *Inuit Tapiriit Kanatami*, EU:T:2013:215, paragraph 66

⁵ Case C-211/01 *Commission v Council* [2003] ECR I-08913, para. 40; Case C-178/03 *Commission v European Parliament and Council* [2006] ECR I-107, paras 43-56.

⁶ Case C-300/89 *Commission v Council* ("Titanium dioxide") [1991] ECR I-2867, paras. 17-25; Case C-268/94 *Portugal v Council* [1996] ECR I-6177.

national regulatory solutions to those problems.” Recital 3 states: “detecting and, where appropriate, addressing such difficulties in an efficient and effective manner requires timely access to comprehensive, accurate and reliable quantitative and qualitative market information”.

Particularly, when acting as guardian of the Treaties pursuant to Article 17(1) TEU, the Commission would require to have access to all the relevant factual information. However, the Commission may not always be able to rely on the information provided by complainants or Member States (recital 5). Recital 4 recalls that the Commission does not have investigative powers of its own helping it enforce Union law in the area of internal market and that the existing investigative powers related to competition law are “*limited by their legal basis to defined areas and do not allow the collection and use of the gathered information for other internal market-related policy purposes.*”

That is why, as stated in recital 8, the Commission should be empowered, as a last resort, to request undertakings and associations of undertakings to directly provide it, in a timely manner, with comprehensive, accurate and reliable quantitative and qualitative market information, where other sources of information have proven unavailable, insufficient or inadequate and thus ineffective.

The purpose of such empowerment is “*to provide the Commission with **additional fact-finding ability** where this is strictly required for performing the task entrusted to the Commission by the TFEU to ensure the application of Union law in relation to the aim of establishing and ensuring the functioning of the internal market.*” (recital 10). Recital 10 clarifies that “[s]uch empowerment does not aim at creating new enforcement powers for the Commission such as, in particular, the powers to pursue infringements of Union law in the internal market area against individual market participants”.

Recital 10 also clarifies that “*in the interest of the establishment of a fully functioning internal market*” the scope of SMIT covers economic sectors within the internal market for which TFEU has foreseen common policies, namely agriculture and fisheries (excluding the conservation of marine biological resources), transport, environment and energy.

Recital 12 provides that the “*requests for information are aimed at solving a presumed (...) serious problem with the application of Union law in the areas of the internal market, agriculture and fisheries (excluding the conservation of marine biological resources), transport environment and energy*”.

In recital 14, the Commission indicates that “[t]he investigative tool is particularly useful for ensuring the application of Union law in the area of the internal market by the Commission” and “is also useful for any subsequent enforcement action by the Member States concerned that would require the use of the relevant information collected using this power and disclosed by the Commission to the Member States concerned” and “could also be useful [...] for contributing to the conception or design of regulatory solutions”. Recital 15 states that “the Commission should be able to enforce compliance with the requests for information [...] by means of proportionate fines and periodic penalty payments imposed by way of decision”. Finally, in recital 20 the Commission admits to “*exceptionality of the investigative tool provided for in this Regulation*”.

When it comes to content, Article 1 explains that the Regulation lays down rules on the conditions under which the Commission may request undertakings and associations of undertakings to provide information required for the performance of tasks entrusted to the Commission in relation to the areas referred to in Article 2 and the procedure for requesting such information. The areas mentioned in Article 2 are the internal market, as referred to Article 26(2) of the Treaty, agriculture and fisheries (except the conservation of marine biological resources), transport, environment and energy. Article 3 gives definitions of micro-undertakings, small undertaking and medium sized undertakings. Article 4 **entrusts the Commission with the power to request information directly** from undertakings and association thereof **for the purpose of addressing a serious difficulty with the application of Union law** which risks undermining the attainment of an important Union policy objective. Article 5(2)(a) refers to that alleged serious difficulty as having a cross-border dimension.

The proposal sets out in its Chapter II the **conditions and procedure for requesting information**. The Commission shall only use SMIT as a mean of a last resort, when the information available to the Commission is not sufficient or adequate and cannot be obtained in a timely manner for an exhaustive list of reasons. In its Chapter III, the proposal **provides for sanctions** in the event the undertaking does not provide information or provides only incomplete, inaccurate or misleading information, giving the Commission the power of imposing fines and periodic penalty payments.

V- Analysis and determination of the appropriate legal basis

The Commission based the proposal on Articles 43(2), 91, 100, 114, 192, 194(2) and 337 TFEU.

In a non-paper prepared by the Commission services on the choice of the legal bases relied on in the proposal, a distinction is made of two sets of legal bases: on the one hand Article 337 TFEU and on another hand Article 114 TFEU as well as Articles 43(2), 91, 100, 192 and 194(2).

Article 337 TFEU allows the Commission, within the limits and under conditions laid down by the Council acting by a simple majority in accordance with the provisions of the Treaties, to collect any information and carry out any checks required for the performance of the tasks entrusted to it.

According to case-law, Article 114 TFEU is the appropriate legal basis for approximation measures genuinely aimed at improving the conditions for the establishment and functioning of the internal market by removing or preventing the emergence of obstacles to fundamental freedoms or of distortions of competition¹.

In accordance with Article 43(2) TFEU, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure shall establish the common organisation of agricultural markets provided for in Article 40(1) and the other provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy.

