

October 2017

## Single Market Information Tool

*Impact assessment (SWD(2017)216, SWD(2017)217 (summary)) of a Commission 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)*

### Background

This note seeks to provide an initial analysis of the strengths and weaknesses of the European Commission's [impact assessment](#) (IA) accompanying the above [proposal](#), submitted on 2 May 2017 and referred to Parliament's Committee on Internal Market and Consumer Protection.

The creation of a deeper and fairer single market is one of the ten main priorities of the Juncker Commission. To this end, the Commission proposed a new [single market strategy](#) in 2015.<sup>1</sup> One of the key areas of the single market strategy's targeted actions is dedicated to a smart enforcement strategy and the culture of compliance and is entitled 'Ensuring practical delivery'. Within this area, the strategy announced, among other actions, 'a regulatory initiative on a market information tool for the Single Market, enabling the Commission to collect information from selected market players' (Single Market Strategy, p.16). It is this 'Single Market Information Tool' (SMIT) that is the subject of the Commission proposal.<sup>2</sup> Two other initiatives were proposed by the Commission alongside the SMIT on 2 May 2017 as part of the compliance package: a regulation establishing a [single digital gateway](#)<sup>3</sup> and an action plan on the reinforcement of the [SOLVIT tool](#)<sup>4</sup>.

### Problem definition

The main problem identified in the IA is **the lack of reliable and accurate 'firm-level' information** for the Commission and Member States in situations where it is necessary, in a timely manner, to:

- identify and measure the impact of practices that are non-compliant with single market rules;
- prioritise enforcement of compliance with such rules;
- in case of enforcement deficits, use the information collected to prepare proposals for Union legislative acts, or, as appropriate, alternative policy instruments.

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<sup>1</sup> For further information, see Szczepanski, M., [A deeper and fairer Single Market. New opportunities for business and people](#), EPRS, European Parliament, December 2015.

<sup>2</sup> For further information, see Karakas, C., [Single Market Information Tool \(SMIT\)](#), EPRS, European Parliament, July 2017.

<sup>3</sup> For further information, see Scheinert, C., [Single Digital Gateway](#). EPRS, European Parliament, September 2017.

<sup>4</sup> SOLVIT is a free of charge service that provides pragmatic solutions to EU/EEA citizens and businesses when they are experiencing difficulties with their EU rights being recognized by public authorities in particular while moving or doing business cross-border in the EU

Examples of firm-level information provided in the IA include factual market data (market size), firm data (cost structure, profits, pricing policy) and overall market functioning data (overall regulatory and entry barriers, costs of cross-border operations). The list of examples is not exhaustive, as the required information depends on a particular enforcement case. The IA discusses the problem drivers on pp. 13-20 and presents the problem tree on p. 9.

The factors accountable for the lack of reliable firm-level information are:

- sector-specific national mechanisms for information collection, which are ill-suited to requesting cross-border information and/or share information collected;
- lack of incentives for the firms to voluntarily reveal confidential information;
- the difficulty to verify correctness, completeness and representativeness of information provided voluntarily by firms;
- unavailability of sufficiently detailed and timely information from the market.

The IA is clear that the problem occurs in a ‘small but significant subset of instances’, ‘extraordinary’ situations where detailed, comparable, up-to-date, and often confidential, firm-level data are necessary within a limited time frame’ (IA, pp.7-8). The IA provides examples of such situations on pp. 9-12 and in Annex 5: a total of 13 cases in the last ten years (out of 17 in the past 20 years) where the Commission could have obtained the missing information or data from private parties had it had the investigative powers. The IA suggests that the economic impact of these cases on the single market is ‘significant’ and the monetary benefits might be ‘enormous’ (IA, pp.10 and 12 respectively). A comparable tool available to the Commission since 2013 in the area of state aid (market investigation tool – MIT) recovered an amount of €23 million in the [Fiat case](#) and €25.7 million in the [Starbucks case](#) (IA, Annex 5). An infringement case may also evolve into a proposal for a legislative initiative, as demonstrated in the Euro Disney case (IA, p.11). Following this infringement investigation, the Commission proposed to amend the [regulation](#) on unjustified geo-blocking by putting an emphasis on price discrimination based on nationality or residence.<sup>5</sup>

The IA explains that the current regulatory framework – Commission reliance on information provided by complainant, public and private bodies and, particularly, by the Member State(s) concerned – works efficiently for the great majority of cases. Annex 6 of the IA provides a comprehensive overview of policy areas where the Commission, EU bodies and agencies, and national authorities in Member States are already empowered to gather information directly from market players, as well as the tools at their disposal on the basis of Union sectoral legislation, such as competition law, financial services and consumer protection, among others. Outside these areas, according to the IA, there is no clear legal basis that would require national authorities to provide the Commission with firm-level data or information. The proposed regulation would therefore cover the areas of internal market, including agriculture and fisheries (other than the conservation of marine biological resources), transport, environment and energy.

