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COMMISSION STAFF WORKING DOCUMENT

STAKEHOLDER CONSULTATION - SYNOPSIS REPORT

Accompanying the document

Proposal 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

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1. INTRODUCTION

This synopsis documents all the consultation activities accompanying the preparation of the proposal to introduce a Single Market Information Tool.

The public consultation on the proposal took place between 2 August and 7 November 2016. There were additional targeted consultations with the following business representatives in the course of 2016: BusinessEurope, EuroCommerce, UEAPME and PostEurop. The issue was also discussed with Member States during several working party meetings within the Council in 2015 and 2016.

The results of these consultations were used for the preparation of the proposal and accompanying impact assessment.

2. RESULTS OF THE PUBLIC CONSULTATIONS

The on-line public consultations for this initiative were announced on Your Voice in Europe¹, used EUSurvey as consultation tool and lasted for 14 weeks. They consisted of three dedicated questionnaires for citizens, firms and Member States available in three languages: German, English and French. Five replies came by mail as position papers only². Responses to public consultation are voluntary and represent only views of the respondents. Consequently they cannot be interpreted as representative in a statistical sense to the whole EU.

2.1. Description of respondents

Responses are classified based on self-identification by the respondent. By the end of the consultation period the Commission received 71 replies: 44 replies from firms (including 31 associations and 13 individual firms), sixteen replies from citizens (including four replies from organisations representing consumers, civil society, or non-governmental organisations in Greece, Italy, Portugal and Spain), and eleven replies from authorities representing ten Member States³ (including 9 national and 2 regional level). The replies came from 18 EU Member States, an EEA country and a non-European country. The geographical distribution of responses is depicted on Fig. 1.

Among the 13 individual firms who responded, four were micro, three small, two medium-sized and four large firms. All but the large firms came from Germany; the large firms came from Spain, France, Poland and Portugal. Five firms were in manufacturing, two firms in wholesale, two firms in transport, two firms in professional activities, one firm in administrative and one in information

¹ http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8899

² Numerical analysis of responses is based only on those that came via EUSurvey, position papers not following the questionnaire of the EUSurvey are used only for describing arguments presented by stakeholders and for description of respondents.

³ Two different authorities from one Member State replied, so there are only ten Member States represented in this consultations.

technology. Three out of four microenterprises exported to three other EU Member States, all small firms exported to from one to seven EU Member States, all but one medium-sized and large company exported to up to 26 other EU Member States.

Among the 31 associations, nine represent SMEs only (one with 1 million members, one with 450,000 members and the rest with less than 120,000 members), and 22 all kind of companies (one with 200,000 members, three with between 200,000 and 300,000 members, the rest below 20,000 members). Altogether the business associations responding represented more than 20 million firms. 22 associations act on behalf of businesses only in their own country, 2 were present in up to five countries, and 7 are pan-European.

28 business associations and 4 firms were registered in the EU Transparency Register⁴.

