

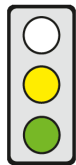
“INVESTIGATIVE TOOL” FOR THE INTERNAL MARKET

cepPolicyBrief No. 2017-18

KEY ISSUES

Objective of the Regulation: The Commission will be empowered to require undertakings to provide information in order to facilitate better enforcement of EU law and the preparation of legislative measures.

Affected parties: Undertakings, federations and similar associations of undertakings.



Pro: Breaches of internal market rules by Member States will be easier to detect and to prove. The internal market will be strengthened.

Contra: It is unclear whether the Commission is also permitted to supply information to Member States in order for them to take action against undertakings that are in breach of EU law, and also whether confidential information is sufficiently protected.

CONTENT

Title

Proposal COM(2017) 257 of 2 May 2017 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

Brief Summary

► Context and objectives

- The Commission wants to introduce an “investigative tool”, directed at undertakings and associations of undertakings - particularly federations - (hereinafter “undertakings”), - whereby it can choose either (Art. 6 (1) para. 1)
 - to make a request for information to be provided voluntarily (“non-binding request for information”) or
 - to impose an obligation for information to be provided (“binding request for information”).
- This information may consist of regulatory restrictions or factual market data - such as cost structure, costs of cross-border transactions, pricing policy, geographical distribution of customers and suppliers (Recital 11).
- According to the Commission, the aim of the investigative tool is
 - to improve the enforcement of EU law by the Commission and the Member States (Recital 14) and
 - to improve existing laws or adopt new ones where internal market rules are not complied with due to inadequacies in European provisions (Recitals 12 and 14).
- According to the Commission, it is not the aim of the investigative tool
 - to pursue infringements of law - such as competition breaches - by the undertaking being asked for information (Recital 12),
 - to create new enforcement powers to enforce EU law (Recital 10).

► Requirements for binding and non-binding requests for information

- The Commission can obtain information from undertakings where
 - in the areas of internal market, agriculture and fisheries, transport, environment or energy (Art. 2)
 - “a serious difficulty with the application of Union law” jeopardises the attainment of an important Union objective (Art. 4),
 - the information available to the Commission is not sufficient for an investigation (Art. 5 (1)) and
 - the information cannot be obtained in a timely manner by other means - such as from a publicly available source or from the Member States (Art. 5 (1) (a) - (c)).
- The Commission
 - can only request information from small and medium-sized undertakings (Art. 3 (2) and (3) Directive 2013/34/EU) where the provision of information does not give rise to any “significant” costs (Art. 5 (3), para. 2, Recital 12) and
 - cannot request information from micro-enterprises (Art. 3 (1) Directive 2013/34/EU) at all unless they are part of a small group of undertakings (Art. 6 (1), para. 3).

► **Procedure for making a request for information and use of the information**

- In order to keep the costs for undertakings as low as possible, the Commission will
 - only request information that is likely to be at the undertaking's disposal (Recital 11) and
 - principally ask larger undertakings with a relevant market position to provide information (Art. 6 (1), para. 1, Recital 12).
- Prior to making a request for information, the Commission must provide Member States with a "summary" of (Art. 5 (2)),
 - the extent to which the requirements for making a request have been fulfilled (Art. 5 (2) (a), (c) and (d),
 - what information is to be requested (Art. 5 (2) (b)) and
 - which criteria were used to select the undertakings (Art. 5 (2) (e)).
- A request for information must in particular contain (Art. 6 (2) and (3)):
 - the purpose of the request for information,
 - a description of the information required,
 - a "proportionate" time limit within which to provide the information.
- The Commission can only use the information for the purpose for which it is requested (Art. 8, para. 1), i.e. not in cartel proceedings for example. This does not apply if the information is already public (Art. 8, para. 3).
- If the Commission uses the information received in infringement proceedings against a Member State for a breach of EU law, it must transmit the information to the accused Member State (Art. 7 (3), sentence 1).
- The costs of a request for information for the requested undertaking are estimated to be a maximum of € 8,400 [SWD(2017) 216].