## Objectives of the legislative proposal

The **general objective** of the Commission proposal is to ensure a better functioning single market through more effective application of single market rules and principles.

The **specific objectives** of the initiative are the following (IA, p.23):

- facilitate access to comparable cross-border data;
- facilitate access to confidential/privileged firm-level information;
- ensure that collected information is correct, complete and unbiased;
- ensure that the information is sufficiently detailed, disaggregated and timely.

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<sup>5</sup> For further information, see Madiaga, T., [Geo-blocking and discrimination among customers in the EU](#), EPRS, European Parliament, July 2016.

Similarly to the problem definition, the IA emphasises that these objectives do not concern the majority of situations, as usually either: (1) market information is not necessary; (2) market information is necessary only at aggregated level, for example as provided by Eurostat; (3) existing sources of information are sufficiently timely and detailed. Contrary to the recommendations of the Better Regulation Guidelines, the IA does not include any *operational* objectives, nor does it discuss when the achievement of objectives will be measured.

## **Range of options considered**

Two options were discarded at the phase of the inception IA:

- enhancing the coverage of official statistics gathered by Eurostat;
- introducing a regular reporting obligation via the Accounting Directive.

Annex 7 of the IA provides a rather detailed discussion of the reasons to discard these options. It argues that both of them would introduce significant administrative burden for the replying companies as well as for the institutions responsible for collecting and processing the information. Moreover, neither option would be suited for targeted, timely information requests (IA, Annex 7, p.120). The five retained policy options are summarised below.

### **Baseline scenario: no EU policy change**

The Commission would continue to rely on current information sources for firm-level information necessary for ensuring the correct application of single market rules. It could enhance the confidentiality provisions of its consultations to try to increase firms' willingness to provide information, make more frequent use of external polling organisations via a Eurobarometer facility, or potentially extend the existing national information collection powers spontaneously and use them in selected sectoral contexts. It is likely that sectoral legislation will include provisions on monitoring in accordance with the Inter-Institutional Agreement on Better Law-Making, and more firm-level data will gradually become available. However, for each of these possibilities the IA provides argumentation as to why it would only partially alleviate the problems identified.

### **Option 1. Exchange of best practices between Member States and with the Commission**

The Commission would recommend Member States to exchange best practices on collecting specific firm-level information. The experience of Union- and national-level authorities would be used to develop guidance and recommendations for collecting firm-level information. Best practices would be devised to minimise the administrative burden, protect confidential information, treat cross-border cases and share information among Member States and the Commission. The Member States would then be encouraged to implement best practices.

### **Option 2. Lifting regulatory limitations to the sharing of firm-level information between the Member States and the Commission**

This option consists of a directive lifting national rules, such as, for example, professional secrecy rules, that prevent Member States' authorities from sharing with the Commission and other Member States firm-level information they already possess or could access on the basis of Union or national law. This option does not envisage granting specific investigative powers to Member States or a specific framework for the Commission's requests to Member States. Instead, general rules on cooperation under Article 4(3) of the Treaty on European Union (TEU) would apply. Member States would be responsible for ensuring compliance with the requests for information. The option sets out the rules for confidentiality and sharing of information. Disaggregated firm-level data could only be used to enforce single market rules relating to the specific subject matter, while aggregated and anonymised information could be further used for other purposes.

### **Option 3. Introducing residual investigative powers through national level single market information tools (national SMIT)**

This option builds on option 2 and consists of a directive requiring Member States to entrust an authority or several authorities with the power to request firm-level information directly from market participants operating within their territories. This power would be of residual nature, supplementing sector-specific investigative powers already entrusted to Member States by Union law and without prejudice to the existing investigative powers of national authorities pursuant to national law. The Commission would be able to request firm-level information from the Member States in a similar way to option 2, and would have a coordination role in the event that firm-level information is needed from more than one Member State. Under option 3, the Commission had contemplated extending the scope of existing investigative powers of identified national authorities already active in specific areas of the single market, such as competition or consumer protection, to alleviate the coordination efforts of the Commission (referred to in the IA as a 'reuse' of existing procedures). However, this was discarded on the grounds that it would go beyond what is provided for by Union law and is therefore disproportionate (IA, Annex 7).