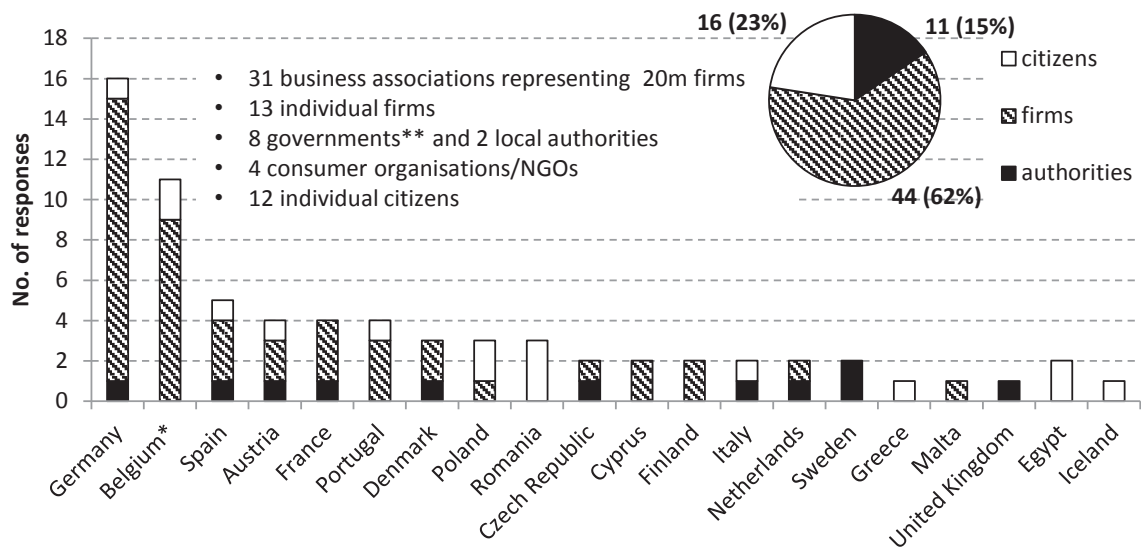


Fig. 1. Distribution of answers to public consultations by country and stakeholder type.
Note: * 9 EU wide business associations are located in Belgium; ** 2 replies from Sweden

2.2. Analysis of responses

2.2.1. Issues causing firms not to share information with authorities via general consultations

The majority (three quarters) of responding firms participated in some form of consultation launched by public authorities during the last five years. They were asked what type of questions they usually do not respond to. The remaining quarter of responding firms were asked hypothetically which information they would prefer not to provide if they were asked. Table 1 summarises the responses.

Table 1. Types of sensitive information asked in consultations

Information on	Those participating in consultations and asked for	Those without experience in consultations said that they
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⁴ <http://ec.europa.eu/transparencyregister/public/homePage.do>

	sensitive information*, said that such information was		would prefer not to provide information on the following**
	Provided	Not provided	
Cost not included in financial reports	0	5 (490,000)	4 (4)
Business strategy (e.g. pricing policy)	4 (90)	3 (480,000)	8 (8)
Turnover, volumes or profit	4 (8,000)	4 (460,000)	4 (4)
Ownership structure	4 (9,300)	2 (450,000)	1 (58)
Contract details and relations with suppliers or other business partners	1 (1)	3 (450,000)	3 (60)
Cross-border business (e.g. foreign branches or subsidiaries, costs of cross-border operations, direct cross-border provision of services)	7 (24,000)	4 (43,000)	5 (62)
Geographic location of headquarters, warehouses and distributors	5 (41,000)	1 (80)	0
Employment contracts and/or number of employees	4 (9,400)	2 (80)	0
Product characteristics and production process	2 (90)	2 (80)	6 (63)

Note: Numbers in brackets indicate no. of firms represented by respondent. Numbers of firm rounded to nearest thousand, hundreds or tens; * between 16 and 23 firms (36-52%) were not asked the above questions, and between 17-18 (40%) did not provide any answer; ** 2 (751) firms said none of the questions is problematic

Firms were not providing information mainly on unpublished costs, business strategy, turnover, volumes and profits, ownership structure and contract details with business partners. The answers from companies that have never participated in consultation activities were similar.

Subsequently, those respondents who did not provide the information requested by public authorities were asked for the reasons not to do so. Four respondents (representing 490,000 companies) said it would be **too costly to extract the information**; 3 respondents (representing 480,000 firms) were concerned that **information might leak and be used either by competitors or public authorities**; one respondent (representing 1,300 firms) was concerned that **information might be made public**. Similar reasons were given by those who have not yet participated in consultations (2 answers, representing 4 firms each).

