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FIEC position paper

20.11.2017

# European Commission's proposal of 2<sup>nd</sup> May 2017 for a Regulation 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 – « SMIT »

## ■ General comments

FIEC supports the stronger enforcement of EU Single Market rules and understands the added-value, for the European Commission, to receive reliable data from market players to make sure that EU rules are properly enforced by Member States.

**However, FIEC believes that the proposal for a "Single Market Information Tool" is NOT the right approach to achieve this goal.**

The European or national public authorities can request confidential information from firms. However, extra (unjustified) inquiries on top of existing reporting obligations are a burden and therefore a cost on companies. Already today, the efforts required to satisfy the requests of public bodies for information of all kind is considerable and should be reduced, not increased.

In particular, the SMIT could lead to unacceptable risks regarding highly sensitive business information (i.e. cost structure, pricing policy, etc.) without clear justification or explanation as to how the European Commission intends to use this information.

Companies should not be made responsible for supplying the Commission with generic market data, when the real reason behind single market fragmentation is predominantly insufficient Member States accountability in the implementation and application of EU legislation.

Through comprehensive public consultations, targeted surveys, the REFIT exercises, stakeholder events, commissioned studies and reports, EUROSTAT and direct contacts with market players, the Commission already has access to a wide variety of detailed information which is useful to address remaining obstacles to free movement and thoroughly prepare new initiatives.

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Valuable information can also be collected from companies that provide their information to business portals such as Points of Single Contact, Product Contact Points, the (to be set up) Digital Single Gateway, the Enterprise Europe Network or even via SOLVIT.

Moreover, Member States should be more helpful and comprehensive in sharing national market information with the Commission, such as the information collected through TRIS (notification procedure for national technical regulations) or the Internal Market Information (IMI) system. This might be an additional source of information to help paint a detailed bigger picture.

On the contrary, if companies supply the data requested by the Commission, but the companies in question do not have sufficient knowledge about the host market, the Commission may propose legislative action based on incorrect and misleading data.

- ⇒ **In conclusion, the proposal for a Single Market Information Tool (SMIT) is not the right approach and should be profoundly reconsidered, or otherwise fully rejected.**
- ⇒ **The "condition sine qua non" is that companies provide the requested information on a VOLUNTARY basis. In particular, companies should NEVER be OBLIGED to provide such commercially sensitive and confidential information.**
- ⇒ **Consequently, the SMIT should neither place sanctions on companies who do not submit information, nor on those who submit – involuntarily – incorrect, incomplete or late information. The spirit of information sharing should remain cooperative.**

## ■ Specific comments on the Explanatory Memorandum

FIEC disagrees with the following statement: "*This proposal does not aim at creating new enforcement powers for the Commission (...)*" (page 2). On the contrary, we are convinced that this proposal DOES create new enforcement powers for the Commission in numerous new areas, while it is now restricted to very specific areas (i.e. competition cases).

FIEC cannot accept the following paragraph: "*The proposal allows the Commission to impose penalties on undertakings or associations of undertakings (...). Any Commission decision imposing penalties would be subject to judicial review.*" (page 5). We are convinced that the compulsory character of the procedure and the imposition of penalties are not proportional to the goals. This is why we ask to delete the entire Chapter III (articles 9 to 13) of the proposal (see proposed amendments here below).

Last but not least, we would like to recall that the Legal Service of the Council is of the opinion that the present proposal cannot be validly based on any of the legal bases cited by the Commission<sup>1</sup>.

<sup>1</sup> Opinion of the Legal Service 12820/17 dated 3<sup>rd</sup> October 2017

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## ■ FIEC amendments' proposals

### Amendment 1:

#### Proposal for a Regulation Recital 11

<i>Text proposed by the Commission</i>	<i>Amendment</i>
<p>For this investigative tool to be effective, the information sought should relate to the application of relevant Union law. <b>This may consist, for example, of factual market data, including cost structure, pricing policy, products or services characteristics or geographical distribution of customers and suppliers. It may also consist of undertakings' or associations of undertakings' fact-based analysis of the functioning of the internal market, such as in relation to perceived regulatory and entry barriers or to costs of cross-border operations.</b> In order to minimise costs of replying to requests for information, such requests should only cover information that is likely to be at the disposal of the undertaking or association of undertakings concerned.</p>	<p>For this investigative tool to be effective, the information sought should relate to the application of relevant Union law. In order to minimise costs of replying to requests for information, such requests should only cover information that is likely to be at the disposal of the undertaking or association of undertakings concerned.</p>

### Amendment 2:

#### Proposal for a Regulation Recital 12

<i>Text proposed by the Commission</i>	<i>Amendment</i>
<p>(...) environment and energy. <b>Their aim is not to prosecute undertakings for the underpinning behaviour, if any. Accordingly, sanctions provided for in the instrument are designed to address exclusively two instances. They only cover an intentional or through gross negligence lack of a response to a request for information and an intentionally or through gross negligence</b></p>	<p>(...) environment and energy. The collected information (...)</p>

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<p><b>incorrect, incomplete, or misleading reply.</b> The collected information (...)</p>	
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**Amendment 3:**

