

The EU Single Market Information Tool: The European Commission's New Investigatory Power Vis-à-Vis Companies Trading in Europe

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Single Market Information Tool in a nutshell

The European Commission (the 'EU Commission'), which is the principal executive power of the European Union (EU), is about to gain a new investigatory power: the Single Market Information Tool (SMIT).¹

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1 In the present article, we will refer to the draft Regulation as proposed by the EU Commission and as amended by the EU Parliament. For the initial draft proposed by the EU Commission, see the EU Commission's proposal for a Regulation of the EU Parliament and of the Council setting out the conditions and procedure by which the EU Commission may request [companies] and associations of [companies] to provide information in relation to the internal market and related areas, 2 May 2017, COM(2017) 257 final, https://ec.europa.eu/info/law/better-regulation/initiative/25692/attachment/090166e5b20c3f54_en accessed 5 March 2018. For the latest draft as amended by the EU Parliament, see the EU Parliament's draft report on the proposal for a Regulation of the EU Parliament and of the Council setting out the conditions and procedure by which the EU Commission may request [companies] and associations of [companies] to provide information in relation to the internal market and related areas, 30 October 2017, 2017/87(COD) www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-612.279+01+DOC+PDF+V0//EN&language=EN accessed 5 March 2018.

The SMIT will be granted through a proposed new EU Regulation. It will allow the EU Commission to request business-related information from private firms or trade associations in cases where it initiates or substantiates infringement proceedings against one or more EU Member State(s) that may have failed to fulfil an obligation under the applicable rules of the EU Single Market legislation.² It is designed to apply to the EU Single Market in its broad sense: a functional area without internal frontiers where goods, people, services and capital circulate freely.

The SMIT will affect a wide range of industries including transport, environment, energy, agriculture and fisheries.³ More generally, the EU Commission will use the SMIT across the EU Single Market, meaning this new power may also affect other sectors such as consumer goods, pharmaceuticals, medical devices, financial services and telecommunications.

The EU Commission is at pains to clarify that the SMIT initiative does not aim to create new enforcement powers allowing it to pursue infringements of EU law in the Single Market against individual market participants. That said, the Single Market rules can be infringed either by Member States or by private companies. Therefore, companies responding to such information requests will not only incur administrative and financial burdens, but they will also have to be careful (among other aspects) not to incriminate themselves in doing so. In addition, companies should prepare themselves by developing the necessary resources for responding to information requests; ensuring that document management systems are in place to minimise the costs of compliance; and undertaking an audit to ensure compliance with the EU Single Market rules.

Over recent years, the EU Commission – in its role as principal executive body of the EU⁴ – has struggled to access reliable information about the conduct of market participants in order to enforce the EU Single Market rules. Its role as ‘guardian of the EU Treaties’ is exercised mainly through the infringement proceedings against EU Member States where they may

2 The EU Commission’s initial proposal envisaged a broader use of the SMIT than the current draft as amended by the EU Parliament. While in the initial draft the EU Commission had the power to request information where serious difficulties with the application of EU law would risk the attainment of an important EU policy objective, now in the current draft such power is limited to cases where the EU Commission initiates or substantiates infringement proceedings against one or more Member State(s).

3 See Recitals 10 and 12 of the draft Regulation.

4 The EU Commission is often referred to as ‘guardian of the EU Treaties’. See Art 17 of the Treaty on EU (TEU).

have failed to fulfil an obligation under the EU Treaties.⁵ The lack of reliable and accurate company-level information available to the EU Commission creates a problem in situations where access to such information is needed to enforce Single Market rules in a timely manner through infringement proceedings against Member States.⁶

The SMIT relies on the experience of the EU Commission in the antitrust and competition law field where its extensive powers to request information from companies help it to gather robust information for the enforcement of EU competition rules. However, the application of the SMIT will be much broader and could potentially involve any company (with very limited exceptions) operating in Europe. It will be used by the EU Commission as a measure of last resort when all other means to obtain information have failed. Thus, it will be used for cross-border cases where national intervention would not be successful, owing to its scale or effects, and the EU would be better placed to act.

While the EU legislators are to decide on the current draft Regulation in the course of 2018,⁷ the SMIT remains an absolute priority for the EU Commission.⁸ Once adopted, the EU Regulation will be published in the EU *Official Journal* and become directly applicable 20 days later.

This article will offer some background on what the EU Single Market and its rules are, explain why the scope of application of this new EU investigatory power is broad, assess the specific provisions of the proposed new rules, consider the possible concerns for companies and suggest next steps that companies should follow.

5 Art 258 of the Treaty on the Functioning of the EU (TFEU). See also the statistics on infringement proceedings against EU Member States regarding the EU Single Market, http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/infringements/index_en.htm accessed 5 March 2018.

