EUROCHAMBRES

Position Paper

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POSITION PAPER ON THE SINGLE MARKET INFORMATION TOOL: REACTION OF EUROCHAMBRES TO THE EUROPEAN COMMISSION'S PROPOSAL

EUROCHAMBRES takes note of the European Commission's proposal which introduces a Single market Information Tool (SMIT).

Under the treaties, The European Commission has not been granted the power to intervene in the area of enforcement of Single Market law, competences that it does have since a long time in the competition area and more recently in the area of state-aid. With its current proposal the Commission would equip itself with a powerful instrument which would allow it to investigate and directly request information to certain market participants. Should the proposal be approved by the other European legislators, it would create a third domain in which the Commission has a say in terms of enforcement of EU law. This third domain would however be exceptional as, opposed to competition policy and state aid, the objective of the information request is not well established.

EUROCHAMBRES main recommendations:

In its current form EUROCHAMBRES cannot endorse the proposal. This is due to serious concerns regarding the lack of evidence supporting the creation of an instrument giving such sweeping powers to the Commission. Another major issue is the unclear objectives that the SMIT initiative is trying to pursue. Nowhere is it made clear what concrete positive outcomes for the Single Market would come out of it. In this context, in addition with the unclear legal framework around the SMIT, we consider that it would not be a proof of good policy-making to go through with this initiative. In addition, it can be perceived by companies and citizens as a cost directly associated with the European Union, at a time which is not most favourable for Europe.

If the Commission's objective is to improve the enforcement of EU Single Market laws, other avenues should be explored. So far, no alternative options have been studied in a thorough way. In essence, the Commission is there to work with the business community in order to create an environment which creates opportunities and welfare. We don't feel that this proposal has been drafted in this spirit of collaboration and trust. It therefore is unlikely to reach its objectives.

1. On the objective of the initiative

As we have already stated in our contribution to the consultation, EUROCHAMBRES is generally in favour of initiatives that contribute to the good functioning of the Single Market and that have the potential to make it easier for companies to trade across borders within the EU.

Member States still too often fail to properly comply with Single Market rules. As a consequence, the extensive legal framework of the Single Market is not perceptible to traders in their day-to-day activities. We therefore call again on the European Commission to redouble efforts to ensure the fast adoption and proper transposition and implementation of EU Single Market law.

Unfortunately too many businesses don't know all their rights and how they can make sure they're respected. It is consequently essential that *"significant regulatory failures"* figures among the priorities of the Commission and the member states' authorities. The lack of information and, especially, knowledge among enterprises and citizens is the key issue.

EUROCHAMBRES is convinced that companies are dedicated to building a proper Single Market as they are among its main beneficiaries. Therefore claiming, as the proposal does, that companies are obstructing the proper functioning of the Single Market is simply farfetched. Fundamentally, the proposal is targeting the wrong audience. The main problems with the Single Market are not due to companies not respecting rules, but member states not implementing laws. Segmentation occurs because of regulatory failures and companies have to work in this imperfect environment. This is the reason for instance why geoblocking, an area which could be addressed by the SMI, practices exist. Fundamentally, geoblocking is the result of a lack of Single Market. Arguing the opposite would show a grave misunderstanding of how companies (try to) operate across borders in a Single Market environment. More can and should be done through infringement proceedings.

2. On the Impact Assessment and the Summary of the Consultation results

Despite the large and relatively undefined breath of companies that might be affected by the SMIT, only a low number of stakeholders responded to the consultation held in the Autumn of 2016. The consultation did not succeed to gather more than 71 replies over the whole of the EU. A mere 44 replies were obtained from the business community, an example of the lack of information and ability to reach the business field.

On itself a low participation is not necessarily an issue, however in the present case it does raise questions given that some market participants, understandably, did not grasp the underlines objectives of the Commission and therefore refrained to contribute.

A bigger source of concern than the participation rate to the consultation are the interpretations and processing of the replies which are at the least very liberal. While we encourage the Commission to be creative about policy solutions, we are less enthused by the creativity used to draw wrong conclusions out of data. In the synopsis report on the replies of the consultation[1], the Commission states on page 7 that *"Were the above conditions secured**, firms would be willing** to provide all kinds of information to authorities, with **most positive answers** concerning information on: turnover, volumes, profits, geographical distribution, ownership, employment and cross-border business."* The conclusion would be acceptable, were it not that table 3 has really low percentages and on the contrary shows that a minority of

[1] COMMISSION STAFF WORKING DOCUMENT STAKEHOLDER CONSULTATION - SYNOPSIS REPORT Accompanying the document 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 SWD/2017/0215 final - 2017/087 (COD)

companies are ready to disclose company information. The type of information companies are most willing to disclose is turn-over, and even for this type of information only a mere 39% of companies were found ready to disclose it. The Commission's choice of words is for the least worrying and, in the worst case, suggest that conclusions were even drawn before the results came in. We would like to recall also that respondents stressed the need for a strong legal framework for any tool allowing the Commission to request market information from firms. Such tool would need to guarantee at least confidentiality, proportionality, neutrality, non-discrimination, a level playing field and a possible right of appeal.

A first impact assessment report was sent to the Regulatory Scrutiny Board in the beginning of 2017, which was received with a negative opinion. A second assessment was then accepted in March, however we believe that the initial remarks[2] of the abovementioned Board are still valid. While all three points are equally important, it is worrying that the Board mentions lack of justification to use the instrument as well as a lack of clarity on what might trigger investigations and potential safeguards. This exposes in a nutshell the legal uncertainty caused by the instrument.