► **Information obligation for undertakings and sanctions**

- The information transmitted must be clear, complete and accurate (Art. 7 (1)).
- The Commission may impose a fine of up to 1% of annual turnover where an undertaking intentionally or through gross negligence supplies incorrect or misleading information (Art. 9 (1) (a) and (b)).
- In the case of binding requests for information, the Commission can also impose
 - a fine of up to 1% of annual turnover where an undertaking intentionally or through gross negligence (Art. 9 (1) (a) and (b))
 - supplies incomplete information or
 - fails to supply the information within the prescribed time limit
 - a penalty not exceeding 5 % of the average daily turnover for each working day of delay (Art. 9 (2)).

► **Protection of confidential information**

- Undertakings may request that, for their protection, information be treated as confidential - i.e. not transmitted to third parties or made public ("disclosed") - (Art. 7 (2) para. 1).
- In this case, they must also transmit a non-confidential - e.g. redacted - version of the information (Art. 7 (2), para. 2).
- On the basis of an assessment, the Commission examines whether the confidentiality claim is well-founded (Art. 7 (4), para. 1).
- Where the Commission considers the claim to be unfounded, it may cease to treat the information as confidential after a period of at least one month (Art. 7 (4), para. 2).
- Where the Commission considers the claim to be justified, it will treat the information as confidential (Art. 16).
 - In principle, it can only disclose the non-confidential version of the submission - notably to an accused Member State in infringement proceedings (Art. 7 (3), sentence 2) - (Art. 8, para. 2).
 - Exceptionally, the Commission may disclose the confidential version if (Art. 8, para. 2 (a) - (c))
 - individual undertakings can no longer be identified due to anonymization or aggregation or
 - the undertaking has given consent or
 - disclosure to a Member State is necessary to substantiate an infringement of Union law and the undertaking has already had the opportunity to express its views and seek judicial remedies

► **Exceptional nature of the use of the investigative tool**

- The Commission expects that, per year, there will be about [SWD(2017) 217, p. 3]
 - four requests for information involving up to five undertakings and
 - one request for information involving up to 50 undertakings.
- The Commission will report to the Member States every two years on the application of the investigative tool (Art. 18). This will include an assessment of whether the investigative tool is being used too often (Recital 20).

Main Changes to the Status Quo

- ▶ Until now, the Commission has only been allowed to require undertakings to submit information in certain special cases – such as EU cartel law and the law on state aid. The Regulation extends this to include the areas of internal market, agriculture and fisheries, transport, environment and energy.
- ▶ Also new is the fact that the Commission can impose sanctions for the submission of false or misleading information in the case of a non-binding request for information.

Statement on Subsidiarity by the Commission

The uniform collection of comparable information from several Member States is easier at EU level than in the Member States. The information obtained enables more efficient enforcement of EU law which gives rise to added value for undertakings and authorities.

Policy Context

The proposal forms part of a package of measures to strengthen the internal market. This also contains a proposed Regulation for a Single Digital Gateway [COM(2017) 256] to facilitate administrative procedures in the Member States for people and businesses from other EU countries and an action plan for greater use of the SOLVIT system [COM(2017) 255] which mediates on the application of EU law in conflicts between authorities in Member States and people or businesses from other EU countries.

Legislative Procedure

2 May 2017	Adoption by the Commission
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union
Open	Entry into force

Options for Influencing the Political Process

Leading Directorate General:	DG Growth (Internal Market, Industry, Entrepreneurship and SMEs)
Leading Committee of the EP:	Internal Market and Consumer Protection (IMCO) Rapporteur: Eva Maydell
Leading Federal Ministry:	Economic Affairs and Energy
Committees of the German Bundestag:	Economic Affairs and Energy (leading)
Decision-making mode in the Council:	Qualified majority (acceptance by 55% of Member States which make up 65% of the EU population)

Formalities

Competence:	Art. 43 (2) (agriculture), Art. 91 and Art. 100 (transport), Art. 114 (internal market), Art. 192 (environment), Art. 194 (2) (energy), Art. 337 TFEU (collection of information by the Commission)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Procedure:	Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

The internal market continues to harbour numerous barriers. These result in less competition between undertakings which leads to higher prices and less choice for consumers. **If a Member State breaches internal market rules** – such as by passing laws discriminating against businesses from other EU countries, or failing to carry out proper public procurement procedures – **the Commission will, in future, in particular, with the aid of a binding request for information, be able to investigate this more easily and submit reliable evidence.** The latter is of particular relevance where infringements by Member States are heard in the context of infringement proceedings before the European Court of Justice (ECJ). **Thus the enforcement of EU law in the context of infringement proceedings will be improved.**

The internal market will also be strengthened where the instrument removes shortcomings in European laws detrimental to the internal market.