6 EU Commission's Impact Assessment accompanying the proposal for a Regulation of the EU Parliament and of the Council setting out the conditions and procedure by which the Commission may request [companies] and associations of [companies] to provide information in relation to the internal market and related areas, 2 May 2017, SWD(2017) 216 final, p 7, https://ec.europa.eu/info/law/better-regulation/initiative/25692/attachment/090166e5b20c3f52_en accessed 5 March 2018.

7 See the EU Parliament's legislative observatory procedure file, 'Internal market: conditions and procedure by which the Commission may request [companies] to provide information', www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-services-including-transport/file-smit accessed 5 March 2018.

8 See, eg, the letter of intent accompanying EU Commission President Jean-Claude Juncker's 'State of the Union' speech, 13 September 2017, https://ec.europa.eu/commission/sites/beta-political/files/letter-of-intent-2017_en.pdf accessed 5 March 2018.

Addressing possible infringements of EU Single Market rules

The general objective of the SMIT is ensuring a better functioning of the EU Single Market through a more effective application of the EU Single Market rules and principles.⁹ Below we will assess what the EU Single Market is and provide examples of possible infringements of its rules.

EU Single Market

The EU Single Market refers to the EU as one territory without any internal borders or other regulatory obstacles to the free movement of people, services, goods and capital. The Single Market represents one of the world's largest economies (a GDP of about €15tn¹⁰ for 500 million consumers),¹¹ and is at the heart of the EU project, offering opportunities for European businesses and greater choice and lower prices for consumers.

However, at times, the benefits of the Single Market may not materialise because Single Market rules are not known or implemented or they are undermined by other barriers. For example, based on a public consultation,¹² the EU Commission has identified barriers such as price discrimination based on residency, reduced access to online audio-visual content while abroad and restrictions on the delivery of online purchases to certain countries.

In its 2015 Single Market Strategy (the 'Strategy'),¹³ the EU Commission decided to give the Single Market an important boost. Among other issues, the Strategy identified that some of the barriers to the Single Market could be addressed more effectively and efficiently if the EU Commission had access to timely, comprehensive, accurate and reliable information from private companies. For this reason, the Strategy proposed the Single Market Information Tool or SMIT so as to collect quantitative and qualitative information directly from selected market players.

Since the adoption of the Strategy, and in addition to the SMIT, the EU Commission has already put forward proposals in a number of fields

9 EU Commission's Impact Assessment, see n 6 above 23.

10 According to Eurostat, in 2016 the EU gross domestic product amounted to €14,800bn, <http://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20170410-1> accessed 5 March 2018.

11 The EU Single Market accounts for 21 million small and medium-sized enterprises, https://ec.europa.eu/growth/single-market_en accessed 5 March 2018.

12 EU Commission's Staff Working Document, Stakeholder Consultation – Synopsis Report, accompanying the proposal for the SMIT Regulation, 2 May 2017, SWD(2017) 215 final, para 2.2.2, https://ec.europa.eu/info/law/better-regulation/initiative/25692/attachment/090166e5b20c4333_en accessed 5 March 2018.

13 EU Commission's Communication, 'Upgrading the Single Market: more opportunities for people and business', 28 October 2015, COM(2015) 550 final.

regarding the harmonisation of EU rules. Some of these include, for example, the prevention of geo-blocking (which is a discriminatory practice that prevents online customers from accessing and purchasing products or services from a website based in another Member State),¹⁴ the consolidation of EU patent¹⁵ and trademark¹⁶ systems as well as the EU standards system,¹⁷ and a reform of EU public procurement rules.¹⁸

Possible infringements of EU Single Market rules

Both Member States and private companies may infringe Single Market rules, which generally protect fundamental principles of the EU Single Market. While the EU Commission's new investigatory power is meant to be exercised for infringement proceedings against EU Member States, the fact that private companies may also infringe EU Single Market rules is relevant for the concerns that the use of the SMIT may raise (see 'Possible concerns for companies' below).

14 See the most recent EU Geo-blocking Regulation, n 29 below.

15 The EU Commission is active in the implementation of a patent package. When it comes into operation, it will establish a European patent with unitary effect and a new patent court, creating a single approach to patent registration and litigation across 26 EU Member States. The patent package includes: EU Commission Regulation No 1257/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ 2012 L361/1; and EU Council Regulation No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, OJ 2012 L361/89; and an Agreement between EU countries to set up a single and specialised patent jurisdiction: the Unified Patent Court. The EU patent package will come into effect when 13 countries have ratified the Unified Patent Court agreement, and the Preparatory Committee of all the signatory states will exist until the Unified Patent Court is established.