2.2.2. Questions on breaches of EU rights, examples of information provided to solve the case and associated costs

A quarter of responding firms (11 answers, representing 770,000 firms) and almost half of the citizens (6 answers, including from 2 consumer organisations from Greece and Portugal) faced a situation of their rights arising from EU law (such as equal treatment, freedom of movement, etc.) not being respected in another Member State. For instance one EU association stated that its *'members face this on a daily basis. Frequently, Member States do not respect EU law, introduce national barriers/measures to establish or operate, or apply rules in a discriminatory way'*; other complaints related to public procurement and unfair practices in business relations between partners with different market power as well as geo-blocking. Citizens and consumer organisations were complaining about problems with price discrimination based on residence, different forms of geo-blocking: restricted access to on-line audio-visual content while abroad, delivery of on-line purchases not possible to certain countries and problems with cross-border redress.

Forty percent of responding firms (18 answers, representing 380,000 firms) and 30 percent of citizens (four individuals) did not encounter such situation, the rest either provided no answer or did not know.

In case of breach of EU law, firms complained either directly to those who violated their rights (six answers), to the European Commission or to the European Parliament (seven answers), to authorities in concerned Member State (five answers) or at home (four answers). In five cases (representing 100 firms) respondents were asked to submit additional information to public authorities to solve the issue, in four cases the information was confidential, and two respondents (representing 80 firms) did not provide it in all cases. Confidential information concerned mainly business strategy, contract details, ownership structure, cross-border operations and turnover (three answers each, representing 80 firms). Respondents compiled the requested information using their own records, but also needed to contact business partners. Legal and accounting firms were contracted by three respondents (representing 100 firms) to prepare the information.

Regarding the cost of preparation of a reply, an association said that *'[t]hese information requirements are too burdensome and confusing for most companies, especially the SMEs'*, and that the cost is case-specific and varies. An individual firm estimated that time to prepare information in one case was around 30 man-hours (but cautioned that the figure is low as information was already prepared for another case) and estimated the cost of external firm advice at around EUR4,000 per reply.

Five respondents (representing 180 firms) and 2 consumer organisations reported that the problem was not resolved. When asked why, they pointed either to firms from other Member States or national authorities not cooperating; one association explained that *'[t]he European Commission did not act against the Member State or the process took so long that our members had no other choice than to adapt to the situation. The Member State did not provide information, flawed or incomplete information, did not respect deadlines to reply or simply chose to ignore EU law'*; another respondent said that the process was *'too costly or too complex to engage'*; one respondent firm said that EU institutions were not interested to follow the case.

2.2.3. Conditions making firms more willing to share sensitive information with authorities

Subsequently, firms were asked to identify the conditions necessary to increase their willingness to provide information to authorities in order to solve cases of breach of EU rights (Table. 2).

Table 2. Conditions necessary for firms to provide confidential information to the authorities

Condition	Absolutely essential	Very important	Of average importance	Of little importance	Not important at all
Information would remain confidential	59% (26, 1.4m)	20% (9, 7k)	7% (3, 170)	0	0
Information would be used only for the purpose of the investigation	50% (22, 1.2m)	25% (11, 12k)	7% (3, 380)	2% (1, 1)	0
My participation would not be disclosed	41% (18, 1m)	16% (7, 300k)	18% (8, 47k)	5% (2, 90)	7% (3, 300)
I would not be asked for information on a regular basis	41% (18, 1.4m)	23% (10, 25k)	16% (7, 7k)	5% (2, 2)	2% (1, 300)
Required information would be easy to extract and compile	43% (19, 1.1m)	27% (12, 23k)	11% (5, 220k)	2% (1, 1)	0
Public authorities could not acquire the information via other channels (e.g. consultations, studies, etc.)	41% (18, 1.2m)	27% (12, 230k)	11% (5, 470)	5% (2, 1.3k)	2% (1, 1)

Legend: % of all firm answers (number of answers, number of firms represented by respondents), numbers rounded

Firms are overwhelmingly of the opinion that information should remain confidential, be used only for the purpose for which it was collected, individual firms participation should not be disclosed, information should be easy to extract and compile and should be asked only if not available elsewhere.

