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COMMISSION STAFF WORKING DOCUMENT

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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

{COM(2017) 257 final}
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LIST OF ABBREVIATIONS AND GLOSSARY OF TERMS

Term/abbreviation	*Explanation*
BEREC	Body of European Regulators for Electronic Communications
bn	Billion
B2B	Business-to-Business
CEBS	Committee of European Banking Supervisors
CIS	Community Innovation Survey
CJEU	Court of Justice of the European Union
CMA	Competition and Markets Authority
COM	The European Commission
CPC	Consumer Protection Cooperation (Regulation)
DG	Directorate-General
DG GROW	Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs
DSM	Digital Single Market
ECtHR	European Court of Human Rights
EBA	European Banking Authority
ECN	European Competition Network
EEA	European Economic Area
EIOPA	European Insurance and Occupational Pensions Authority
ESMA	European Securities and Markets Authority
EUIPO	European Union Intellectual Property Office
FRIBS	Framework Regulation Integrating Business Statistics
IMI	Internal Market Information system
Infringement	Breach of the EU acquis
IPR	Intellectual Property Right
m	Million
MIT	Market Investigation Tool used by the Commission in the State aid area
MS	Member State
NCA	National Competition Authorities
NSA	National Statistical Authorities
RSB	Regulatory Scrutiny Board
SBS	Structural Business Statistics
Single Market Strategy	Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Upgrading the Single Market: more opportunities for people and business', COM(2015)550, 28.10.2015
SME	Small and Medium-sized Enterprise(s)
SMIT	Single Market Information Tool
SRB	Single Resolution Board
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1. INTRODUCTION

While there has been considerable progress towards a more integrated single market in recent years, citizens and firms are frustrated that they still face obstacles to reaping its full benefits. In addition, they consider that these obstacles are not being addressed fast enough by the Commission, other Union institutions and the Member States. In the words of one stakeholder:

> *'The 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'*[1].

The Single Market Strategy adopted in October 2015 identifies that these barriers could be addressed more effectively and efficiently if the Commission and the Member States had access to timely, comprehensive, accurate, and reliable information. For this reason, the Strategy proposed a Single Market Information Tool (SMIT) to collect quantitative and qualitative information directly from selected market players.

> *'It [the Commission] will propose a regulatory initiative allowing it to collect reliable information directly from selected market players, with a view to safeguarding and improving the functioning of the single market'*[2].

When the Commission or Member States are alerted of an incidence of malfunctioning in the single market, evidence is necessary in order to proceed, particularly evidence in respect of whether the underlying cause is a breach of Union rules. Furthermore, sound information on the severity of the breach is required, of its impact on individuals or firms, and on how widespread the practices that cause the breach are at the geographical, sector, and product/service level.

Obtaining this information is challenging, particularly in cases with a cross-border dimension, for a number of reasons. Firstly, the required evidence is often detailed and sensitive firm-level information[3], which is not available publicly and cannot be purchased from third party data providers. Secondly, the required information is sometimes available to national authorities in only some Member States. Thirdly, the collected data is often not comparable across Member States.

Given these challenges, the market participants concerned would be the only feasible information source. Unfortunately, in most cases they currently lack the incentive to share their confidential information; and in addition there is no mechanism in place to ensure the veracity of any data that would ultimately be shared. At present, Union and national mechanisms for information collection are not sufficient to acquire this information from market players. At the national level, a large

[1] Submission of a European association of enterprises in reply to the public consultation (See Annex 2).
[2] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Upgrading the Single Market: more opportunities for people and business', COM(2015)550, 28.10.2015, p. 16. Hereinafter, the 'Single Market Strategy'.
[3] The required information depends on a particular enforcement case. For illustration purposes, such information could include factual market data (e.g. market size, geographical distribution of consumers and suppliers), firm data (e.g. cost structure, profits, pricing policy, volumes, actual levels of capital, composition of liabilities, new products, ownership structure or supply contracts, warehouses and distributors) or overall market functioning data (e.g. regulatory and entry barriers, costs of cross-border operations, growth rate of the market or overcapacity). For specific examples see Section 2.2.1.

majority of Member States have only sector-specific information collection powers, and these are generally ill-suited to request cross-border information or to share the information that is collected with the Commission or other Member States. At the Union level, the Commission has investigation powers only in the domain narrowly prescribed by competition law and trade defence policy[4]. In these domains, the existing powers help the Commission to be more precise in its economic assessments and enable it to adopt swifter and solid facts-based decisions. Nevertheless, Union rules on State aid, anti-competitive agreements, abuse of dominant position, or mergers address only a subset of all the possible instances of potential malfunctioning of the single market; and information collected using these investigation powers cannot be used for purposes other than the application of the competition rules of the Treaty.

