WIRTSCHAFTSKAMMER ÖSTERREICH

SINGLE MARKET – INFORMATION TOOL (SMIT)

Position Paper of the Austrian Economic Federal Chamber on the proposal of the European Parliament and the European Council on 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.

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General Information

The Austrian Federal Economic Chamber welcomes the efforts of the Commission to deepen the European Single Market, moreover, to develop and seize appropriate measures to ensure the smooth functioning of the Single Market.

Essential content of the Commission's proposal

In the draft regulation the Commission suggests a Single Market information tool to gather information directly from selected market participants.

In the case of serious market distortions, the Commission wants to inquire Single Market information with this tool, for example, about cost structures, price formation, profits, characteristics of goods and service, and about client and delivery relations. This should help better enforcing Single Market regulations and designing suggestions for political measures.

The Commission itself does not have the investigative power to enforce EU law in the Single Market area. The Commission's already existing investigative capacities currently only affect the competition law and the state aid law (see Council Regulations (EC) No 1/2003, (EC) No 139/2004, and (EU) 2015/1589). With this proposal the European Commission gives itself the power to ascertain information from directly chosen market participants.

This empowerment will affect all economic branches within the Single Market for which a common policy has been established by the Treaty on the Functioning of the European Union (TFEU). The draft regulation will be applied in the following areas: the Single Market, agriculture and fishery, traffic, environment and energy (Art. 2).

Microenterprises will be excluded from the proposal since it seems unlikely that they have relevant information.

If a business refuses to disclose information, the Commission can impose fines and penalty payments (Art. 19).

Competence

The Commission itself does not have investigative powers to enforce union law in the Single Market area. The regulations regarding the Single Market are implemented and carried out by the Member States. The introduction of such an instrument would change the competences set between the EU and the Member States, as stated in the treaties (see Art. 4 TFEU).

Despite the Commission's reasoning (p.3, explanatory memorandum), if the proposal is implemented it will create new enforcement powers for the Commission. The Commission will then have the authority to claim information (Art. 4) and impose fines and penalty payments if no information was delivered or the information given was wrong or deceptive

(Art. 9). We view the desired right of access and circumventing the national authorities very critical. Moreover, this desire is not compatible with the principles of subsidiarity and proportionality.

Our concerns regarding the proposed legal act

Area of application

The planned scope of the regulation goes further than announced in the Single Market Strategy.

In its Communication "Upgrading the Single Market: more opportunities for people and businesses" (COM (2015) 550 final) the Commission declared its wish to design a new market information tool which will help the Commission to better target its cooperation with the Member States, reinforce the basis for infringement action and also help determine where regulatory solutions are needed. If this is the true intention of the compliance package, we wonder why one has to act with the power of investigation and means of coercion based competition law against legal entities. It seems the new Single Market information tool uses the problem of artificial market segmentation to justify the necessity to gather information and conduct prosecutions. However, this can be done by the existing mechanism as well. In the case of antitrust and state aid proceedings, the Commission should take decisions in accordance with procedural law. This procedure is largely modelled on a national procedure in accordance with the law of the Member States. Hence, it cannot be compared to the Commission's role in the remaining Single Market law.

According to Article 4 of the proposal the Commission can request information from undertakings and associations of undertakings "where a serious difficulty with the application of Union law risks undermining the attainment of an important Union policy objective". The desired power violates the constitutionally given rights of the concerned legal entities. Apparently no misconduct that can be sanctioned has to be done to demand the right to information. Moreover, the undertakings concerned are not granted adequate legal protection. Since the Commission is able to achieve its legal objective even with milder interventions, we strongly reject direct access to companies through the Commission.

Conditions for the implementation

The draft regulation does not explain what kind of circumstances portray a serious difficulty when applying Union law (Art. 4) and would hence justify the application of the regulation. This definition needs to be clarified. We fear that the Commission might use such an imprecise provision disproportionally. We are convinced this provision is too broad and are, hence, critical of it.

Reporting and information requirement

The planned reporting and information requirement would create additional administrative and bureaucratic costs for enterprises and would not be consistent with the Commission's idea to cut red tape. The suggested regulation does not include any protective measures to avoid multiple reporting requirements. The obligation to report and the duty of disclosure for firms is already vast that we are convinced undertakings should not be burdened further by information requirements, which carry penalties. It would be better to improve and perfect already existing structures and ways of information.