16 Directive 2015/2436/EU of the EU Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, OJ 2015 L336/1.

17 On 13 June 2016, entities including the European Commission, the EU Member States, European Free Trade Association (EFTA) Member States (ie, Iceland, Liechtenstein, Norway and Switzerland), and the European Committee for Standardisation (CEN), among others, signed the 'Joint initiative on standardisation under the Single Market Strategy', which sets out a shared vision for European standardisation, http://ec.europa.eu/growth/content/joint-initiative-standardisation-responding-changing-marketplace-0_en accessed 5 March 2018.

18 By 18 April 2016, the EU Member States had to transpose the following three pieces of EU legislation into their national laws: Directive 2014/24 of the EU Parliament and of the Council of 26 February 2014 on public procurement, OJ 2014 L94/65; Directive 2014/25 of the EU Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors, OJ 2014 L94/243; and Directive 2014/23 of the EU Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ 2014 L94/1.

MEMBER STATE INFRINGEMENTS

Let us consider the example of the general principle of free movement of goods: quantitative restrictions on imports and all measures having equivalent effect are prohibited between EU Member States (unless justified under specific circumstances).¹⁹ This principle is identified as a defence right that can be invoked against those rules or practices of an EU Member State (including its inactivity)²⁰ that create unjustified obstacles to cross-border trade (ie, between the EU Member States). In this context, ‘Member State’ should be interpreted broadly to include all the authorities of that state such as central, federal or any other territorial authorities.²¹ Despite this broad interpretation, the concept of Member State does not apply to typical ‘privative’ measures such as those taken by companies or private individuals.²²

Infringements may arise from either quantitative restrictions (ie, measures that amount to a total or partial restraint on imports of goods in transit across the EU, from one Member State to the other, such as an outright ban or a quota system) or measures of equivalent effect.²³ An example of this could be the obligation imposed by a Member State to obtain an import licence before importing goods into its territory: such a measure would make imports more cumbersome because a formal process of this type could cause delays.²⁴

In order to avoid such infringements by EU Member States, there is a notification procedure at the EU level according to which Member States have the obligation to inform the EU Commission of any draft technical regulation before its adoption.²⁵ This procedure enables the EU Commission and other EU Member States to examine the proposed text and respond in order to ensure the compatibility of national legislation with EU law and Single Market principles.

In cases where one or more Member State(s) do not respect such type of EU Single Market rules, the EU Commission can take legal action against them in the form of infringement proceedings before the Court of Justice of

19 Art 34–37 of the TFEU.

20 Judgment of 9 December 1997, *Commission v France*, C-265/95, ECLI:EU:C:1997:595, para 31.

21 Judgment of 25 July 1991, *Aragonesa de Publicidad Exterior*, C-1/90 and C-176/90, ECLI:EU:C:1991:327, para 8.

22 See EU Commission’s (at the time) Directorate General for Enterprise and Industry, ‘Guide to the application of Treaty provisions governing the free movement of goods’, 18 December 2013, p 10, <http://ec.europa.eu/DocsRoom/documents/104> accessed 5 March 2018.

23 Judgment of 11 July 1974, *Dassonville*, 8-74, ECLI:EU:C:1974:82, para 5.

24 See ‘Guide to the application of Treaty provisions governing the free movement of goods’, n 22 above, p 15.

25 Directive 2015/1535 of the EU Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on information society services, OJ 2015 L241/1.

the EU.²⁶ In order to do so, the EU Commission will have to produce to the Court of Justice evidence to demonstrate if and how EU Single Market rules were infringed. In infringement proceedings, the EU Commission has the responsibility to place before the Court of Justice all the factual information needed to enable it to establish that an obligation has not been fulfilled by the Member State concerned.

INFRINGEMENTS BY PRIVATE COMPANIES

It is important to clarify also that private companies (or trade associations) may infringe EU Single Market rules. Using the previous example of the free movement of goods, a company may restrict – either by contract or by pressuring its distributors – the import of certain products into one Member State from another Member State. In technical terms, that company would be opposing or obstructing the parallel imports or parallel trade of goods. This is a common scenario in the pharmaceutical sector where EU Member States adopt different rules regarding the pricing and the reimbursement of drugs, thus creating different prices for a specific drug across different states.²⁷ In order to take advantage of pricing differentials, parallel importers (ie, companies that are outside the distribution network of producers) may decide to purchase certain items in one Member State (where they are low-priced) and resell them in another Member State (where they are more expensive). The producing company may be tempted to halt such parallel trade outside its network either by contract or by pressuring its distributors. The EU does not favour such restrictions of parallel trade (unless there is a due justification under specific circumstances) and has imposed very heavy fines on companies restricting parallel trade.²⁸

As another example, the EU has recently adopted new rules that prohibit a company restricting internet purchases in one EU Member State from

26 Art 258 of the TFEU.

27 EU Commission's Communication, 'Parallel imports of proprietary medicinal products for which marketing authorisations have already been granted', 30 December 2003, COM(2003) 839.

