

MBB Position Paper

The Malta Business Bureau is the EU-Business advisory office of the Malta Chamber of Commerce, Enterprise and Industry, and the Malta Hotels and Restaurants Association.

Compliance Package

Single Market Information Tool (SMIT) – 2017/0087(COD)

Maltese business fully shares the Commission’s objective of ensuring better implementation, correct application and stronger enforcement of EU legislation. Moreover, the COM’s effort ensure compliance with EU law is admirable. There is little doubt that incompliance must be countered rigorously and effectively to ensure a level playing field in the single market.

However, we do not believe that the SMIT instrument is an appropriate measure to achieve these goals since it imposes additional obligations on companies to provide highly sensitive business information without adequate justification or explanation how and for which precise objectives the COM intends to use this information, and under the threat of sanctions. Reporting obligations represent a cost to companies, and adding to those obligations without a clear purpose is unjustified and disproportionate.

At the same time, we acknowledge that Member States should be more helpful and comprehensive in sharing national market information with the Commission, such as the information collected through TRIS or the IMI system. Moreover, competition law already provides the COM with sufficient investigation and enforcement powers, and it should use existing information gathering and enforcement tools before seeking further and possibly overlapping powers as set out in this proposal.

Several issues require clarification from the COM and further detail in the legal text. Nowhere is it clear what kind of information will be requested, why specifically it will be requested, and to what specific purposes will it be used. This can be mostly fixed by defining “a serious difficulty with the application of Union law risks undermining the attainment of an important Union policy objective”. More crucially, there do not seem to be any checks and balances on how the COM will use this tool, and it seems to give it a carte blanche on what to request without any clear justifiable reason. Companies are not given any realistic opportunity to appeal against the request for information. Moreover, there is no clear distinction between a “simple request” and a “decision” in Article 6, particularly since the legal consequences of non-compliance are similar.

While we strongly advise that the SMIT procedure is reconsidered and withdrawn, we are willing to assist in ensuring that a constructive outcome for all is reached. Ideally, we believe that the tool should be made voluntary for companies and that confidential information is only provided upon the company’s consent. It is important to bear in mind that the Single Market exists for EU citizens and businesses, and not the other way around.

Suggested Amendments

<i>Article</i>	<i>COM text</i>	<i>Suggested Amendment</i>	<i>Justification</i>
Recital 18	In the interests of transparency and legal certainty, it is appropriate to give public information on Commission decisions. The Commission, when publishing and handling such information, should respect the rules on professional secrecy, including the protection of all confidential information, in accordance with Article 339 TFEU.	Delete	If the purpose of SMIT is to collect information in order to internally address shortcomings of the single market, it is not appropriate to make information collected, confidential or otherwise, publicly available. Information made public may create speculation that a company is being investigated.
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 information from undertakings or associations of undertakings, as provided for in Chapter II, for the purpose of addressing the above-mentioned difficulty.	Where a serious difficulty with the application of Union law risks undermining the attainment of an important Union policy objective, the Commission may request information from undertakings or associations of undertakings, as provided for in Chapter II, for the purpose of addressing the above-mentioned difficulty. <u>When requesting information, the Commission shall comply with the principle of proportionality, in particular with regard to small and medium-sized undertakings, and take into account the differences in size and resources between small and medium-sized undertakings.</u>	Information requested by the Commission should be proportionate and should not put undue burden on the undertakings concerned. Moreover, the Commission should at all times be aware that there are differences in the capability of small enterprises and medium enterprises, that would allow them to comply in a timely manner. Moreover and more generally, Art 4 lacks a significant amount of detail needed to give legal certainty. The legal conditions for the request of information are subject to interpretation and will give the Commission a broad margin of discretion. Moreover, it is

			unclear why associations of undertakings are also targeted.
5.2	<p>[...]</p> <p>The decision shall be addressed to the Member State or Member States concerned. The Commission shall notify the Member State or Member States concerned without delay.</p>	<p>[...]</p> <p>The decision shall be addressed to the Member State or Member States concerned. The Commission shall notify the Member State or Member States concerned without delay.</p> <p><u>The Commission shall simultaneously provide a copy of the decision to the undertaking or associations of undertakings concerned.</u></p>	It is fair that when the Commission alerts the Member State of its intention to request information, it simultaneously alerts the undertaking.
5.2a (new)		<p><u>The Commission shall consult the Member State concerned prior to adopting the decision pursuant to paragraph 2 for the purposes of stating its intent.</u></p> <p><u>Upon adoption of the Commission's decision, Member States shall, where available, and after consulting with the undertaking or association of undertakings concerned, transmit the requested information to the Commission.</u></p>	Member States should be more helpful and comprehensive in sharing national market information with the Commission, such as the information collected through TRIS or the Internal Market Information (IMI) system. This might be an additional source of information to help paint a detailed bigger picture. For example, Member States already have access to data of companies in a number of cases, like the ownership structure/beneficial ownership that is stored in a central register.
5.3	The undertakings or association of undertakings concerned by the request as referred to in Article	The undertakings or association of undertakings concerned by the request as referred to in Article 4 <u>and pursuant to Article 6 may are obliged to provide only</u> information	Undertakings should not be forced to provide information to the Commission for the purposes of better policy making. The single market exists to serve our

