Registration No. 1771817758-48

BDI

Law, Competition and Consumer Policy

Position paper

on the Commission's consultation on the envisaged Single Market Information Tool

Document No.
D 0820
English version

Date
3 November 2016

First of all, we are grateful for the opportunity to take a position in the framework of the consultation on the envisaged Single Market Information Tool. Since some of the questions in the consultation paper (e.g. relating to corporate strategy, profit and price formation) are more geared to responses from individual companies but since the information tool also relates very strongly to companies in their totality, we summarise our position on the consultation on the following pages.

BDI acts as a coordinating confederation of 36 German sectoral umbrella federations as well as numerous subsidiary associations from all areas of industry and industrial services. In this way, it represents around 100,000 companies from virtually all sectors. These include not only large but also small and medium-sized enterprises, which play a particularly important role in the German economy.

I. Broadly firm support for the Commission's activities to deepen the single market and combat practices incompatible with the single market

BDI broadly welcomes the Commission's efforts to intensify the single market and to combat practices which violate European law or are incompatible with the single market, in particular also via the route of treaty infringement procedures. This applies with a view to a number of important single market issues and certain still occurring rule infringements, for instance in the area of civil and military public procurement. Inasmuch, we have always expressly supported the Commission's activities to combat illegal direct awards in civil procurement as well as in cases of unjustified recourse to the derogation contained in article 346 TFEU (formerly article 296 TEC).

Furthermore, for instance, BDI also continues to support the EU remedies directives implemented by the Commission years ago. They also make an important contribution to correction of infringements against single market rules in this sector and should therefore be maintained essentially unchanged (see also the BDI position on the Commission's recent consultation on the EU remedies directives).

Federation of German Industries
Member Association of BUSINESSEUROPE

Phone Contacts
T: +493020281412
F: +3227921093

Internet
www.bdi.eu

E-Mail
C.Mueller@bdi.eu
P.Schaefer@bdi.eu

II. Appeal against unduly extensive direct information requests despite explicit commitment to the single market

Nevertheless, notwithstanding the above, we have extremely serious misgivings about the envisaged Single Market Information Tool insofar as extensive powers for direct collection of sensitive company data are under consideration.

1. Envisaged information and data collection requests unacceptable due to very high need for protection or sensitivity of data

Many of the possible objects of data collection mentioned in the consultation are so "sensitive" that, with good reason, they would be subject to special access rules for protection as confidential data, even in formal court procedures. Even in the extensive provisions of freedom of information laws as well as in the recently adopted directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets), the legitimate protection of undisclosed know-how and trade secrets is recognised and there are provisions on the protection of business and trade secrets whereby general access to such information is not possible without conditions. The possibility of gaining access to such sensitive company data would also be unacceptable in light of the protection of business and trade secrets on the basis of articles 15 and 16 of the European Union's Charter of Fundamental Rights as well as constitutional provisions that exist in the Member States – such as articles 12 and 14 of the German constitution (German Basic Law). In light of the above, we also deem the options for action outlined in the inception impact assessment as a whole to be inappropriate.

2. Concept of a "serious single market distortion" considerably too vague as a precondition for problematic information and data collection requests

By contrast, it would not be reasonable to create extensive direct information requests vis-à-vis companies on the basis of a fairly general unspecified concept of a "serious distortion" of the single market. In particular, it would be unacceptable to provide for direct access to the sensitive company data mentioned in the consultation insofar as the investigation is only generally about "serious single market distortions" and there is no substance for reproaching the company with having being involved in a violation of single market provisions in the area for which the information is being collected.

3. Mandatory information and data collection requests unacceptable

The intention of overcoming distortions in the single market is welcome but must not justify any general, mandatory direct information request vis-à-vis companies. A general situation of a single market distortion – even serious – does not justify any general encroachment into the important principle that sensitive business and trade secrets should be protected; because such secrets are essential not only to preserve

companies' rights but also fair competition, growth and prosperity in the EU as a whole.

4. Cautious positioning on the possible content of information and data collection requests mentioned in the consultation

In light of all the above viewpoints, it is mentioned only by way of caution that the creation of a general mandatory information request, above all regarding the following content set out in the consultation such as

- cost information not contained in financial reports,
- business strategy (e.g. pricing policy),
- costs of cross-border operations,
- ownership structure,
- employment contracts,
- contract details and relations with suppliers or other business partners, and
- product characteristics and production processes

does not seem acceptable.

Under no circumstances should any information on

- turnover, volume or profit,

as also addressed by the Commission, be requested from a company on a mandatory basis if the company is not obliged to publish these figures under the legal order.

5. More coherence with existing instruments and use of information already available instead of problematic new requests

On the above-mentioned aspects and generally, the Commission should ensure stronger coherence with existing legislative acts and legislative initiatives and protect companies against double reporting. Instead of considering extensive direct information requests vis-à-vis companies, it should be remembered that numerous instructive reports and figures are already available on the basis of existing legislative provisions and reporting obligations, e.g. company reports of listed companies, etc. The observation that information about the transposition and application of EU law by the Member States might not be available does not justify any direct information requests vis-à-vis companies.

Thus, turnover, profit, nature of activities, geographical location and employee numbers already have to be disclosed on a country-by-country basis for credit institutions and investment firms as specified in article 89 of directive 2013/36/EU. Furthermore, a corresponding legislative initiative (COM(2016) 198 final) on country-by-country disclosure of the above and further information for multinational enterprises with a turnover of more than € 750 million is currently going through the legislative procedure. Following adoption of the legislative act, this information would be available in companies' annual reports.