This impact assessment analyses the need for intervention allowing the Commission, or the Commission and Member States, to collect information directly from selected market players in order to '*improve the Commission's ability to monitor and enforce EU rules in priority areas*', as well as '*help the Commission to propose improvements where evaluation shows that enforcement deficits are due to flaws in the relevant sectoral legislation*'[5].

2. PROBLEM DEFINITION

The establishment of an internal market[6] is one of the main objectives to be reached by the Union in cooperation with the Member States, as set out in Article 3(3) of the Treaty on European Union (TEU). This objective is articulated in more detail in Article 26 of the Treaty on the Functioning of the European Union (TFEU), which provides for the adoption of measures to both establish and ensure the functioning of the internal market. To that end, the internal market is underpinned by fundamental provisions of the TFEU on free movement of goods, services, persons, and capital; and non-discrimination on grounds of citizenship/origin[7]. Member States' authorities are responsible for the implementation of single market legislation into national law and its correct enforcement in their respective territory. Additionally, the responsibility of the Commission, defined by the Article 17(1) TEU, is to ensure that the Treaties, as well as secondary rules adopted pursuant to them, are correctly applied to, *inter alia*, make the single market a reality. The Commission is often referred to as the 'guardian of the Treaties', and is empowered by the TEU to monitor in all Member States the application of Union law.

The responsibility to enforce market participants' compliance with the Union legislation in the area of the internal market generally lies with Member States (except as regards Union rules on competition, which the Commission can enforce). In turn, the Commission can take legal action

[4] Details of existing powers are described in Section 2.4.1.
[5] Single Market Strategy, p. 16. The Single Market Strategy indicated that any market information tool would be used only once a proper screening of all available evidence had been conducted and once the value added of gathering information from market players in addition to existing information sources has been clearly established.
[6] Throughout this document, we employ the term 'single market', but use the term 'internal market' when referring directly to an article of the EU Treaties, or to the title of an act of Union law where the latter is used.
[7] Articles 18-19 (non-discrimination), 34-37 (free movement of goods), 45-66 (free movement of persons, services and capital) and 114 (approximation of laws) TFEU.

against Member States in the form of infringement proceedings under Article 258 TFEU[8]. Those proceedings allow the Commission to ensure that Union law is correctly applied. In those proceedings, the Commission has the '*responsibility to place before the Court all the factual information needed*'[9] to enable the Court of Justice of the European Union (CJEU) to establish that an obligation has not been fulfilled by the Member State concerned. In addition, in cases where the evaluation shows that enforcement deficits are due to shortcomings of the relevant sectoral legislation, the Commission may propose improvements[10] aiming at giving effect to the Treaty rules in the area of single market. However, as mentioned above, the Commission does not have investigative powers of its own in the area of the single market and is largely reliant on information provided by complainants, by public and private bodies and, particularly, by the Member State(s) concerned. At the same time, the CJEU has progressively become stricter with the Commission in relation to the volume of factual evidence that it must submit.

2.1. What is the problem?

The main problem addressed by this impact assessment is the lack of reliable and accurate firm-level information for the Commission and Member States in situations when it is necessary to timely (i) identify and measure the impact of practices non-compliant with single market rules; (ii) prioritise enforcement of compliance with such rules; or (iii) in cases of enforcement deficits, use the information collected to prepare proposals for Union legislative acts or, as appropriate, alternative policy instruments . It is important to emphasise at the outset that this initiative does not aim at creating new enforcement powers for the Commission (e.g. procedures to pursue infringements against individual market participants). Rather, it complements existing enforcement procedures with additional fact-finding ability for a small but significant subset of instances where this is strictly necessary.

Since 1996, the CJEU has, either partially or totally, dismissed the Commission's claims in at least 49 infringement cases stating that the Commission had not submitted sufficient factual evidence in support of all or part of its claims[11]. This amounts to 16% of the 309 infringement cases lost by the Commission on substantive grounds during that period (of the total 1654 judgments on infringement cases issued by the CJEU in that period). Furthermore, **in at least 17 of those cases the Commission could have obtained the missing information/data from private parties had it have investigative powers**[12].