¹ See e.g. case C-217/04 *United Kingdom v Parliament and Council* (ENISA) (2006) ECR I-3771, paragraph 42.

Under Article 91 TFEU, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, adopt any appropriate provisions for the purpose of pursuing the objectives of the Treaties within the framework of a common transport policy. Article 91 TFEU applies to transport by rail, road and inland waterway (Article 100(1) TFEU). The European Parliament and the Council may, acting in accordance with the ordinary legislative procedure, lay down appropriate provisions for sea and air transport.

Article 192 provides for the adoption of measures in the area of environment. Article 192(1) TFEU provides that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, decide on the actions to be taken by the Union in order to achieve the objectives of the Union policy on the environment. Certain measures falling within the Union policy on the environment are adopted by the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament (Article 192(2)). In accordance with Article 192(3), the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, adopt general action programmes setting out priority objectives to be attained.

Under Article 194(2) TFEU, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, establish the measures necessary to achieve the objectives of the Union policy on energy.

According to the Court, the legal basis of an act must be determined having regards to its aim and content.

As mentioned above, the stated aim of the proposal is to enable the Commission to perform its tasks entrusted by the TFEU to ensure the application of Union law in relation to the aim of establishing and ensuring the functioning of the internal market. More specifically, the main aim of SMIT is to provide the Commission with a tool for collecting information required for the performance of its tasks entrusted by the Treaty in relation to certain areas.

According to case-law, Article 337 TFEU gives the Commission general competence to collect any information needed for the achievement of the tasks which have been entrusted to it by the Treaties, subject to conditions and the limits laid down by the Council. This provision forms the legal basis for the acts concerning the general activity of collecting information carried out by the Commission, so that such acts need not be based on the various Treaty provisions which confer specific tasks on the Commission and without requiring that such collection be needed to achieve the objectives of a given EU policy.¹

The Court stated that, in order to determine whether the legal basis for a Union act having the aim of the collection of information in a specific sector is Article 337 TFEU or a specific legal basis, it must be examined whether that act, as regards its aim and content, may be considered necessary to achieve the objectives specifically assigned to the European Union policy in question.

Article 2 of the proposal states that SMIT is to apply in specific areas. Therefore, it closely relates to the objectives of the Union policies listed in that Article. However, the information tool is part of a general enforcement strategy aimed at improving overall compliance with

¹ Case C-490/10, *Parliament v. Council*, EU:C:2012:525, paragraphs 63-64.

Single Market rules and EU law in general. The collection of information that the Commission can carry out is only the one done with a view to help the Commission performing its tasks relating to implementation and enforcement of Union law. The proposal does not seem to provide for any rules embedding the SMIT in the framework of Union rules concerning the internal market or any of the specific sectors referred to in Article 2 of the proposal. It appears that SMIT's purpose is not to achieve the objectives specifically assigned under one or more specific policies of the Union but rather to solve difficulties in the implementation and application of Union law in specific areas.

In light of the above, given the horizontal character of SMIT and the fact that the link with the policy areas listed in Article 2 appears to be rather merely incidental, Articles 43(2), 91, 114, 100, 192 and 194(2) are not appropriate legal bases for the proposal.

With regard to Article 337 TFEU, it should be noted that the proposal does not only empower the Commission to request information from undertakings and associations of undertakings. The proposal in fact states that it establishes an exceptional investigative tool for the Commission and an enforcement measure. In particular its Chapter III on Fines and periodic penalty payments shows strong resemblance with the provisions related to sanctions in Regulation (EC) No 1/2003, Council Regulation (EC) No 139/2004 and Council Regulation (EU) 2015/1589. However, the legal basis for these acts that allows for making provision for fines and periodic penalty payments is limited strictly to competition cases, is specifically provided for in the Treaty, did not require recourse to Article 339 TFEU and is not applicable to other internal market-related policies. In the case of SMIT, the legal basis provided for by the Commission, namely Article 337 TFEU, only empowers the Commission to collect information and carry out checks required for the performance of the tasks entrusted to it without giving to it any additional powers in that respect.

VI - Conclusion and recommendation

In light of the above, it should be concluded that Articles 43(2), 91, 114, 100, 192 and 194(2) TFEU are not appropriate legal bases for SMIT as proposed by the Commission and that the current aim and content of the proposal go beyond the powers stipulated in Article 337 TFEU.

At its meeting of 10 September 2018 the Committee on Legal Affairs accordingly decided by 12 votes in favour, none against and 2 abstentions¹, to recommend that Articles 43(2), 91, 114, 100, 192 and 194(2) TFEU are not appropriate legal bases for SMIT as proposed by the Commission and that the current aim and content of the proposal go beyond the powers stipulated in Article 337 TFEU.

Yours sincerely,

¹ The following were present for the final vote: Pavel Svoboda (Chair), Mady Delvaux, Laura Ferrara (Vice-Chair), Axel Voss (rapporteur for opinion), Alex Mayer (for Mary Honeyball pursuant to Rule 200(2)), Joëlle Bergeron, Geoffroy Didier, Pascal Durand, Sylvia-Yvonne Kaufmann, Julia Reda, Evelyn Regner, Virginie Rozière, Francis Zammit Dimech, Tadeusz Zwiefka.

Pavel Svoboda