28 In 2017, a pharmaceutical company was fined €5m for parallel trade restrictions (and excessive prices) in Italy. In 2011, suppliers of prescription-only medicine and their distributors were fined €2m for restricting parallel imports in Romania. In 2009, the EU Commission fined a company €44.5m for restricting parallel imports from the Netherlands to other Member States. In 2005, the EU Commission fined a company €52m for regulatory abuses resulting in, among others, a parallel trade restriction.

buyers located in another EU Member State (so-called ‘geo-blocking’).²⁹ This will remove barriers to e-commerce, allowing consumers to choose from which website they buy goods or services, without being blocked or automatically re-routed to another website owing to their nationality, place of residence or even their temporary location. Even unilateral practices of a company (as opposed to agreements or understandings between a company and its distributors) would fall under the new ban of geo-blocking. The consequences for infringements of these anti-geo-blocking rules will depend on the specific rules to be adopted by each EU Member State, which will have to be ‘effective, proportionate and dissuasive’ and will have to include the designation of ‘a body or bodies responsible for adequate and effective enforcement of this Regulation’.³⁰

The EU Commission will acquire a new and broad investigatory power

Until today, the EU Commission did not have general investigatory powers of its own to help it enforce EU law in the area of the Single Market. The EU Commission’s existing investigatory powers are related to other specific fields such as antitrust law (see below). The EU Commission argues that it needs to be able to send information requests to companies and trade associations to protect the Single Market and pursue infringement proceedings against Member States that may violate the Single Market rules (see ‘EU Commission will now acquire a general investigatory power vis-à-vis companies’ below). This new power will affect several sectors and industries (see ‘The EU Commission’s new power will affect different sectors and industries’ below).

The EU Commission already has investigatory powers in the field of antitrust enforcement

The EU Commission’s existing investigatory powers are related to specific fields of the Single Market: antitrust,³¹ merger control³² and EU rules

29 Regulation 2018/302 of the European Parliament and of the Council 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, OJ 2018 L60I/1. These new anti-geo-blocking rules entered into effect on 22 March 2018.

30 *Ibid* Art 7.

31 EU Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts [101] and [102] of the TFEU, OJ 2003 L1/1.

32 EU Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between [companies], OJ 2004 L24/1.

prohibiting government subsidies (state aids).³³ These specific rules do not allow the collection and use of the requested information for other – more general – Single Market-related purposes such as the free circulation of goods, tackling discrimination based on residence or geo-blocking practices.

The EU Commission has extensive powers to request information from companies for the enforcement of antitrust or merger control rules. In these cases, the EU Commission's information requests can be far-reaching, include several hundreds of questions, and responding to them may require a very significant amount of time and resources (and thus costs).

For example, in the context of the EU Commission's investigations in the cement industry, the Commission's information requests were described as follows:

'the questions... are extraordinarily numerous and cover very diverse types of information. It is... extremely difficult to identify a connecting thread among questions which range from the quantity and costs... to the means of transport and distance... from the type of packaging... to the transport and insurance costs... from statistics... to VAT numbers of its customers... and from the technology... to the costs of repair and maintenance of those facilities... if the connecting thread tying those questions together were to be a complete mapping of the [company]'s revenue and cost structure to enable the Commission to analyse it by econometric methods (comparing it with those of other companies active in the cement industry), it could be questioned whether such a broad and all-encompassing request for information is at all appropriate.'³⁴

In that specific case, the Court of Justice annulled the EU Commission's decisions on the basis of which the requests for information were sent.³⁵ The reason for this was that the decisions did not disclose clearly the suspicions of infringement that justified their adoption and it was unclear whether the requested information was necessary for the purposes of the investigation.

The SMIT seems also to be analogue to the Market Information Tool, which the EU Commission, since 2013, may use in state aid investigations.³⁶

33 EU Council Regulation 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the TFEU, OJ 2015 L248/9.

34 Opinion of Advocate General Wahl of 15 October 2015, *HeidelbergCement*, C-247/14, ECLI:EU:C:2015:694, paras 46–47.

35 Judgment of 10 March 2016, *HeidelbergCement*, C-247/14, ECLI:EU:C:2016:149, para 44.

36 EU Council Regulation 2015/1589 of 13 July 2015 laying down detailed rules for the application of Art 108 of the TFEU, cited above, Art 7 entitled 'Request for information made to other sources'. Further information on the state aids market information tool is available at http://europa.eu/rapid/press-release_MEMO-12-942_en.htm accessed 5 March 2018.