[8] Action against a Member State for failure to fulfil an obligation under the Treaties.
[9] For instance, judgment of the CJEU in case C-400/08, Commission vs. Spain, paragraph 58.
[10] This mainly refers to legislative initiatives. However, it should not restrict the nature of the potential policy proposals. In particular, in certain circumstances, following the examination of the problem, the Commission may consider that proposing a non-legislative initiative would be more appropriate than a legislative initiative. However, in order to simplify the presentation of this impact assessment, we herewith refer to legislative initiatives only.
[11] For further information see Annex 5.
[12] The missing factual evidence at stake concerned, *inter alia*, firm-level data on: operational costs of pension funds; level of interest paid on bank loans and refinancing conditions; insurance companies' approach to set premium rates and actuarial principles they follow; shareholdings in certain companies; organisation/ allocation of powers issues within a group of undertakings; access charges for use of networks; etc. It also

When addressing obstacles to the functioning of the internal market - either via infringement proceedings or, in case of enforcement deficits, through legislative initiatives - the Commission is in a great majority of cases able to acquire the necessary information already. It is collected either from the Member States, who are under a duty to cooperate with the Commission as per Article 4(3) TEU, or via currently available tools[13]. Although this information is not always extremely detailed, it is in most cases sufficient to clearly support the Commission's decision-making. Sometimes, however, the available information does not allow to: (1) confirm whether the situation constitutes a breach of Union rules, (2) assess how grave the impact of such breach is on the single market (prioritisation), and (3) how efficient a Commission action (regardless of whether in a form of an infringement procedure or actions to ensure the application of the Union law) would be in improving the situation. In such circumstances, fine-grained information would allow for more rapid and precise actions.

The current regulatory framework as regards the Commission's powers to obtain information for addressing obstacles to the functioning of the internal market rules works efficiently for a great majority of cases. **Challenges only arise in extraordinary situations where very detailed, comparable, up-to-date, and often confidential, firm-level data are necessary within a limited time frame**[14]**.** The remainder of this section, and this impact assessment in general, describe problems relating to the latter limited subset of cases.

2.2. Why is it a problem?

In order to acquire evidence needed for proving the existence of serious obstacles to the functioning of the internal market (including possible infringements of Union law) and calibrating the Commission's response to such obstacles, the Commission primarily relies on the Member States (except in the field of antitrust and mergers). However, in certain cases national authorities may not possess the required firm-level information or their national rules on information collection may prevent them from sharing it with the Commission or with other Member States (either at all or in a sufficiently timely/disaggregated fashion).

To complement the information received from national authorities, the Commission relies on voluntary cooperation from interested parties. This may involve obtaining information from complainants or through voluntary public or targeted consultation methods. Such consultations, however, are not designed with proprietary or confidential information in mind. Accordingly, it is frequently difficult to ensure that the information collected is unbiased, reliable, complete, comparable or timely. In certain circumstances, the Commission and Member States cannot rely on official statistics, as there is a time lag in their production and they are often insufficiently detailed or

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concerned wider economic data on distortive effects of national rules (exclusive rights to import and export goods; certain tax rules) which could have been provided by those benefiting from such distortion.

[13] For information on existing tools see Section 2.4.1.

[14] Other factors may impede identification of non-compliant practices or render enforcing compliance with single market rules difficult (e.g. administrative and judicial capacity, lack of resources, clarity of law). However, this impact assessment focuses only on the reasons relating to the lack of relevant firm-level information.

disaggregated for enforcement and policy preparation purposes. These underlying problem drivers are presented in Fig. 2.1 and are discussed in Section 2.4.