The restriction that only available information has to be disclosed is very vague too. It does not state the costs involved in verifying what kind of information is actually available, furthermore, there are also costs involved in passing on the information. Even the Commission's impact assessment states that information has to be collected and the answers will have to be prepared. If answers have to be prepared, one can assume, the Commission has a broad definition of the "available information".

Confidentiality – legal security

One has to fear that due to such a procedure business and trade secrets will not be protected enough. Much of the company data listed in the draft regulation, which could be part of an information request, is extremely sensitive, actually so sensitive that even during legal proceedings they would be subject to special rules of file inspections for the protection of confidential company data. Even though the enterprises can state which information they rate as confidential, the Commission can decide whether it agrees with this opinion and whether it will make the information public or not. Since every undertaking and association of undertakings – even without misconduct (Art. 5) – could be subject to reveal business and trade secrets, and as they will not receive adequate legal protection, we strongly reject data collection claims in the planned form.

Selection of the target

The question is which selected market participants are addressed. A selective view like this might lead to distorted results.

Ultima ratio

Although according to the explanatory memorandum the proposed Single Market information tool will only be used as a means of last resort, this is not clearly stated within the draft regulation.

Fines and payment penalties

We are clearly against the Commission's proposed fines and penalty payments (Art. 9). The recommended amount of these fines (up to 1% of the annual turnover and up to 5% of the daily turnover) appears to be too high for the kind of misconduct.

Better enforcement of Single Market legislation instead of creating new legal instruments

In the case of Single Market problems, the Commission should, in our opinion, rely on existing instruments such as infringement proceedings or pilot procedures. The "REFIT program" can also make valuable contributions. With its impact assessments and the consideration of existing regulations it helps to limit changes in the legislation to the necessary and to grasp the legal situation.

Furthermore, the Commission has extensive opportunities for cross-border enforcements in various sectors. According to competition law the Commission can already screen companies and request information from them directly through an official competition procedure (see Regulation (EC) No 1/2003). There is no need to create a new act of law in this area. When it comes to the environment there are report requirements which are regulated in the environmental information directive and everyone, hence, also the Commission, has the right to request certain information. Also in other legal matters there already exist extensive report and registration obligations for undertakings according to Austrian law (eg. waste balance regulation, or end-of-life vehicle regulation).

Other issues

A central provision of the draft regulation seems to be Article 5 paragraph 2: prior to requesting information from undertakings and associations of undertakings it should adopt a decision in accordance with Article 6. This order should include a summarised description of the alleged serious difficulties […] and a justification why these difficulties jeopardise the attainment of an important Union policy objective. Interestingly enough, in the first paragraph of Article 6 it is stated that the Commission can also demand information from companies and their associations through a simple request. In the previous Article (Art. 5 paragraph 2) this is not mentioned. Hence, the Commission would have to reach a decision every time they demand information instead of only making a simple request. The directions of Article 5 paragraph 2 and Article 6 paragraph 1 are contradictory.

Furthermore, the second sentence of Article 7 paragraph 2 is incomprehensible: “The undertaking or association of undertakings submitting information […] shall clearly indicate which information it considers to be confidential, stating the reasons for such confidentiality claim, and provide the Commission with a separate non-confidential version of the submission.” However, a content is either confidential or not. If the content is confidential then only the information of the contents confidentiality may be conveyed and also the reasons for its confidentiality. However, it seems impossible to turn confidential information into a non-confidential one by still submitting the information.

Conclusion

To conclude, the Commission should use its already existing powers instead of creating problematic information requirements with new regulations and thereby causing additional costs for European enterprises. We also view the fact that the present proposal disregards the division of competences between the Union and the Member States as very critical.

Moreover, in our opinion, the proposal violates the objective cutting red tape, which is one of the Commission's main objectives.

Moreover, we consider the proposed right of enforcement by circumventing national authorities at the same time as being problematic and as being incompatible with the principles of subsidiarity and proportionality.

Contact

Vienna:
Tamara Achleitner
Austrian Federal Economic Chamber
Wiedner Hauptstraße 63
1045 Vienna
Tel: +43 5 90 900 4593
E-Mail: tamara.achleitner@wko.at

Brussels:
Barbara Dallinger
Austrian Federal Economic Chamber
Permanent Representation of Austria to the EU
Avenue de Cortenbergh 30
1040 Brussels
Tel.: +32 2 286 58 80
E-Mail : barbara.dallinger@eu.austria.be

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