State aid is defined as an advantage (in any form whatsoever) conferred on a selective basis to companies by national public authorities. A company that receives government support gains an advantage over its competitors. Therefore, the EU rules generally prohibit state aid unless it is justified by specific reasons such as general economic development. To ensure that this prohibition is respected and exemptions are applied equally across the EU, the EU Commission is in charge of ensuring that state aid complies with EU rules.

By using such power in the field of state aid, the EU Commission can, if the information provided by the Member State subject to the state aid investigation is not sufficient, ask that any other Member State as well as companies (including the company benefiting from the aid measure or its competitors) provide directly to the EU Commission all market information necessary to enable it to complete its state aid assessment.

EU COMMISSION WILL NOW ACQUIRE A GENERAL INVESTIGATORY POWER VIS-À-VIS COMPANIES

Now, the EU Commission will acquire a general investigatory power vis-à-vis companies, which will be independent from its current powers in the antitrust field. The EU Commission considers that it needs this new and general power of investigation for when it cannot obtain information from other channels.

To obtain evidence needed for proving the existence of obstacles to the functioning of the Single Market (and the related possible infringements of the relevant rules by EU Member States), the EU Commission relies on the information provided by EU Member States as its primary source. Indeed, EU Member States are under a duty of cooperation with the EU Commission.³⁷

However, according to the EU Commission,³⁸ a Member State may not be of much help in certain circumstances, whereas private companies may have the relevant information and evidence needed. This would happen for example in cross-border cases where information from market participants based in more than one Member State would be necessary (or in any case the available evidence would not be comparable and thus usable).

37 Art 4(3) of the TEU. See also the judgment of 26 April 2005, *Commission v Ireland*, C-494/01, ECLI:EU:C:2005:250, para 42.

38 EU Commission's Impact Assessment, see n 6 above 5.

Other sources that the EU Commission may also rely on are interested third parties (ie, citizens or companies that act as complainants)³⁹ or public consultations. Importantly, the EU Commission may rely on the existing mechanisms to share information with Member States: national statistical offices, business registers, data available from sector reporting tools, Eurostat data, data shared on the Internal Market Information System (IMI),⁴⁰ the Technical Regulation Information System (TRIS),⁴¹ the Regulatory Fitness and Performance Programme (REFIT)⁴² and reports available on the Online Dispute Resolution (ODR) website.⁴³

However, according to the EU Commission, the information available through the aforementioned channels may not always be sufficient for it to confirm with certainty whether one or more Member States are in breach of EU rules.⁴⁴ The information that the EU Commission needs to proceed is ‘often detailed and sensitive firm-level information, which is not available publicly and cannot be purchased from third party data providers’.⁴⁵ That is where the role of private companies and/or trade associations would become important.

In all such cases, the SMIT would make it easier for the EU Commission to access company-level data, if needed to detect and correct the misapplication

39 EU Commission’s Communication, ‘EU law: better results through better application’, OJ 2017 C18/10, section 1 entitled ‘Introduction’, para 3. Complaint forms are available from the Commission on request or online from the Europa website https://ec.europa.eu/assets/sg/report-a-breach/complaints_en accessed 17 May 2018.

40 IMI is an information technology-based information network that links up national, regional and local authorities across borders, enabling them to communicate quickly and easily with their counterparts abroad regarding the practical implementation of EU Single Market legislation. More information on IMI is available at http://ec.europa.eu/internal_market/imi-net/index_en.htm accessed 17 May 2018.

41 Under the TRIS, Member States are obliged to notify to the EU Commission all draft technical regulations concerning products and information society services before they are adopted in national law. The TRIS enables the EU Commission and the Member States to inform and be informed about new draft technical regulations, examine these drafts, detect potential barriers to trade before they have any negative effects, pinpoint protectionist measures, comment on the draft regulations, have an effective dialogue when assessing the notified drafts and identify the need for harmonisation at EU level.

42 The EU Commission’s REFIT ensures that EU legislation delivers results for citizens and businesses effectively, efficiently and at minimum cost. The REFIT platform allows national authorities, citizens and other stakeholders to get involved in improving EU legislation. They can make suggestions on how to reduce the regulatory and administrative burdens of EU laws, which are then analysed by the REFIT platform and the EU Commission.

43 The ODR platform is provided by the EU Commission to allow consumers and traders in the EU or Norway, Iceland and Lichtenstein to resolve disputes relating to online purchases of goods and services without going to court. The ODR platform is available at <https://ec.europa.eu/consumers/odr/main/?event=main.home.show> accessed 17 May 2018.