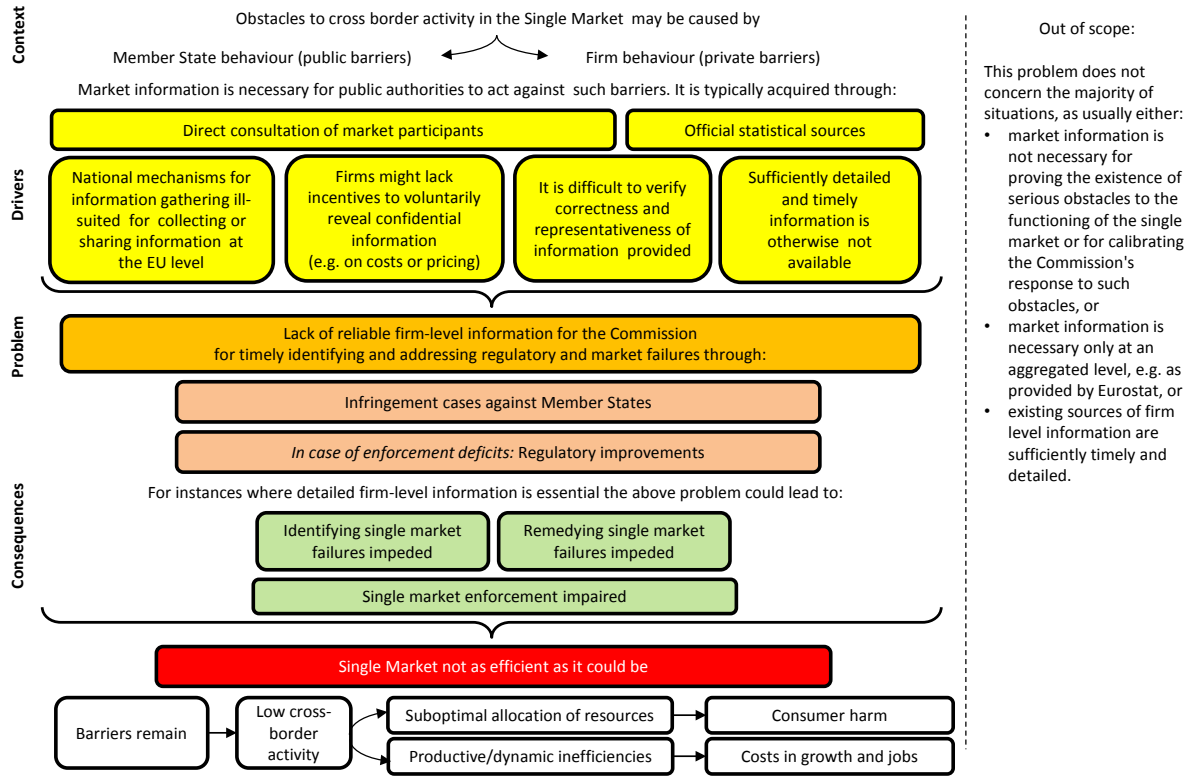

Fig. 2.1 Problem tree

Following the Single Market Strategy, this initiative primarily focuses on the problems relating to the enforcement of Union internal market rules, particularly through legal actions (i.e. infringement proceedings against Member States). In case when such legal actions are not sufficient to tackle the single market obstacles at stake (particularly if such obstacles are novel, systematic and persistent), the information will be used to prepare proposals of legislative or non-legislative nature. Moreover, it should be emphasized that these actions are not easily separable as, for example, individual infringement cases can evolve into new Union legislation (see the case study on the geo-blocking initiative in the following section).

2.2.1. Illustration of the problem

This subsection presents examples illustrating why lack of information could, in particular circumstances, constitute an obstacle to the enforcement of single market rules. They include infringement proceedings at the judicial stage, infringement proceedings at the administrative stage and preparation of new single market rules where evaluation has shown that systematic enforcement deficits are due to gaps in Union legislation.

These examples span across different policy domains. They are not meant to be exhaustive, but rather a small, yet representative, subset to illustrate that reliable, detailed and timely market information would have allowed for more effective and efficient enforcement in different areas.

Examples of incomplete information in the scope of infringement proceedings

a) Examples of incomplete information before the CJEU

As already mentioned, over the past 20 years the Commission has lost at least 17 infringement cases in front of the CJEU due to lack of sufficient factual evidence that could had been obtained from private parties. **Moreover, the economic impact of these cases on the single market is significant.** For instance, in one such case[15], the Commission argued that German legislation was discriminating against non-resident pension funds since these funds could not deduct from dividends and interest received the operating costs incurred which are directly linked to that income (e.g. banking expenses and analogous transaction costs; costs linked to disputes on dividends paid by a resident company to a non-resident pension fund; and expenses linked to human resources specifically tasked with the acquisition of shares from which dividends may be obtained). The CJEU considered that the evidence submitted by the Commission was insufficient and theoretical, amounting to mere presumptions, and dismissed the action. The Commission would have needed detailed and representative examples of operational costs to support its allegations – yet, such evidence could have only originated from pension funds. In another case[16], the CJEU dismissed the Commission's claim that Portuguese legislation resulted in higher taxation of non-resident financial institutions because of lack of credible evidence and further stated that '*the Commission could have furnished, inter alia, statistical data or information concerning the level of interest paid on bank loans and relating to the refinancing conditions in order to support the plausibility of its calculations*'. Such missing information could have only come from (resident and non-resident) financial institutions.

b) Examples of incomplete information in the framework of proceedings at an administrative stage

Enforcement of public concessions rules in the context of large infrastructure projects: Extending concessions without opening a call for tender is allowed by Union public procurement rules if certain conditions are met. These conditions include compensating a concessionaire for lost revenues caused by a regulatory change or providing a concessionaire additional time to amortise its investment costs. **Given the nature of the infrastructure that is subject to concessions (e.g. railways and ports), the monetary implications and the consequences for citizens of choosing the best and cheapest concessionaire are enormous (and were estimated at least at EUR 3 billion in one particular case).** In order to determine whether an extension of a concession without opening a tender is justified, or more importantly, whether such a prolongation infringes on Union rules[17], detailed revenue and cost data are indispensable. Since the conditions that justify such an extension relate to the concessionaire not having been sufficiently remunerated for its investment and risk-taking, detailed data on investment and demand are required for such assessment. These data are mostly business secrets of private firms and the Commission cannot obtain them under the current legal framework. Buying these data from commercial data sources is not an option either as it is unavailable. Hence, in the past the Commission has had to rely on estimates.