### **Option 4. Introducing an EU-level single market information tool (SMIT) (preferred option)**

This option consists of Union legislation empowering the Commission to use a SMIT for requesting firm-level information directly from market participants. The tool would be used for acquiring information needed to support procedures currently available to the Commission, without introducing new enforcement procedures or obligations. The SMIT would not be used routinely, but rather as an exceptional, 'last resort' tool following case-by-case assessment by the Commission, on the basis of a decision adopted by the Commission showing that the following conditions are fulfilled (IA, pp.28-29):

1. There is sufficient information available to suggest the existence of a serious problem with the application of Union law undermining the attainment of important Union policy objectives in relation to the aim of establishing and ensuring the functioning of the internal market, most notably in terms of economic or social impact;
2. The information to be requested is required for the performance of the tasks entrusted to the Commission by the Treaties in the area of the internal market, notably proving the existence of serious obstacles to the functioning of the internal market or calibrating the Commission's response to such obstacles;
3. The information is not available elsewhere, meaning it may not be obtained or could not be obtained in a sufficiently timely manner through other means.

In addition, the decision should detail the criteria for selecting the addressees of the requests for information. These requests are to be addressed only to market participants that could be expected to provide sufficiently relevant information and for whom the information would be readily available. The Commission's compliance with the above-mentioned conditions would be subject to judicial review before the EU Court of Justice, which could annul a decision failing to show how the conditions had been met. When presenting the option, the IA does not state whether the Union legislation would be in the form of a directive or a regulation. As in the area of state aid, the Commission would be empowered (but not obliged) to impose sanctions on any addressee who intentionally or through gross negligence supplied incorrect or misleading information. It would do so based on case-by-case assessment, with due regard to proportionality and appropriateness, especially in the case of SMEs, and due process.

### **Option 5. A 'hybrid' approach combining options 2 and 4**

This option would combine lifting regulatory limitations to the sharing of firm-level information between the Member States and the Commission and the introduction of the SMIT. The SMIT would only be used if the requested firm-level information were not available anywhere else and could not be obtained in a timely fashion through other means. This would include information that Member States already possess or could already access on the basis of Union or national law. It would ensure that national investigative powers were primarily used for the targeted enforcement of Union law at national level, while the SMIT would be applied in instances

with specific cross-border dimension. The IA does not state whether the Union legislation would take the form of a directive or a regulation.

The IA sets out the content of the options in a clear manner and selects option 4 as the preferred option.

## **Scope of the impact assessment**

The IA discusses the impacts of all options in a largely qualitative way. When presenting the impacts, the IA makes a distinction between the impacts common to options 3, 4 and 5, and additional impacts of these options. When discussing additional impacts, it highlights the limitations of options 3 and 5, and the positive aspects of the preferred option 4. The resulting analysis of the impacts is somewhat imbalanced and seems to favour option 4. The IA provides a comparison of the policy options in terms of their effectiveness and efficiency (IA, p.44) and the impact on the following stakeholders: firms, EU institutions, Member States and citizens (IA, p.45). The IA does not compare the options in terms of coherence with EU policies and discusses proportionality only for the preferred option. The IA estimates the costs and benefits of all options in Annex 8 and provides an overview on p. 45. The preferred option is expected to result in faster enforcement of Union law and prevention of future breaches. The benefits per year are estimated between €50 million and €6 billion for small-scale requests and over €9 billion for large-scale requests (for EU28). The costs for firms replying to requests are estimated between €0.37 and €0.61 million and costs for the Member States between €0.12 and €0.43 million per year for EU28.

## **Subsidiarity / proportionality**

The IA provides a general discussion of subsidiary for the initiative as a whole (IA, p. 21-22). This initiative does not deprive Member States of their important role, alongside the Commission, in the enforcement of single market rules. Member States continue to have their own investigative powers and remain free to extend them (IA, p.140). Furthermore, Member States will be involved in different instances, reflecting the principle of sincere cooperation between the Commission and the Member States. In particular, any Commission decision stating its intention to use the SMIT would be notified to the Member State(s) concerned. Furthermore, the initiative would establish mechanisms for the sharing of information between the Commission and the Member States in relation to the requests for information and the replies to such requests, without prejudice to professional secrecy obligations (explanatory memorandum of the proposal, p.5).