**Proposal for a Regulation  
Recital 15**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
<p><b>The Commission should be able to enforce compliance with the requests for information it addresses to any undertaking or association of undertakings, as appropriate, by means of proportionate fines and periodic penalty payments imposed by way of decision. In setting the amounts of fines and periodic penalty payments, the Commission should take due account of the principle of proportionality (including the aspects of appropriateness), in particular as regards small and medium-sized undertakings. The rights of the parties requested to provide information should be safeguarded by giving them the opportunity to make known their views before any decision imposing fines or periodic penalty payments is taken.</b></p>	<p><b>DELETED</b></p>

**Amendment 4:**

**Proposal for a Regulation  
Recital 16**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
<p><b>Taking due account of the principle of proportionality (including the aspects of appropriateness), the Commission should be able to reduce the periodic penalty payments or waive them entirely, when addressees of requests provide the information requested, albeit after the expiry of the deadline. For reasons of legal certainty, it is also</b></p>	<p><b>DELETED</b></p>

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<b>appropriate to provide for limitation periods for the imposition and enforcement of fines and periodic penalty payments.</b>	
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**Amendment 5:**

**Proposal for a Regulation  
Recital 17**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
<b>The Court of Justice should, in accordance with Article 261 TFEU, have unlimited jurisdiction in respect of decisions by which the Commission imposes fines or periodic penalty payments under this Regulation, which means that it may cancel, reduce or increase the fine or periodic penalty payment imposed by the Commission.</b>	<b>DELETED</b>

**Amendment 6:**

**Proposal for a Regulation  
Article 5 – paragraph 3 – 1<sup>st</sup> sentence**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
The undertakings or association of undertakings concerned by the request as referred to in Article 4 <b>are obliged to</b> provide <b>only</b> information that is at their disposal.	The undertakings or association of undertakings concerned by the request as referred to in Article 4 provide information that is at their disposal <b>on a voluntary basis</b> .

**Amendment 7:**

**Proposal for a Regulation  
Article 6 – paragraph 2**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
The simple request referred to in paragraph 1 shall state the legal basis and its purpose, specify what information is required and	The simple request referred to in paragraph 1 shall state the legal basis and its purpose, specify what information is required and

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<p>prescribe a proportionate time limit within which the information is to be provided. <b>It shall also refer to the fines provided for in Article 9(1) for supplying incorrect or misleading information.</b></p>	<p>prescribe a proportionate time limit within which the information is to be provided.</p>
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**Amendment 8:**

**Proposal for a Regulation  
 Article 6 – paragraph 3**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
<p>The decision referred to in paragraph 1 shall state the legal basis, the purpose of the request, specify what information is required and prescribe a proportionate time limit within which the information is to be provided. <b>It shall also indicate the fines provided for in Article 9(1) and the periodic penalties payments provided for in Article 9(2), as appropriate.</b>            (...)</p>	<p>The decision referred to in paragraph 1 shall state the legal basis, the purpose of the request, specify what information is required and prescribe a proportionate time limit within which the information is to be provided.</p>

**Amendment 9:**

**Proposal for a Regulation  
 Article 7 – paragraph 1a (new)**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
	<p><b>The undertakings or associations of undertakings provide the requested information to the Commission on a voluntary basis.</b></p>

**Amendment 10:**

**Proposal for a Regulation  
 Article 7 paragraph 2**

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<i>Text proposed by the Commission</i>	<i>Amendment</i>
<p><b>The Commission shall give the addressee the opportunity to indicate which information it considers to be covered by the obligation of professional secrecy.</b> The undertaking or association of undertakings submitting information pursuant to Article 5 shall clearly indicate which information it considers to be confidential <b>stating the reasons for such confidentiality claim</b>, and provide the Commission with a separate non-confidential version of the submission. When information is to be provided by a certain deadline, the same deadline shall apply for providing the non-confidential version.</p>	<p>The undertaking or association of undertakings <b>voluntarily</b> submitting <b>confidential</b> information pursuant to Article 5 shall clearly indicate which information it considers to be confidential and provide the Commission with a separate non-confidential version of the submission. When information is to be provided by a certain deadline, the same deadline shall apply for providing the non-confidential version.</p>

**Amendment 11:**

**Proposal for a Regulation  
Article 7 – paragraph 4**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
<p><b>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.</b> <b>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.</b> <b>That decision shall be notified to the undertaking or association of undertakings concerned without delay.</b></p>	<p><b>DELETED</b></p>

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## Amendment 12:

### Proposal for a Regulation Article 8 – point (c)

<i>Text proposed by the Commission</i>	<i>Amendment</i>
<p><b>where the disclosure of such information to a Member State is necessary to substantiate an infringement of Union law within the scope of this Regulation provided that the respondent has had the opportunity to make his views known before a decision is taken and to make use of available judicial remedies before disclosure.</b></p>	<p><b>DELETED</b></p>

## Amendment 13:

### Proposal for a Regulation Article 8 – last sentence

<i>Text proposed by the Commission</i>	<i>Amendment</i>
<p><b>The information that has already been made public may be used by the Commission for a purpose other than the one set out in this Regulation.</b></p>	<p><b>DELETED</b></p>

## Amendment 14:

### Proposal for a Regulation Chapter III

<i>Text proposed by the Commission</i>	<i>Amendment</i>
<p><b>Chapter III Fines and periodic penalty payments</b></p>	<p><b>Full Chapter deleted</b></p>