44 See Recital 8 of the draft Regulation.

45 EU Commission’s Impact Assessment, n 6 above 5.

of EU law or non-compliance with Single Market rules by Member States.⁴⁶ This would ensure the timely delivery of information and match developments in the digitalisation of the Single Market.⁴⁷

THE EU COMMISSION'S NEW POWER WILL AFFECT DIFFERENT SECTORS AND INDUSTRIES

In general terms, the SMIT will enable the better enforcement of Single Market principles and rules: free movement of goods, services, persons and capital and non-discrimination on grounds of citizenship or origin.

The EU Commission's new power will affect several sectors and industries. First, the SMIT will contribute to the development and functioning of economic sectors where common EU policies have already been established such as the common agricultural policy, the common transport policy⁴⁸ and the EU policy on energy.⁴⁹

Furthermore, the EU Commission will also be able to use the SMIT in other industries that are also (fully or partially) regulated at the EU level, such as medical devices (which was regulated most recently),⁵⁰ consumer goods (for which e-commerce was also regulated recently),⁵¹ pharmaceuticals (for which parallel trade remains an important aspect of the EU Single Market),⁵² and financial services or telecommunications. In more general terms, the SMIT will affect fast-moving markets, new economic activities and new business models, all of which are relevant to today's Digital Single Market, also known as the Single Market 2.0.

In more specific terms, the documentation accompanying the proposed Regulation refers to a list of cases where the EU Commission – in the context of infringement proceedings against Member States – failed to obtain missing factual evidence from private companies. These cases relate to a number of sectors such as energy, transport and insurance, and they touch upon various Single Market rules such as the regulation of network industries,

46 EU Commission's Impact Assessment, n 6 above 23.

47 See the explanatory statement of the draft Regulation.

48 EU infringement scoreboards often refer to cases of transport safety and security. See the EU Commission's page, 'Single market scoreboard: EU countries['] compliance with EU law not yet good enough', http://ec.europa.eu/growth/content/single-market-scoreboard-eu-countries-compliance-eu-law-not-yet-good-enough-0_en accessed 5 March 2018.

49 The Energy Union is one of the pillars of the current EU Commission.

50 See, eg, the two EU Regulations of 2017 for medical devices. See EU Regulation 2017/745 of the EU Parliament and of the Council of 5 April 2017 on medical devices, OJ 2017 L117/1; and EU Regulation 2017/746 of the EU Parliament and of the Council of 5 April 2017 on in vitro diagnostic medical devices, OJ 2017 L117/176.

51 See n 29 above.

52 See n 27 above.

free movement of capital in relation to tax issues, freedom of establishment, freedom to provide services and public procurement procedures.⁵³

For example, had the EU Commission had additional powers to request information from companies, the Court of Justice might have ruled differently in a case where it dismissed the EU Commission's claim that Portuguese legislation generated higher taxation of non-resident financial institutions given the lack of reliable evidence ('the Commission could have furnished, inter alia, statistical data or information concerning the level of interest paid on bank loans and relating to the refinancing conditions in order to support the plausibility of its calculations').⁵⁴

How the Single Market Information Tool will work in practice

The EU Commission will be empowered to request information from companies or trade associations (see Article 4 of the proposed Regulation). This power can be exercised where there are 'serious problems with the establishment and the functioning of the internal market by means of infringement procedure'. In other words, the EU Commission will be able to send information requests to companies or trade associations only in the context of initiating or substantiating infringement proceedings.⁵⁵ Information that is likely to be sought from companies or trade associations may consist of, for example, factual market data, including cost structure, pricing policy, products or services characteristics or geographical distribution of customers and suppliers (see Recital 11).

The EU Commission shall only use its powers to request information 'as a measure of last resort' if the information sought: (1) is not publicly available or available from other channels at the EU Commission's disposal (see IMI, the TRIS, the REFIT, etc, cited at 'EU Commission will now acquire a general investigatory power vis-à-vis companies' above); and (2) has not been provided by a Member State, company or citizen. In addition, the EU Commission must adopt an explanatory decision prior to using the power, stating its intention to use the power, explaining the suspected serious problem with the establishment and functioning of the Single Market that has a cross-border dimension, the information sought, why such information is needed, why other means to obtain such information failed (including a list of the institutions and sources consulted) and the criteria for selecting the addressees of the requests (which cannot be micro-companies). Such an

53 EU Commission's Impact Assessment, n 6 above 68.

54 Judgment of 17 June 2010, *Commission v Portugal*, C-105/08, ECLI:EU:C:2010:345, para 29.

55 This limitation was proposed by the EU Parliament in its last round of amendments to avoid a disproportionately frequent use of the power.

explanatory decision should be addressed to the Member State(s) concerned (see Article 5).