[15] Case C-600/10, Commission vs. Germany (free movement of capital).
[16] Case C-105/08, Commission vs. Portugal (free movement of capital / freedom to provide services).
[17] In particular Directive 2014/23/EU on the award of concession contracts.

Enforcing public procurement rules in the utilities sector: If a given utility sector (water, energy, transport and postal services) in a Member State is subject to enough market pressure, entities and contracting authorities operating in that sector are exempted from the application of the Utilities Directive (Article 34 of the Directive 2014/25/EU). Firms have a clear incentive to be exempted, since this reduces their administrative burden and allows them to procure at their own discretion. Analysing whether the degree of market pressure is sufficient to justify an exemption requires micro-level information that is not publicly available, including business secrets, such as data on prices, quantities, and cost structure. Currently, the Commission can neither obtain such information from stakeholders other than the applicant, nor question the validity of the evidence presented by the applicant. The latter is particularly relevant because the Commission is at a clear informational disadvantage regarding the sector information compared to the applicant. Since the applicant has a clear incentive to be exempted, it could present the information in the most favourable light to being granted the exemption. **Given the relevance of the water, energy, transport, and postal service, a precise and timely assessment is extremely important.**

Examples of incomplete information where an infringement case evolves into a proposal for a legislative initiative

In July 2015, following consumer complaints on discrimination of German and British buyers, the Commission asked France to investigate Euro Disney's online pricing practices. Following this infringement investigation, the Commission proposed the regulation addressing unjustified geo-blocking specifically addressing price discrimination based on the nationality or residence, including services that are delivered in the same location, such as entry tickets to leisure parks[18].

The Council conclusions of 21 November 2016 call for evaluating four years after adopting the geo-blocking regulation whether it should be extended to the sale of copyright protected works in an intangible form[Error! Bookmark not defined.]. These works are often licensed and distributed on a territorial (Member State) basis. Furthermore, producers of premium content often grant an exclusive license to a single distributor/broadcaster/service provider in each Member State[19]. Whether reasons for such territorial restrictions are justified[20] and whether expanding the scope of the geo-blocking regulation to the sale of copyright protected content[21] would be desirable and improve consumer choice is not obvious. This will require an empirical quantitative assessment, for which CRA (2014)[22]

[18] http://data.consilium.europa.eu/doc/document/ST-14663-2016-INIT/en/pdf, see Article 20.

[19] Beyond copyright licensing issues, the limited availability of content online across borders might also be the result of decisions taken by service providers (which may be related to regulatory requirements, technological or financial constraints, etc.). As a result, there are instances where even if multi-territorial licences are granted by right-holders or even if agreements between right-holders and service providers do not include limitations on territorial exploitation, EU content market might remain partitioned.

[20] One of the most commonly invoked justifications for the territorial exploitation of copyrighted content is that it is crucial to ensure the funding and sustainability of the European creative industries.

[21] Provided that the trader has the requisite rights for the relevant territories.

[22] Economic Analysis of the Territoriality of the Making Available Right in the EU, Study for the Commission (DG MARKT).

confirmed that the necessary data are not publicly available. In the past, the Commission has requested these data, but only a handful of anecdotes and aggregated statistics were delivered[23]. A report by the European Parliament and the Council on addressing unjustified geo-blocking[24] stated: '*[…] evaluation of the extension to audio-visual services should be* ***based on detailed price and cost data which only service providers possess****. Therefore, these providers should cooperate in the evaluation in order to assess whether the inclusion of these services within the scope of this Regulation would lead to the evolution towards more efficient business models than the ones currently used*.'

A well-informed regulatory decision would be crucial as it could have a significant impact on existing business models, industry revenues and content creation. **A marginal improvement in the precision of measuring a policy change impact might have enormous benefits when a change in revenues for a whole industry might be at stake: 1 % of copyright intensive industries revenue constitutes more than 9 billion euros[25].**

2.3. Who is affected, in what ways, and to what extent?

Obstacles to the Single Market cannot be easily overcome when the Commission lacks data to prove what is causing them, how severe they are, and what the impact of potential solutions would be. In exceptional cases, when very detailed, comparable, up-to-date, often confidential, firm-level information is required within a short time frame, such data can only be obtained directly from firms. Not being able to obtain this information and hence, not being able to overcome the single market obstacles, affects firms operating in the single market, citizens (in their capacity as consumers, employees and shareholders) and public authorities, including the Commission.