The IA does not check the regulatory options in the light of the principle of subsidiarity and provides a proportionality assessment only for the preferred option 4. No reasoned opinions were submitted concerning the proposal, but six national parliaments have communicated their positions within the framework of political dialogue and information for exchange.<sup>6</sup> The Hungarian National Assembly and the Polish Senate expressed their concerns about imprecise definitions in the proposal, with the interpretation being left to the discretion of the Commission, and about the confidentiality of the information provided. Similarly, the German Bundesrat pointed out that the proposal does not comply with the principle of legal certainty, using as it does terms such as 'important political goals' (Article 4). Furthermore, both the Hungarian National Assembly and the German Bundesrat were of the opinion that the proposal is contrary to the principle of proportionality. The issue of additional administrative burden was raised by the Czech Senate and the German Bundesrat. The German Bundesrat also felt that agriculture and fisheries should be excluded from the scope of the proposal. The Austrian Federal Council emphasised that the initiative must continue to remain the measure of last resort and that the exemption of micro-enterprises should be underlined. The Czech Senate was convinced that the proposal has no merit and recommended not to adopt it. The Portuguese Assembly of the Republic raised no objections. The subsidiarity deadline for this proposal was 18 July 2017.

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<sup>6</sup> See the Platform for EU Interparliamentary Exchange (IPEX).

## **Budgetary or public finance implications**

The IA estimates that the Commission could incur annual data collection and analysis costs of between €120 000 and €430 000, assuming five information requests are made per year. This assumption comes from the experience with investigations in the area of state aid, where information requests have been issued twice since 2013 and 17 cases were lost by the Commission in 20 years (IA, pp.123-124). These costs would not require any new budgetary provisions, only the redeployment of existing staff and infrastructure, according to the explanatory memorandum of the proposal. The implications for the Member States' public finances are considered to be negligible.

## **SME test / Competitiveness**

According to the IA, the SMIT primarily concerns large enterprises, meaning no administrative burden on SMEs as a default, and exempts microenterprises<sup>7</sup> (IA, p.129). This means, however, that there may be instances where SMEs would be asked to participate, for example in the case of smaller Member States or certain sectors of the economy in which medium-sized companies may be the main market players (IA, p.129). The individual costs for an SME to reply is estimated to range between €300 and €1 000 per information request with a cost of €1 000 for legal advice (IA, p.122). These cost calculations rely on the 2009<sup>8</sup> and 2010<sup>9</sup> accounting studies (maximum scenario) and the response of one (large) firm to the public consultation (minimum scenario).<sup>10</sup> The Commission would be required to take due account of the principle of proportionality with regard to SMEs.

## **Simplification and other regulatory implications**

According to the IA, the initiative complements existing sector-specific tools in the area of competition and consumer protection law (summarised at length in Annex 6 of the IA). Although addressing issues in a different domain, this initiative closely corresponds in many ways to market information tools available to the Commission in the state aid area.

## **Quality of data, research and analysis**

The Commission did not rely on specific external expertise for this initiative and the analysis underpinning the impact assessment was done in-house. The cost-benefit analysis of the options is based on the experience with MIT, the study on the evaluation of consumer protection cooperation, one large firm's response to a public consultation quantifying the costs of replying to public inquiries, and accounting studies from 2009 and 2010, externalised by the Commission (IA, pp. 122-123). The 2009 and 2010 studies were used by the Commission as a proxy for estimating the cost of replying (in a maximum scenario), because they reported the costs of preparing information of similar quality to be requested under SMIT that was already available. According to Annex 4, no econometric modelling was used to support the impact assessment (IA, p.66); however, no explanation is provided as to why it was not used. The IA does not explicitly acknowledge that the studies used in its preparation are rather old and limited in number, which seems to decrease the report's objectivity somewhat.

## **Stakeholder consultation**

The IA identifies the stakeholders affected by the problem to be citizens, firms operating in the Union and EU institutions and public authorities (IA, p. 13). The proposed regulatory solution would have a 'significant positive

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<sup>7</sup> According to [Directive 2013/34/EU](#), micro-undertakings are undertakings that do not exceed the limits of at least two of the three following criteria: balance sheet total of €350 000; net turnover of €700 000; average number of employees during the financial year: 10.

<sup>8</sup> Ramboll, CapGemini, Final Report for Priority Area Annual Accounts/Company Law, European Commission, 2009, unavailable on-line.

<sup>9</sup> CSES, [4th Company Law Directive and IFRS for SMEs](#), European Commission, 2010.