The scope of the investigative tool is very broadly worded. The possibility that the Commission will also use the tool to pursue other internal-market objectives, such as the prevention of price differentiations, cannot be excluded. In this case, there is a danger that the freedom to conduct a business will be restricted.

Impact on Efficiency and Individual Freedom of Choice

The fact that a request for information can only be made where the information required by the Commission is not available and cannot be obtained in good time by other means, protects the undertaking from unnecessary red

tape. Nevertheless, requests for information will result in costs for the affected undertakings. It remains to be seen whether the Commission's estimated upper limit of € 8,400 per undertaking and request is actually reliable. Sanctions, for undertakings that submit incomplete information or fail to comply with time limits, are necessary in order for the investigative tool to function.

The fact that undertakings can ask for the supplied information to be treated as confidential is essential because the information involved will, in some cases, be very sensitive, e.g. costs. On this basis, **it is questionable that, under certain circumstances, information can be published "exceptionally" – such as in aggregated form – because aggregating the information will not necessarily protect undertakings against a negative impact – e.g. on profit:** Where, due to publication, business partners or foreign competitors know the average costs of all the undertakings in a sector, this may impair the negotiating position of the affected undertakings or encourage foreign competitors to enter the market. In this case, however, the affected undertakings still have the possibility of bringing a claim before the EGC (Art. 263 (4) TFEU).

Impact on growth and employment

Negligible.

Impact on Europe as a business location

Negligible.

Legal Assessment

Legislative Competency

Effectively unproblematic.

Subsidiarity.

Unproblematic.

Proportionality with respect to Member States

Unproblematic.

Compatibility with EU Law in other Respects

Binding requests for information constitute intervention in the freedom to conduct a business protected under Art. 16 EU Charter of Fundamental Rights. They must be proportionate (Art. 51 (1) CFR). **Two clarifications are needed, in order to ensure the proportionality and thereby the lawfulness of binding requests for information:**

Firstly it is unclear to what precise purpose the Commission is permitted to collect and use information. Information may be collected and used with the aim of addressing a difficulty in the application of Union law. On the question of how exactly this is permitted to take place, however, the Recitals are contradictory. In addition to the Commission, the information is also supposed to help Member States to improve the enforcement of EU law (Recital 14). At the same time, however, the information is not meant to be used to prosecute undertakings (Recital 12). For Member States, though, the enforcement of EU law is only conceivable with respect to undertakings. Therefore **it is unclear whether the Commission is also permitted to supply information to Member States in order for them to take action against undertakings that are in breach of EU law. The latter would thus be forced, to incriminate themselves** with the information even if, at the time of the request for information they were not suspected of having committed a breach of the law. This would be disproportionate.

Secondly, it is unclear whether confidential information is sufficiently protected. In principle, the Commission can only disclose confidential information of an undertaking where the interest in access to the information outweighs the undertaking's interest in maintaining confidentiality (Art. 339 TFEU). The transmission of confidential information to a Member State as part of infringement proceedings for a breach of EU law by a Member State is possible (Art. 8, para. 2 (c)). This exemption from the duty of confidentiality is justified **because** Member States have a right to defend themselves and to have access to all incriminating information. What is problematic, however, is the fact that **a disclosure is also conceivable under the Transparency Regulation** [(EC) 1049/2001], which gives EU citizens and undertakings a right to access to Commission documents – including confidential ones. This right of access – also protected under primary law (Art. 15 (3) TFEU) – must be brought into line with the protection of confidential information under the Regulation. In this regard, access under the Transparency Regulation should, as far as possible, be excluded by the legislator.

Conclusion

If a Member State breaches internal market rules the Commission will, in future, be able to investigate this more easily and submit reliable evidence. Thus the enforcement of EU law in the context of infringement proceedings will be improved. It is questionable, however, that information can be published in aggregated form because aggregating the information will not necessarily protect undertakings against a negative impact – e.g. on profit. Two clarifications are needed, in order to ensure the lawfulness of binding requests for information. Firstly, it is unclear whether the Commission is also permitted to supply information to Member States in order for them to take action against undertakings that are in breach of EU law; this would force them to incriminate themselves. Secondly, it is unclear whether confidential information is sufficiently protected because disclosure under the Transparency Regulation is conceivable.