Lack of evidence related to market functioning may compromise the Commission's response, whether in relation to its precision (through insufficiently robust evidence to back up economically important infringement cases or policy interventions), its efficiency (enforcement of cross-border cases hampered and/or slowed down due to incomplete evidence), or its effectiveness (insufficient grounds to prioritise infringements or assess potential policy interventions).

The following stakeholders are affected by these issues:

- **Citizens** face uncertainty about the extent of protection of their rights due to sub-optimal cross-border enforcement of single market rules. Lower trust in the single market can dissuade them

[23] Since the whole demand curve and not just an average effect would have to be estimated, buying aggregate data from commercial data sources would not solve the problem either. The Commission's e-commerce sector inquiry in the antitrust field included a questionnaire on digital content that was answered by 340 firms, which did not collect disaggregated price and sales data. It did review actual licensing agreements, hence understanding better what the current business practices are. The public consultation on the review of the EU copyright rules held in 2013/1014 included qualitative questions to understand why firms geo-block copyrighted content.

[24] http://www.europarl.europa.eu/sides/getDoc.do?mode=XML&language=EN&reference=PE595.745

[25] Copyright-intensive industries generated 914.6 billion value added or 6.8% of EU GDP. This is an annual average for 2011-2013 as reported by EUIPO October 2016 report; https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IPContributionStudy/performance_in_the_European_Union/performance_in_the_European_Union_full.pdf

from working, travelling, and shopping (including online) in other Member States. Consumers ultimately suffer from the limited competition resulting from sub-optimal cross-border enforcement: they pay higher prices and have fewer choices.

- **Firms operating in the Union** may face legal uncertainty and barriers when expanding cross-border, thus limiting their possibilities for optimal allocation of resources and achieving economies of scale. In turn, this negatively affects their international competitiveness and job creation.
- **Institutions of the Union and national public authorities** may not be able to acquire necessary data to support infringement procedures or to propose amendments to the existing rules[26]. This may cause less optimal calibration of enforcement actions or policy responses, delays, as well as monetary and staffing costs in inefficient attempts to acquire firm-level information through indirect and potentially less reliable sources[27].

2.4. Problem drivers

This section singles out the principal reasons why the current information-gathering framework might not be sufficient to obtain detailed and timely firm-level information in specific instances[28].

2.4.1. National mechanisms for information collection are sector specific and generally ill-suited to request cross-border information and/or share information collected

When monitoring and enforcing Union rules, the Commission relies primarily on information submitted by the Member States concerned. Pursuant to Article 4(3) TEU, Member States are under the obligation to facilitate the Commission in carrying out its tasks, particularly its role as guardian of the Treaties. In practice, this means that Member States should provide the Commission, upon request, with information and documents when the Commission investigates a possible infringement of Union law[29].

As mandated by Union law, competent authorities in Member States have horizontal (generic) supervisory powers in competition policy and consumer protection, as well as several sector-specific powers, all of which are relevant for the single market area. Some of these powers allow them to collect detailed information directly from market participants. However, those powers are generally limited to either a specific sector (e.g. energy, transport, financial services) or to one section of a value chain (e.g. consumer protection)[30].

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[26] Authorities from three Member States out of ten who replied reported a situation when lack of firm data limited their enforcement or legislative activity.

[27] Data problems and a need for better monitoring are e.g. reported in 2016 Annual Growth Survey http://ec.europa.eu/europe2020/making-it-happen/annual-growth-surveys/index_en.htm

[28] The examples below are for illustration purposes. Many of the quoted single market imperfections were solved either by cumbersome research or by descriptive analysis that allowed the Commission to nevertheless proceed with enforcement actions, although arguably at the cost of time/precision.

[29] '*It follows that Member States are required to cooperate in good faith with the inquiries of the Commission pursuant to Article [258 TFEU], and to provide the Commission with all the information requested for that purpose*.' - Judgment of the CJEU in case C-494/01, Commission vs. Ireland, paragraph 198.

[30] Investigative powers of national authorities in EU Member States are often based on Union law: e.g. national competition authorities (NCAs), financial supervision authorities, consumer protection authorities, national

In principle, several existing policy frameworks – on the basis of Union sectoral legislation – contain mechanisms for limited data and information sharing between national authorities and the Commission respectively[31]. However, unless specifically provided for under Union legislation, Member State authorities cannot share firm-level data and information with the Commission, for reasons related to professional secrecy obligations, the confidential nature of such information, or data protection. In addition, it can be argued that currently, outside of those areas regulated by Union sectoral legislation, there is no clear legal basis that would require national regulatory authorities to provide the Commission with firm-level data or information. Only one local authority replying to the public consultation, said that it would be possible both to ask companies on behalf of the Commission and then to subsequently share with the Commission the information collected.