Once the EU Commission has adopted its explanatory decision, it may, by simple request or by a subsequent decision, require companies or trade associations to provide information (see Article 6). An information request by ‘decision’ (as opposed to a ‘simple request’) can be addressed only to ‘large’ companies (ie, with above 250 employees)⁵⁶ and trade associations, it may entail fines in the form of periodic penalty payments and can be challenged before the Court of Justice of the EU (CJEU).

This means that small and medium-sized enterprises (SMEs) cannot be the recipient of an information request by a ‘decision’ that may entail fines, and therefore their compliance with an information request would be ‘quasi-voluntary’.

‘Micro-companies’ (ie, with fewer than ten employees)⁵⁷ are not subject to the SMIT. According to the EU Commission, this is to avoid imposing a disproportionate administrative burden on them, considering in particular that they are unlikely to be in a position to provide sufficiently relevant information (see Recital 12).

Companies and trade associations that receive an information request from the EU Commission must reply on time in a complete, accurate and non-misleading manner (see Article 7). The EU Commission is empowered to impose sanctions in the form of periodic penalty payments (maximum five per cent of the average daily turnover of the recipient in the preceding business year for each working day of delay) if a recipient supplies incorrect or misleading information or if, in response to a request made by a formal EU Commission decision, it provides incomplete information or does not respond at all (see Article 9).⁵⁸

Companies (or trade associations, as the case may be) are to provide information that is already at their disposal and should incur no or limited costs in doing so (see Article 5). Additionally, they have the right to demand that the request be withdrawn in cases where the company does not possess

56 Directive 2013/34 of the EU Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of [companies], OJ 2013 L182/19, Art 3(4)(c).

57 Ibid Art 3(1)(c).

58 The latest draft of the proposed Regulation no longer provides for the possibility to impose fines of up to one per cent of the total turnover in the preceding business year (which was present in the initial proposal by the EU Commission). This is because the EU Parliament found the imposition of such fines, which are comparable to those for violations of competition and antitrust rules, to be disproportionate, and proposed the deletion of that provision.

the information or where the costs for processing and compiling the information would be disproportionate (Article 6).⁵⁹

The EU Commission must forward the answers it receives from companies to the Member State concerned by the request where the answers are relevant to a formal EU infringement procedure against that Member State (see Article 7). In cases where an answer includes information that is confidential to the company providing it, the EU Commission shall only forward the non-confidential version of the submission to the Member State concerned.

The use of the information collected by the EU Commission can only be used for the purpose of addressing serious problems with the establishment and the functioning of the Single Market (Article 8). The use of such information for other purposes, in particular for the application of EU competition rules, is explicitly excluded in the proposed Regulation (see the EU Commission's Explanatory Memorandum and Recital 14).

Possible concerns for companies

The EU Commission persists in suggesting that the SMIT does not aim to create new enforcement powers; however, there is little doubt that the proposed Regulation would *significantly* increase the EU Commission's ability to detect and investigate breaches of EU law. The application of the SMIT will potentially affect all firms operating in Europe whenever related to the application (or non-application) of EU Single Market rules and principles, common EU policies (eg, agriculture, transport and energy) or industries that are regulated at the EU level such as e-commerce or life science.

It is important to note that, besides Member States, companies may also infringe certain EU Single Market rules. In this regard, they may end up in a situation where their responses to information requests could (possibly) be indirectly used against them at the EU and/or Member State level. It remains to be seen whether the EU Commission will use the SMIT to enlarge its Single Market enforcement not only vis-à-vis Member States (the stated objective) but also against private companies (as an indirect and/or hidden consequence). Companies should also be concerned for a number of other reasons.

First, the Regulation fails to provide protection against self-incrimination to companies receiving information requests, as is instead the case in other

⁵⁹ Such provisions were proposed by the EU Parliament to avoid the new procedure becoming a burden for companies in the EU.

fields of EU law.⁶⁰ Although the proposed Regulation explicitly excludes the use of the information obtained for the application of EU competition rules, its failure explicitly to recognise the right against self-incrimination presents a significant risk for companies. For instance, a company's response may inadvertently signal an infringement of EU Single Market rules, such as parallel trade restrictions or geo-blocking practices that may attract heavy fines (although Member States are to decide on the specific consequences for infringement of anti-geo-blocking rules).