3. General lack of safeguards and unclear terms

This proposal stands out for its brevity, leaving the reader with many unanswered questions. Worse than this is the void in legal certainty it creates.

Ultima ratio?

The instrument had been announced an *"ultima ratio*" instrument, however nowhere in the articles is there even the slightest reference to this notion. Instead, the Commission included the term *"serious difficulty"* in article 4. Where a serious difficulty *"with the application of Union law risks undermining the attainment of an important Union policy objective"*, the Commission may request for information. Without a serious definition of what a serious difficulty is, there is no guarantee that the SMIT is in essence a last resort instrument. There is a risk that, over a period of time, it might become a commonly used instrument, especially with a lack of safeguards. In addition to that the scope of the Regulation is very wide, which is the opposite of a guarantee that the use of the tool will be marginal. Virtually every directorate general of the European Commission would be enabled to start a procedure.

Article 5 § 1, is equally vague as the previous article. The terms *"sufficient and adequate"* are not defined at all and would therefore easily warrant inadequate request for information.

Scope

It seems that the scope of the Regulation is wider than had previously been announced. Article 4 for instance mentions *"Union law"* instead of breaches in Single Market law. It must specifically be ensured that the instrument is not endlessly applicable.

Simple request vs decision

Article 6 makes the distinction between a simple request for information and decisions to require information to companies and associations. It is unclear in the proposal what the difference is between the two concepts. According to article 5 § 2 which sets out the conditions under which the Commission may request

[2] The Regulatory Scrutiny Board stated that *'The report is still not sufficiently clear and sometimes inconsistent with regard to the scope of the initiative. In several places the report still presents the SMIT as a solution to general problems of data availability, or as a source of information for single market related policy purposes that do not stem from specific enforcement deficiencies, while it does not provide justification to do so. (2) The report makes clear that the tool would be of last resort, but it is not clear about safeguards or the conditions that might trigger investigations. (3) The main report still does not reflect clearly enough Member States' and business interests' respective views.*'

information, it is only explained what a decision should contain, and not which conditions need to be fulfilled for a "simple request". Neither is it clear how the College of Commissioners would adopt a decision.

Type of information

Although the Commission made an attempt to reassure market participants with confidentiality provisions, it doesn't state anywhere what type of information could be requested. It is crucial for legal certainty purposes that a clear framework is set up in this regard in order to avoid any overly intrusive requests.

We believe that if the Commission does not find the data for a certain specific aim, it should improve its other channels of data gathering without imposing supplementary burdens on companies. Voluntary disclosure of data can be highly effective as well and would be less intrusive. If the Commission is only looking to aggregate data on benefits and turnover of companies, then it should consider other avenues and rather than addressing companies, request the information to for instance national banks and consult business registers which contain information aplenty.

Another option would be to increase the collaboration with intermediary bodies, representatives of companies, capable of obtaining the required information. The effectiveness of this route would suppose that associations can recover the costs they made.

Strict rules about the way how questionnaires are structured and about the type of questions that can be asked should be set out. EUROCHAMBRES is wary of the type of information that could be requested. Information related to cost-structure for instance is for many companies very closely related to their business strategy.

4. Small undertakings

We repeat our view that the tool should only apply in exceptional cases and on large corporations. In our contribution to the consultation we wrote that SMEs, typically characterized by smaller market power, should, if not exempted from the scope of the tool, at least have enough guarantees that they would be excluded from some types of information requirements which would otherwise be disproportionately costly for them to provide to the Commission.

In the proposal in its current form, only micro-enterprises have been exempted from the proposal in order to avoid imposing disproportionate administrative burdens on them, considering in particular that they are unlikely to be in a position to provide sufficiently relevant information. This is welcome, but what holds true for micro-enterprises, may also apply to many SMEs.

We identified two major concerns with having SMEs in the scope of the proposal:

- If the Commission believes there to be Single Market related issues in a particular niche sector, it is far from unthinkable that SMEs might be the most important players, or at the least in smaller markets. Despite certain measures regarding confidentiality, it is highly probable other market participants will know that a particular company has been requested and has provided information to the Commission. This can be highly harmful to a company and might damage its reputation. In that case, the costs will far exceed the stated maximum 1000 € the company would have to invest to reply to the information request.
- According to the Commission, the costs associated with an information request should not go beyond 1000 €. It is unclear how the Commission arrived at this figure and whether there are any safeguards to prevent the costs to exceed that amount. For instance the Commission does not mention the setup of a formatted questionnaires in the proposal. The information request should be cost-neutral or at the very least safeguards should be introduced ensuring that costs remain (very) low for small undertakings.

5. Fines and periodic penalty payments

In article 9, it is described how companies would be fined in case of providing wrong information or not providing information The rules of non-compliance would be very much akin the regime applied in the competition policy area. It is questionable whether it is appropriate and necessary to copy-paste measures from another policy domain to this case where it is about information request where, in principle, the company should not feel falsely accused for any wrongdoings or lack of compliance with Single Market law.

In short, the penalty system goes far beyond the objectives and is not appropriate.

6. The need for a new tool

EUROCHAMBRES reiterates its doubts as regards the need for a new tool. We consider that the introduction of the SMIT has not sufficiently been considered against its complementarity with existing tools, such as SOLVIT, EEN, or the EU-Pilot procedure, and neither has its need been be weighed against several considerations. Time considerations in order to receive information quicker cannot be a reason to introduce a tool such as SMIT. It should be ensured that all attempts were exhausted. The proposal has insufficiently addressed the question what the SMIT would do that the existing tools cannot.

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