Moreover, none of the Member States except the UK possess horizontal (generic) information powers adequate for single market enforcement (the notable exception being the UK Competition and Markets Authority)[31]. As a result, Member States are generally not able to ask companies for information in the context of a single market infringement case or for preparation of a Union single market policy; or they may not be able to get data for evaluation/benchmarking purposes outside an investigation procedure (e.g. by asking competitors). In the public consultation, only three out of ten responding authorities reported having powers to ask companies directly for information (a UK, French and a regional Spanish administration). Three authorities explicitly stated that they have no such powers, and two said that the absence of these powers caused problems in enforcement or in legislative activity.

The **UK Competition and Markets Authority (CMA)** combines the powers of initial and in-depth investigations and it uses criminal and civil means to gather information and conduct cases related to competition and consumer protection problems. These powers allow it to examine why particular markets may be malfunctioning, including reasons beyond competition policy. The CMA can seek firm-level information on a range of matters, including the pricing and quality of goods and services supplied in the market under investigation. It can impose sanctions for non-reply. It can also make recommendations to sectoral regulators (e.g. Ofcom and Ofgem) or to the UK Government when new legislation might be required. However, the firm-level information collected cannot be shared with the Commission or other Member States.

Extensive market investigation powers are available to over **300 federal-level US authorities** as well as to Australian authorities, including subpoenas, obtaining confidential firm data and imposing sanctions for non-compliance (Annex 6).

Another aspect is the lack of specific information in all Member States, and the incomparability of such information due to the different definitions used.

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regulatory authorities in energy, transport and telecommunication sectors, as well as national market surveillance authorities responsible for product safety. These authorities have in their respective fields extensive investigating powers to access firms' documents and data, take testimonies from employees, carry out on-site inspections, take product samples, etc. They often can impose sanctions for non-compliance with information requests. These authorities cooperate in cross-border cases through various networks (e.g. European Competition Network, Consumer Protection Cooperation network). For details see Annex 6.

[31] For details see Annex 6.

In 2014 the Commission wanted to assess the importance of copyright-intensive sectors to the EU economy. **Necessary detailed data on employment were not available in Eurostat.** The French, German and UK governments were the only Member States collecting this type of information at a national level. However, the data was not comparable due to different national definitions used. As a result, the report heavily relied on assumptions, when measuring employment in the copyright intensive sector. This in turn weakened its value for policy making in the field[32].

Even if firm-level information is available in one Member State, it is by definition limited in its geographic scope. This prevents the use of Member State information tools – where available – to address enforcement cases with a cross-border dimension (i.e. where relevant market data relates to cross-border value chains or where there are indicators that similar single market failures may exist in several Member States). At the same time, such cases would precisely be those that are likely to be a priority for single market enforcement.

2.4.2. Firms lack incentives to voluntarily reveal confidential information

To gather necessary information, the Commission relies on consumer/firm complaints, as well as various consultation methods and tools (both open and targeted), such as questionnaires, surveys, meetings, hearings and workshops. The most common consultation methods include open public consultations, seminars, reports from stakeholders and studies. These information resources always rely on voluntary participation by requested stakeholders.

Complainants may have a vested interest in submitting information, particularly in situations in which they are disadvantaged. Yet, confronting this information with (possibly contradictory) information originating from other parties may not be an easy task. Firms replying to the public consultation for this initiative stated that they do not/would not provide sensitive information as it is costly to extract, it might leak and be used by competitors or public authorities, or it might simply be published.

In addition to complaints, the Commission routinely approaches market participants to request firm-level information (on a voluntary basis). However, experience shows that stakeholders are often reluctant to disclose data with private value, especially when it could be used against their interest in enforcement actions or to introduce legislation that could diminish their market power (e.g. through exposure to foreign competition). This is also due to the fact that firms often fear that the confidentiality of the information provided might not be properly respected[33]. This problem concerns also national authorities. For instance, one Member State reported in the public consultation problems with obtaining data from firms located in other Member States who simply did not reply to its requests.

[32] http://ec.europa.eu/internal_market/intellectual-property/docs/joint-report-epo-ohim-final-version_en.pdf
[33] 80% of firms responding to the public consultation found protecting confidentiality essential or very important (see Annex 2).

