EBSA
European Business Services Alliance

Position on Single Market Information Tool (SMIT)

1st of December 2017

Introduction

The enforcement of the Services Directive and rules of the internal market should be improved. The smooth flow of services inside the internal market has to some extent been established, but is in effect being undermined by protectionism. The way forward is to ensure a high level of enforcement and a level playing field for cross-border delivery of services. The European Business Services Alliance, EBSA, believes this is a matter for serious concern.

EBSA understands the Commission's intention in the new proposal for SMIT (COM(2017)257), but regrettably the tool appears to be entirely disproportionate. The proposal confers powers to the Commission which mirror its powers under EU competition law. There is, however, a fundamental difference between the two legal frameworks which is that under competition law the Commission has direct enforcement powers which do not exist under the single market framework.
It can be difficult to procure the necessary information to address breaches of internal market rules, but the Commission already has access to a host of relevant information on breaches that is currently not being addressed. Thus it seems disproportionate to require businesses (who have not breached the rules in questions) to deliver highly sensitive information under threat of massive penalties. These penalties apply not only for not replying to the Commissions requests but also for information that is inaccurate or may be deemed misleading.

Proportionality

The suggested tool and especially the proposed penalties seem disproportionate especially in the light of the very broad scope of the regulation.

The proposed regulation covers *"all economic sectors within the internal market for which TFEU has foreseen common policies…"* and *"the Commission may request undertakings and associations of undertakings to provide information required for the performance of tasks entrusted to the Commission"*. Reassurances have been issued by the Commission that the tool would be used rarely and in exceptional cases, but the actual legal text in no way ensures this. It is furthermore apparent from the impact assessment that the tools estimated use is 5 times a year.

The proposed sanctions are up to 1% of total turnover in the preceding year or up to 5% of the average daily turnover each day until the information is supplied. These fines are massive and appears entirely out of proportion with the stated goals – especially considering that the breaches that the information is targeted at, are perpetrated by Member states not businesses.

Administrative burden and safeguards

The requirement to supply sensitive information under threat of penalties furthermore places an administrative burden on businesses. It is continuously stated in the proposal that businesses would only

KCW
Mail:
kcw@servicealliance.eu

be required to deliver information that they are "capable of providing" and which is at "their disposal". It is not clear what this means in practice, but what is clear is that due to the large penalties for misleading information the companies in question would need legal assistance so ensure that these penalties would not be attributed to them at a later stage.

In addition to that it is unclear what extent of activity could be required of a business in terms of gathering the requested information – "at their disposal" is not a comforting phrase in this context.

For business-sensitive information the business could also be required to provide a "non-confidential" version of the confidential information that they would be required to supply. It is unclear how a business would provide a non-confidential version of confidential information, such at price-setting mechanisms and business strategies – and even if such can be achieved with aggregation of figures etc. it would place an additional administrative burden on businesses.

As regards safeguards that the Commission proposes to set in place to avoid the misuse of the tool (article 5 and 6), these are not sufficient. The text mainly provides that the requested information cannot be gathered in another way and that the businesses are not faced with disproportionate burdens. These factors, we assume, are always considered when the Commission conducts its duties. Furthermore, a series of Commission College decisions are envisioned before the tool can be activated (and fines can be levied). These does not provide any firm safeguards for businesses and are thus not appropriate in this context, even if they may serve to slow the process down.

Protection of business secrets or business sensitive information

The protection of business secrets are vital to any sector in the internal market and especially article 7(4) and 8(c) in the Commission's proposal gives rise to serious questions about the protection of this information.

Article 7(4) describes that information that the business states are sensitive can nevertheless be published anyways if the Commission (on its own accord) decides that the explanation for why something is sensitive is not "well-founded and proportionate". The decision can only be challenged at the ECJ. Article 8(c) states that information can be shared with a member state if it is needed to prove an infringement. This can be challenged only by "available judicial remedies".

It is thus plain that business have no assurance that their sensitive information will not be shared.

Lack of evidence

The proposal is not sufficiently evidenced. In the proposal itself footnote 21 (page 8) recounts the Regulatory Scrutiny Boards assessment of the proposal, which we do not believe have been sufficiently addressed:

> *"The report is still not sufficiently clear and sometimes inconsistent with regard to the scope of the initiative. In several places the report still presents the SMIT as a solution*

to general problems of data availability, or as a source of information for single market related policy purposes that do not stem from specific enforcement deficiencies, while it does not provide justification to do so. (2) The report makes clear that the tool would be of last resort, but it is not clear about safeguards or the conditions that might trigger investigations. (3) The main report still does not reflect clearly enough Member States' and business interests' respective views."

Recommendation for action

In light of the Juncker Commission's focus on better regulation and evidence-based policy EBSA recommends the following actions:

1. Withdraw the proposal, which places disproportionate administrative burdens and penalties on businesses as well as creates legal uncertainty.
2. Pursue a much more ambitious tightening of SOLVIT – so that challenges can be addressed through this system.
3. Resolve the current and coming cases in SOLVIT. This would attain the dual purpose of better enforcement of internal market rules and more willingness from stakeholders to supply information on possible breaches. Many cases (including obvious infringements) are closed as unresolved in the SOLVIT system.
4. Use the data currently available in SOLVIT actively.
5. Make sure the notification procedures currently under revision are tightened so that national rules breaching internal market rules can be addressed swiftly and decisively.

Conclusion

EBSA firmly believes in the internal market and that enforcement of the rules are of paramount importance. The proposal from the Commission on a Single Market Information Tool is however disproportionate – especially in combination with the lack of willingness to pursue existing cases. EBSA therefore would welcome a renewed focus on addressing the cases already known and building on the trust of businesses that their cases will be handled seriously and not just closed as unresolved. Businesses are the first to identify and deliver information on possible breaches of internal market rules and this should be encouraged through efficient follow-up and enforcement towards the infringing member states, not through placing administrative burdens under threat of massive fines on businesses that have not broken any of the rules in question.