Second, as the proposed Regulation recognises, the information submitted to the EU Commission may be useful not only for EU infringement proceedings against the Member States but also for any subsequent enforcement action by the Member States concerned.⁶¹ At this stage, it remains unclear what type of enforcement Member States could avail themselves of and what warranties would be available for companies, presumably these may differ under the national laws of each EU Member State. Moreover, it is worrying that companies will not know in the hands of whom (EU Commission or Member State) the information provided will end up, and for what purpose.

Third, despite all the safeguards included in the Regulation regarding the confidentiality of the information provided by respondents, there is an additional risk that is not contemplated but which surely exists: information may still be leaked and used either by competitors or public authorities. This risk is even higher nowadays, with the vast amount of digital data that companies amass and which, under the SMIT, could potentially be requested by the EU Commission. Although it is true that most information leaks are not deliberate, whenever information is transferred between entities the risk of a leak is present.

60 The right against self-incrimination operates such that one should not be obliged to produce evidence against oneself. As a criminal law principle, this right is mostly applicable in the context of procedures against individuals. Nevertheless, companies are also considered to have such a right, as confirmed by the CJEU in *Orkem*. Judgment of 18 October 1989, *Orkem v Commission*, C-374/87, ECLI:EU:C:1989:387. The protection against self-incrimination derives from the right to a fair trial and the presumption of innocence enshrined in Art 6 of the European Convention of Human Rights and Arts 47 and 48 of the Charter of Fundamental Rights of the EU. In the area of competition law, this principle translates as preventing the EU Commission from compelling a company to provide answers in the course of an investigation that might involve an admission as to its participation in an infringement. Eg, in *Orkem*, the CJEU held that the EU Commission could not require a company to reply to questions relating to the purpose or the objectives of measures taken that would oblige it to admit its participation in an infringement of EU competition law. *Ibid* paras 34–36.

61 See Recital 14 of the draft Regulation.

Fourth, despite assurances to businesses from the EU Commission that the SMIT will be used sparingly and only as a last resort, its use will involve an administrative and financial burden for companies. According to the EU Commission's estimates,⁶² five information requests will be made per year involving several companies. Responding to such requests will involve devoting resources and incurring costs for which the EU Commission has already provided an estimate: for large firms, costs would range from €1,200 to €4,400; if firms seek legal advice to comply with the information request, they would incur an additional cost ranging from €1,000 to €4,000.⁶³ For more complex cases, it cannot be excluded that the costs would be higher. And in any case the cost that companies' business would dedicate to responding to information requests of the EU Commission would also have to be factored in, as time is money.

Last (but not least), companies remain under the threat of periodic penalty payments in case of incorrect or misleading information (or if they do not respond after the EU Commission has adopted a formal decision to request the information).

Next steps to prepare and conclusions

2018 is most likely the year that will see the EU Commission's new investigatory power come to life.⁶⁴

Businesses concerned by the possible impact of the proposed Regulation are the vast majority of companies and trade associations that are active or trade in Europe. These companies should consider the following actions:

1. *Develop a policy and the necessary resources for responding to information requests.* Responding to a request for information from the EU Commission may disrupt the business, whereas a careful organisation of resources may cut costs and avoid submission to the EU Commission (and subsequently to the Member States) of self-incriminating information that could open an investigation and possible fines against the company, or incorrect or misleading information that could attract sanctions.

62 EU Commission's Impact Assessment, see n 6 above, at 35.

63 The latest draft of the proposed Regulation clarifies that targeted companies would only have to submit information that is already at their disposal, when that implies no or limited processing costs, and that they would have the possibility of requesting a withdrawal of the information requests whenever this is not the case. However, it is difficult to estimate at this stage whether and to what extent the EU Commission will make (frequent) use of its new power.

64 The proposed Regulation is currently within the EU Parliament's Internal Market and Consumer Protection Committee, which has been appointed as the lead committee on SMIT. Its draft report was adopted in October 2017 and the final adoption is foreseen for April 2018.

2. *Ensure that document management systems are in place to minimise the costs of compliance.* Information should be readily available and organised in a way that allows firms to respond in a non-self-incriminating, accurate and non-misleading manner. Technology can assist companies in making sure the information is readily available to be reviewed prior to submission to the EU Commission. In this way, companies may avoid submitting any data to the public authorities that may be damaging to their interests.
3. *Firms may want to undertake internal audits to ensure compliance with Single Market rules.* Examples may include reviewing existing contracts, certifying conformity of products or services with EU-wide standards, and ensuring an EU-wide level playing field with no unjustified barriers or obstacles to the EU Single Market (parallel trade or geo-blocking). The involvement of Single Market-savvy external counsel can help maintain legal professional privilege and make the right choices before the information is in the hands of the EU Commission or the Member States. After that, it may be too late.