<sup>10</sup> According to the IA (p.121), only one (large) firm replied quantitatively and all other firms replied qualitatively. These scarce answers confirm that one problem driver is that firms are reluctant to share any cost data. In order to estimate the costs of preparing and submitting information, other assumptions were needed (see 'Quality of data, research and analysis').

impact' on all those affected by the problem and would result in financial implications for the Commission and the firms concerned (IA, p.65). The IA report includes a summary of stakeholder consultations (IA, Annex 1, pp.56-64), also published in a separate [synopsis report](#). In addition to several targeted consultations and working party meetings within the Council in 2015 and 2016, a 14 week public consultation took place in August-November 2016 covering firms, citizens and Member State authorities. The majority of replies came from the firms: 13 individual firms and 31 associations representing 20 million firms. According to the IA, 'feedback and concerns raised by the Member States have been taken into account *in the design of the options*' (IA, p.64, emphasis added). This seems to suggest that the stakeholders were consulted on the general problem, and not on the specific content of the options. The summary of stakeholder responses to public consultation confirms that rather general topics were discussed: issues causing firms not to share information, conditions making them more willing to do so and the types of sensitive information. The firms' concerns revealed during the consultations, such as ex-ante checks, reuse of existing tools, confidentiality, sanctions, appeal possibility, and administrative burden reduction, were taken on board in the preparation of the SMIT initiative, according to the IA (p.64). Among these concerns, the disclosure of business secrets (confidentiality) was one of the major fears of firms (IA, p.41, 59, 62). The IA reports that three quarters of the citizens and consumer organisations agreed that authorities at the Union or national level should have the right to ask for confidential firm-level information when it is crucial for solving breaches of the rights of citizens or firms under Union law. Out of the 10 Member States who responded to the public consultation, two expressed their preference for the Commission to coordinate information requests; two opted for direct power to ask firms in any Member States without involvement of the Commission (IA, p.34). Overall, the IA is inconsistent in presenting stakeholder views on the options and their impacts.

## **Monitoring and evaluation**

The IA contains a number of useful criteria for monitoring the SMIT's effectiveness and proportionality, including the exceptionality of the use of the tool, cooperation of the addressees of the requests, and quality and usefulness of the information collected. According to the IA, the Commission will report on the results of monitoring after five full years of the tool's functioning and could lead to modifications of the legal framework, if appropriate. Contrary to this, article 18 of the proposed regulation provides for a report on the application of the regulation every two years, without further specification of the monitoring criteria or provisions for an assessment after five years.

## **Commission Regulatory Scrutiny Board**

The Regulatory Scrutiny Board (RSB) issued a [negative opinion](#) on the IA report on 20 January 2017. The RSB assessment concluded that the report did not treat sufficiently thoroughly the need, options and proposed use of powers to seek information for policymaking, and did not adequately discuss proportionality issues. It felt that adjustments were required throughout the report: in the scope and objectives, with regard to its evidence base, proportionality, subsidiarity, options, stakeholder consultation and further monitoring and evaluation. On 23 March 2017, the RSB issued a [positive opinion with reservations](#) on a resubmitted version of the IA. This opinion acknowledged the improvements made since its first opinion, but noted that the report was still not sufficiently clear with regard to the scope of the initiative, the safeguards or the conditions that might trigger investigations, and the respective views of Member States and business interests. The IA argues that revisions were introduced to address all of the RSB's recommendations (IA, p.55); however, neither the safeguards, nor the conditions that might trigger investigations, nor the respective views of Member States and business interests in the analysis of the options were introduced in the final IA report in a consistent and clear way.

## **Coherence between the Commission's legislative proposal and IA**

According to its explanatory memorandum, the legislative proposal appears to follow the recommendations of the IA insofar as the preferred option 4, in the form of an EU-level single market information tool, is the basis for the proposal.

## Conclusions

The problem tackled in the proposal occurs in a limited number of instances referred to in the IA as 'extraordinary'. The IA explains the problem definition at length and sets out the content of the options in a clear manner. The analysis of the impacts, however, is somewhat imbalanced and seems to favour the preferred option. The IA does not compare the options in terms of coherence with EU policies or their proportionality, nor does it check the regulatory options in the light of the principle of subsidiarity. The qualitative discussion of the impacts of the options is combined with a quantification of the costs and benefits. The IA does not explicitly acknowledge that the studies used in its preparation are rather old and limited in number, meaning that the report's objectivity seems somewhat decreased. Overall, the IA is not entirely consistent in its presentation of stakeholder views on the options and their impacts. Nor did the final version of the report introduce in a consistent and clear way a number of the RSB recommendations, notably concerning safeguards, the conditions that might trigger investigations, and the respective views of Member States and business interests in the analysis of the options.

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*This note, prepared by the Ex-Ante Impact Assessment Unit for the European Parliament's Committee on Internal Market and Consumer Protection (IMCO), analyses whether the principal criteria laid down in the Commission's own Better Regulation Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.*

To contact the Ex-Ante Impact Assessment Unit, please e-mail: [EPRS-ImpactAssessment@europarl.europa.eu](mailto:EPRS-ImpactAssessment@europarl.europa.eu)

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