	<p>4 are obliged to provide only information that is at their disposal.</p> <p>The Commission shall take due account of the principle of proportionality, in particular with regard to small and medium-sized undertakings.</p>	<p>that is at their disposal <u>easily accessible to them.</u></p> <p>The Commission shall take due account of the principle of proportionality, in particular with regard to small and medium-sized undertakings.</p>	<p>citizens and businesses and not the other way around.</p> <p>Moreover, undertakings should not be obliged to collect information that would not normally be used in the day-to-day running of the company as it would create a disproportionate cost and burden on the concerned undertaking.</p>
6.1	<p>In the cases provided for in Article 4 and under the conditions laid down in Article 5, the Commission may, by simple request or by decision, require undertakings and associations of undertakings to provide information.</p>	<p>In the cases provided for in Article 4 and under the conditions laid down in Article 5, the Commission may, by simple request or by decision, require <u>request</u> undertakings and associations of undertakings to provide information <u>relevant to the serious difficulty with the application of Union law that risks undermining the attainment of an important Union policy objective.</u></p>	<p>Since we do not support the idea of a mandatory SMIT, the notion of a decision is superfluous. This should be applied throughout the text.</p> <p>Moreover, the information requested should be relevant to the “to the serious difficulty with the application of Union law risks undermining the attainment of an important Union policy objective.” This also shows how this phrase needs to be defined in Art 3.</p>
6.2	<p>The simple request referred to in paragraph 1 shall state the legal basis and its purpose, specify what information is required and prescribe a proportionate time limit within which the information is to be provided. It shall also refer to the fines provided for in Article 9(1) for supplying incorrect or misleading information.</p>	<p>The simple request <u>for information</u> referred to in paragraph 1 shall state the legal basis and its purpose, specify what information is required and prescribe a proportionate time limit within which the information is to be provided. It shall also refer to the fines provided for in Article 9(1) for supplying incorrect or misleading information.:</p> <ol style="list-style-type: none"> a. <u>state the legal basis;</u> b. <u>state in detail the purpose of the request and why the information is required. This shall include an</u> 	<p>It is only fair that if an undertaking is being requested to provide such sensitive information, it should be given more information why such information is required.</p>

		<p><u>explanation of how the information to be provided may assist the Commission;</u></p> <p>c. <u>state why other means to obtain such information have proven insufficient or inadequate or cannot be obtained in a timely manner to date;</u></p> <p>d. <u>state the criteria for selecting the addressee of the request for information;</u></p> <p>e. <u>specify in detail what information is required;</u></p> <p>f. <u>prescribe a proportionate time limit within which the information is to be provided;</u></p>	
6.3		Delete	Since we do not support the idea of a mandatory SMIT, the notion of a decision is superfluous. This should be applied throughout the text.
7.1	The undertakings or associations of undertakings providing information following a Commission’s request for information based on Article 5 shall submit their answers to the Commission in a clear, complete and accurate manner.	<p>The undertakings or associations of undertakings <u>choosing to provide</u> providing information following a Commission’s request for information based on Article 5 <u>and under the conditions set out in Article 6</u> shall submit their answers to the Commission in a clear, complete and accurate manner. <u>Refusal to provide information shall be supported by reasons.</u></p> <p><u>The Commission may request confidential information from undertakings or associations of undertakings, which may consent to</u></p>	Undertakings should not be forced to provide information to the Commission for the purposes of better policy making. The single market exists to serve our citizens and businesses and not the other way around. Notwithstanding, we appreciated the overall reasons for the COM to request such information, and in such instances believe that the COM deserve a reason for companies choosing not to comply.

		<u>provide such confidential information or withhold it as appropriate.</u>	It is imperative that confidential information should only be provided at the consent of the companies.
7.4	<p>The Commission shall verify whether the confidentiality claim of the information transmitted made by the respondent undertakings or associations of undertakings under subparagraph 2 of paragraph 2 is well-founded and proportionate.</p> <p>After giving the undertaking or association of undertakings concerned the opportunity of making known its views, the Commission may take a decision finding that the information claimed to be confidential is not protected, and setting a date after which the information is to be disclosed. That period shall not be less than 1 month.</p> <p>That decision shall be notified to the undertaking or association of undertakings concerned without delay.</p>	<u>Delete</u>	It is not for the Commission to determine whether information deemed by a company to be sensitive and confidential is actually confidential or not.

<p>9.1</p>	<p>The Commission may, by decision, where deemed necessary and proportionate, impose on undertakings or association of undertakings fines not exceeding 1 % of their total turnover in the preceding business year where they intentionally or through gross negligence:</p> <p>(a) supply incorrect or misleading information in response to a request made pursuant to Article 6(2);</p> <p>(b) supply incorrect, incomplete or misleading information in response to a decision adopted pursuant to Article 6(3) or do not supply the information within the prescribed time limit.</p>	<p>The Commission may, by decision, <u>and</u> where deemed necessary and proportionate, impose on undertakings or association of undertakings fines not exceeding 1 % of their total turnover in the preceding business year where they intentionally or through gross negligence:</p> <p>(a) supply incorrect or misleading information in response to a request made pursuant to Article 6(2);</p> <p>(b) supply incorrect, incomplete or misleading information in response to a decision adopted pursuant to Article 6(3) or do not supply the information within the prescribed time limit.</p>	<p>While we are advocating voluntary participation in the SMIT, we accept that if companies do choose to participate, then the information provided should be correct and does not mislead.</p> <p>The additional “and” is a technical clarification to show that the imposition of the fines should be necessary and proportionate, not the Commission decision itself.</p> <p>Regarding the deletion of point (b), since we do not support the idea of a mandatory SMIT, the decision pursuant to Art 6.3 is superfluous.</p> <p>We suggest Arts 9, 10, 11, 12, 13 be amended to reflect our suggested change in Art 9.1</p>
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