In addition, Germany also plans to introduce an obligation to report on main risks in the supply chain when it transposes directive 2014/95/EU. This information should also be made accessible in the company's annual report and hence partially covers the above-mentioned criteria.

Moreover, the Member States are currently transposing the fourth anti-money-laundering directive (EU) 2015/849 under which Member States will have to put in place a central notification point and a register to prevent, uncover and effectively combat money laundering and terrorist financing. Companies or other legal persons are obliged to file appropriate, accurate and up-to-date information on their economic owners, including precise information about the economic interest, to the competent authorities and notification points for inclusion in the register. Furthermore, it is proposed by the European Commission in a recent revision of the fourth anti-money-laundering directive that there should also be public access to certain essential information on the economic owners of companies and trusts stored in registers.

In the first line, the Member States are responsible for the enforcement of single market law. Since they already have access to the corresponding information on companies, as set out above for instance, companies should not be burdened with a further double reporting obligation.

6. Unacceptable bureaucratic additional effort for companies

Apart from the conflicting fundamental legal aspects of protection of business and trade secrets, the envisaged information requests would also burden the companies affected with further considerable bureaucratic effort, which would also be unacceptable. For example, practical experience has shown that the efforts made by companies for individual state information requests, for example in the framework of sectoral antitrust investigations in the area of e-commerce, have sometimes proven to be extremely high and burdensome, which runs clearly counter to the generally strongly highlighted efforts to dismantle bureaucratic burdens on companies.

7. Instrument not suitable even in case of confidential treatment of data or data collection only in special circumstances

The creation of a general, mandatory information request is also inappropriate insofar as there is a prospect of confidential treatment of data. Despite the intention of handling data confidentially, an unacceptable risk of unauthorised access to data or data espionage would arise given the extraordinary sensitivity of these data. This could result in extremely serious and, in some circumstances, existence-threatening disadvantages for the companies in question. Inasmuch, reference is also made to the comprehensive data protection requirements in the general data protection regulation (EU) 2016/679 which has recently entered into force, for instance with a view to the criterion of employment contracts or contract design.

Lastly, the restriction that information would be collected from companies not as a matter of routine but only in special circumstances

does nothing to change the highly problematic classification of direct information requests for sensitive company data. Because even a merely occasional survey of sensitive company data seems unacceptable with a view to the necessary protection of these data and potential dangers of disclosing this information. Moreover, with the envisaged information requests, it would clearly not only be companies assumed to be involved in a "distortion of the single market" which would be obliged to provide information but also other companies such as competitors, suppliers and customers of those companies in order for an assessment to be made. This also sheds a very considerably different light on the Commission's appraisal that data collection "only in special circumstances" is not problematic.

8. Existing instruments should be used consistently

Existing mechanisms already enable the Commission to enforce EU law, which means the additional introduction of a Single Market Information Tool seems inappropriate. In this connection, alongside the particularly important instrument of the Treaty infringement procedure also the REFIT programme can provide valuable contributions. With its impact analyses and the consideration of existing provisions, it helps to limit changes in the legislation to a minimum and to chart the legislative situation on the ground. In this way, the Commission collects valuable analyses on the application of EU law – also from academia and stakeholders.

Reference should therefore also be made to the obligation of the EU institutions Commission, Council and European Parliament to work in the framework of the inter-institutional agreement on better regulation to ensure that the Member States cooperate with the Commission on collection of the information and data needed for monitoring and evaluating the transposition of Union law.

Further, the sector-specific inquiry mechanism of the antitrust regulation (EC) no. 1/2003 already exists. Under this mechanism, the Commission already has the possibility to investigate whether trade between the Member States, price developments or other circumstances show that competition is distorted in special economic areas (or, in special cases, across sectors). In this connection, the Commission can already request information from economic players.

With the intended Single Market Information Tool, the problem of artificial market segmentation is clearly being used to justify the need for information procurement and prosecution measures. Nevertheless, this is clearly a question of competition law, for which the existing mechanism is sufficient.

It follows from all the above aspects that the Commission should make full and consistent use of the existing possibilities instead of creating extremely problematic general information requests with new provisions and at the same time causing additional effort and costs for European companies.

III. BDI position on a further strengthening of the single market and enforcement of single market law

In BDI's view, the Commission should continue above all to work energetically to ensure that the Member States comply with their obligations to transpose and apply EU provisions. In the event of violations, it should react consistently with Treaty infringement procedures. Application of the Treaty infringement procedure instrument should not be reduced, since it also continues to constitute an important corrective alongside national jurisdiction.

Furthermore, the Commission should make sure that national legal protection is applied correctly insofar as it is rooted in EU provisions and serves for compliance with EU law. Specific misbehaviour by companies can be reprimanded respectively reviewed via the courts or competition authorities, taking into consideration the statutory provisions regulating access to documents. In our view, single market distortions can be countered very effectively if the said instruments are used systematically.

Conversely, as already set out, no general direct information requests from the Commission regarding highly sensitive company data should be created. This applies above all for the items listed under point II above.

IV. Willingness to participate in the ongoing discussion

BDI is willing to contribute constructively to the ongoing discussion on this theme. Whereas it has already been announced in the Commission's work programme 2017 with a relatively short time horizon, and given the extraordinary importance of the protected goods in question for European business and the critical risks highlighted, we very strongly urge the Commission in any event to carry out a very thorough and comprehensive evaluation of the consultation ahead of any further decision on the envisaged initiative.