Respondents stressed the need for a strong legal framework for any tool allowing the Commission to request market information from firms. Such tool would need to guarantee at least confidentiality, proportionality, neutrality, non-discrimination, a level playing field and a possible right of appeal. Among other concerns, limiting the burden on companies was often raised, as well as not requesting information that is in possession of another public authority. Secure systems for data storage that should protect business secrets from leakage or data hacking were prominent as well as calls to clarify how long the data would be kept, who would have access and who would own it. Firms were also concerned about small concentrated markets where the identification of respondent could be possible even despite anonymizing the replies. Several companies were advocating only voluntary participation in data requests. It was suggested that companies would be more willing to provide information if reassured that it would not be used against them by national authorities; otherwise legal assistance would be necessary to prepare their answers, increasing the cost of replying. An association of small crafts asked for a simple, clear and targeted questionnaire that would be easy to answer to small firms. Another answer said that the cost might rise also when information is available to the respondent, but in different format than requested. Use of local organisations who could gather information and send aggregated responses was suggested. It was also stressed that business would be more willing to participate if the Commission could demonstrate that participation speeds up the resolution of market problems.

Were the above conditions secured, firms would be willing to provide all kinds of information to authorities, with most positive answers concerning information on: turnover, volumes, profits, geographical distribution, ownership, employment and cross-border business.

Table 3. Types of sensitive information firms would provide upon satisfying certain conditions

Turnover, volumes or profit	39% (17, 240k*)
Geographic location of headquarters, warehouses and distributors	37% (16, 690k*)
Ownership structure	32% (14, 700k*)
Employment contracts and/or number of employees	30% (13, 240k*)
Information on cross-border business (e.g. foreign branches or subsidiaries, costs of cross-border operations, direct cross-border provision of services)	27% (12, 230k*)
Business strategy (e.g. pricing policy)	18% (8, 2.4k)
Contract details and relations with suppliers or other business partners	16% (7, 10k)
Product characteristics and production process	14% (6, 8.4k)
Information on cost not included in financial reports	11% (5, 220k*)
None	18% (8, 180k)
Other	30% (13, 650k)

Legend: % of all firm answers (number of answers, number of firms represented by respondents), numbers rounded

* includes answer of a tax advisors association (around 220k firms)

In the 'other' category respondents suggested that information must be readily available in company records. It should not be requested several times by different governmental bodies. One association noted that the older information gets the less sensitive it becomes thus easier to provide. Others stressed that the type of information they could submit depend on the company type and case at

hand and cannot be determined in advance. There was also opposition to requesting sensitive information from companies and support for a voluntary approach.

2.2.4. What powers Member States currently have

Only three out of ten replying Member States reported having powers that allow them to ask market participants for information on an *ad hoc* basis: a United Kingdom authority reported being able to ask for information for the purpose of law enforcement (e.g. information on staff salaries); a regional authority in Spain reported having powers that allow it to collect information for the purpose of policy development; an authority in France reported having powers to ask for information for both the enforcement of existing rules and preparation of policy, but exclusively in the fields of competition and product safety, which are endowed by Union rules, and in taxation. Three Member States (the Czech Republic, the Netherlands and Sweden) and one local government in Germany indicated having no such powers.⁵

France reported having in certain cases powers to sanction firms for noncompliance with information requests and noted that in areas where sanctions are not possible firm participation is negatively impacted. The Spanish regional authority state that despite voluntary nature of its information requests the quality of data was not affected. Both Spanish and French authorities stated that they would be able to share information with the Commission; conversely the United Kingdom authority could not share such data.

Three authorities encountered a situation when lack of firm data limited their enforcement or legislative activity, while other three did not. One authority reported problems with obtaining data from companies located in another Member State, as either firms or foreign authorities did not cooperate. Another explained that lack of resources or time pressure could also explain why firm-level information is not gathered.

2.2.5. When a single market information tool should be used

In all three questionnaires the Commission asked when it should be possible to query companies for information. Most support in all categories of respondents concerned (1) solving breaches of EU rights of firms and citizens, followed by (2) prevention of future breaches.

As for the answers from authorities, three of those having national powers and one with no national power supported the first case (1), and two with national powers supported the second case (2). Two national authorities expressed their preference for the Commission to coordinate information requests; two opted for direct power to ask firms in any Member State without involvement of the Commission. Two authorities with no national powers said that public authorities should never ask firms for sensitive information.

All four responding consumer organisations supported the first case (1) and two supported as well the second (2).

⁵ Additionally a Danish business association (non-governmental) in their reply informed that the Danish government has powers to request sensitive firm data when investigating potential rule breaking

Table 4. In which cases public authorities could ask firms for sensitive information

	Firms	Authorities	Citizens
(1) When the information is crucial for resolving a breach of consumers' or firms' EU rights (such as equal treatment, freedom of movement, provision of services, establishment, and other situations with a strong cross-border context)	41% (18, 250k)	40% (4)	69% (11)
(2) When the information is crucial for preventing future breaches of consumers' or firms' EU rights by reviewing existing or preparing new EU rules	18% (8, 26k)	20% (2)	31% (5)
Never	14% (6, 340k)	33% (3)	19% (3)
Other	32% (14, 1.2m)	0	0

Legend: % of all answers in a given respondent category (number of answers, number of firms represented by respondents – in case of Firms), numbers rounded

Note: 'No answer' not shown

In case of firms, the 'other' category included limitation only to cases of breach of competition law, and calls for more cooperation with companies on concrete cases. One association suggested that it should be used when quick Commission action could prevent damage to consumers and businesses or prevent persistent breaches of EU law. Fears about administrative burden creation or statements of opposition to granting such powers to authorities were also aired.

Thirteen firms additionally sent position papers. They argued that Member States rather than companies are creating most of the barriers in the single market⁶. Eleven expressed serious concerns about the introduction of a tool allowing the Commission to request market information from firms, calling it disproportionate, intrusive and causing administrative burden. Two remained neutral highlighting conditions necessary to make a possible market information tool as easy for companies as possible. It was pointed out that firms are already subject to a plethora of different formal reporting and informal requests which are increasingly costly to comply with, thus diverging resources from the core business. Hence, it was highlighted that any information requested should be readily available. Requests targeting SMEs should be proportionate to their capabilities. Commission was asked for no new regular reporting obligation and asked to reuse existing tools and sources of information (including competition tools, improved consultations, etc.) and avoid 'double reporting'. There were also calls for more cooperation and data exchange between institutions and Member states as well as for more cooperation with business organisations. The voluntary nature of any participation of companies was raised repeatedly, with strong opposition to any sanctions (both for non-submission and errors in submission). Also, the importance of securing legal certainty to participating firms was highlighted, including possibility for appeals and remedies. In case the tool is adopted it should be used very infrequently, after exhausting all other information sources and only for the purpose for which it was collected. The need to protect confidential business information with state-of-the-art systems was prominent. One respondent suggested outsourcing the collection of information to an independent and neutral entity. It was suggested that information could only be requested in cases of national administrative or criminal proceedings, only when there is suspicious of law being breached. Many respondents asked for clarification of when a market information tool would be used and which its added value would be in comparison to the existing tools. Others asked for clarification of the consequences of no-replying to requests for market information. One

⁶ One organisation explained that for instance geo-blocking exists because it is often the only way to operate in a fragmented single market.

respondent called for more transparency in firm reporting and electronic access to financial statements.

Position papers were also sent by national authorities. One supporting Member State called to use a possible market information tool to prioritise infringement cases. It also suggested that proportionate sanctions are necessary to ensure participation⁷. A few cautioned about excessive burden that could be minimised by e.g. high threshold for the Commission to launch a request for market information, such as College of Commissioners decision as well as offering different ways to reply (face-to-face, phone, e-survey). Calls for clarification when a possible market information tool could be used were also made. Advantages of collaboration with Member States in the data collection process were highlighted, including prior checking if national authorities already have the information to avoid double reporting. However, it was also noted that for the information gathering to be effective no Member State should be able to veto the request of the Commission. Another Member State asked to clarify how the information would be used, as well as to demonstrate why national authorities could not handle such requests themselves. It was also suggested that Member States are better placed to conduct such inquires and investigative powers in sector legislation could be extended. Those Member States against a possible market information tool for the Commission requested a thorough assessment of the actual need for such a tool, suggesting better use of existing information sources: annual accounts, national statistics, business registers, SOLVIT⁸, the Internal Market Information system (IMI)⁹, or REFIT¹⁰. They also found sanctions proportionate only in the event of potential rule-breaking by a company.

3. RESULTS OF THE TARGETED CONSULTATIONS

The Commission discussed a possible market information tool during bilateral meetings with several pan-European business organisations: BusinessEurope, EuroCommerce, UEAPME and PostEurop during the course of 2016 (all of these organisations are registered in the Transparency Register). All of them expressed their reservations, mainly due to the increase of administrative burden by yet another information request. One stressed that existing competition tools are sufficient and should not be extended. They pointed to the fact that even readily available information would have to be reworked before it is sent. Thus, they stressed that, if adopted, a possible market information tool should only be used on an exceptional basis. There were also fears about safeguards on the protection of commercially-sensitive data. One association stated based on experience with competition requests that preparation of additional non-confidential version of reply to Member States was extremely burdensome. The compulsory nature of the requests and the potential fines for not-replying or for providing misleading information were not welcome either. A need for appeal possibility against information request was also raised. One claimed that companies are willing to provide evidence of single market infringements by Member States to the Commission, but that

⁷ The reply stated: *'For SMIT to work companies must supply the information requested by the Commission. (...)If the Commission has been unable to ensure compliance by other means and they judge that obtaining the information is important enough then they should have the power to impose fines on companies for non-compliance.'*

⁸ http://ec.europa.eu/solvit/index_en.htm

⁹ http://ec.europa.eu/internal_market/imi-net/index_en.htm

¹⁰ http://ec.europa.eu/info/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less_en

companies are frustrated by no or slow reaction from the Commission to resolve breaches of single market rules.

A possible market information tool was also discussed in some meetings of the Council Working Party on Competitiveness and Growth in 2015 and 2016, as well as at the High Level Working Group on Competitiveness and Growth and during several bilateral meetings with individual Member States. National authorities were mainly interested in which conditions would need to be satisfied by the Commission to be able to launch requests for information to firms, who would collect the information, what the role of the Member States would be and whether data collected by the Commission would be shared with Member States, the administrative burden that such a tool would cause and the proportionality of any sanctions.

4. HOW THE RESULTS OF CONSULTATIONS WERE USED

The suggestions by stakeholders were taken on board in the preparation of the initiative on a market information tool. Notably the calls for sparse application of the tool and clarification when it would be used were translated into demanding ex-ante requirements – the market information tool would only be used for cases of high single market significance, the Commission would need to demonstrate that all sources of information available cannot provide the information at stake and approval by the College of Commissioners would be needed before launching requests for information. It has also been explained in the impact assessment why the existing tools, including the ones in the competition area, cannot deliver the kind of information at stake in the single market setting: EU law restricts the use of information collected under the competition rules to use by the Commission for competition purposes only; while other tools such as SOLVIT, IMI and REFIT do not collect the kind of firm-level information considered in this initiative. The aspect of protecting confidential information was strengthened by, among others, following state-of-the-art tools and procedure used in the competition enquires. On the controversial issue of sanctions for not replying, the proposal was made clearer showing that they act as an incentive to reply (not punishment for wrong behaviour), in practice are hardly ever used (based on experience of the competition cases) and will always be considered on a case-by-case basis. As from every Commission decision the appeal possibility to the Court of Justice of the European Union was explicitly highlighted. On administrative burden reduction, the proposal stressed that information should be easily available to firms, questionnaires should be clear and simple allowing for alternative ways to reply.

Feedback and concerns raised by the Member States have been taken into account in the design of the options, particularly with regard to the proportionality of an information tool, subsidiarity (most notably in terms of an appropriate role for the Member States), and measures to minimise the administrative burden for the replying firms.