Selected examples of past information requests addressed to private parties demonstrate their lack of incentive to provide this information on a voluntary basis:

- In the context of a recent enforcement case of the Utilities Directive[34] in the transport sector, the Commission requested the applicant to provide key privately-owned raw data concerning its revenues and costs[35]. **The applicant refused to cooperate diligently and provided the required information long after the deadline, thus limiting the Commission's ability to use this data to support its decision.**
- In 2016, the Commission had a reasonable suspicion of a frequent absence of published tenders for purchasing Computer Tomography scanners in several Member States[36]. In order to support an infringement case for failure to comply with EU public procurement rules, the Commission needed firm-level information on contracts and sales. Due to obvious inconsistencies, existing sources of information were considered unreliable. The Commission asked a prominent market player for this information who, despite having it readily available, replied that it was '*unwilling to cooperate in the investigation until the Commission makes a formal request*'.

For the reasons outlined above, stakeholders are also often reluctant to provide sensitive information in response to public consultations. That being said, public consultations do give access to empirical information, indicate expected impacts, and they identify non-evident policy alternatives when taking a policy decision. They are particularly valuable as they involve a wide range of stakeholders in the regulatory processes and improve transparency. However, standard consultations might not be sufficient when the necessary data are sensitive or confidential.

Several examples of past public consultations illustrate the lack of stakeholders' incentive to provide the requested information, which may present a problem in evidence collection:

- **A 2014 consultation on copyright generated 9581 replies, which took 30 officials and 5 month to process. Almost no data on prices, costs, and profits was submitted – even though all were of utmost importance**[37].
- The 2009 consultation on Accounting Directives resulted in 309 replies, but several questions on cost were answered by only 2 companies[38]. This information was necessary to assess the burden of reporting obligations to see whether it needed to be simplified.

[34] Application of Article 34 of Directive 2014/25/EU, as described in Section 2.2.
[35] From the content of previous submissions it was apparent that the data was already available to the applicant and that this request was not adding administrative burden.
[36] The reasonable suspicion was based on a large mismatch between the number of the contract awards in two public information sources (Tender Electronic Daily and Eurostat) for the period of 2010 and 2015.
[37] European Commission, Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, July 2014, http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf.
[38] E.g., only 1 respondent provided an answer to the Question 19 ('*If you are a preparer, what is the annual cost of publishing your accounts?*'). Only 2 respondents provided cost estimates under the question '*What information has to be compiled especially for preparing the disclosures? Can you say anything about the costs of preparing this information?*' http://ec.europa.eu/internal_market/accounting/docs/200910_accounting_review_consultation_report_en.pdf.

- The recent public consultation on due diligence and supply chain integrity for intellectual property asked right holders to provide, *inter alia*, information related to their relation with suppliers, identification of intellectual property infringements, and auditing practices. Notwithstanding the encouragements to industry to engage in the consultation, the Commission received only 11 replies from companies and business associations. **Many told the Commission they did not want to provide the information – even if it was in their interest to do so – because it was too confidential**[39].

External studies produced for the Commission and Member State authorities often suffer from the same problem: study authors cannot oblige stakeholders to provide the needed firm-level information. In fact, it is common practice that external contractors request the Commission for a recommendation letter to present to interviewees to gain their confidence – signifying even greater lack of trust than in front of the Commission.

- Difficulties in acquiring information and data from firms were outlined in the 2012 RAND report on measuring intellectual property rights infringements in the single market[40]. In this case, the point-blank refusal of firms to provide sensitive information (e.g. forecasts and sales data) was due to the fact that, if leaked, their competitors or new entrants into the market could potentially make strategic use of the information revealed. Only in two instances firms were willing to share data with RAND upon the execution of a nondisclosure agreement.
- The 2016 study on the distribution in the organic food chain commissioned by the Commission[41] aimed at providing deeper understanding of the dynamics of the organic market. Yet it could not collect the necessary supply chain data due to the reluctance of firms to give up sensitive commercial data.

Occasionally, contractors performing external studies succeed in acquiring the necessary data. However, this is often under the condition of signing a confidentiality agreement with stakeholders which obliges them not to share any firm-level information with the Commission. This situation is problematic for several reasons. The Commission has access only to aggregated data, which makes targeted single market enforcement difficult. More importantly, the Commission has no ability to

[39] In particular, the consultation asked respondents for the number of suppliers they know beyond the 1st and 2nd tiers of their supply chains, type of information they ask from their suppliers, whether they have already identified intellectual property infringements in their supply chain, how they addressed this problem, whether they implemented auditing practices, what type of auditing practices they use, and whether they use track and trace technologies. See report of the consultation: http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8603

[40] 'Measuring IPR infringements in the internal market: Development of a new approach to estimating the impact of infringements on sales', 2012, RAND Europe: Stijn Hoorens, Priscillia Hunt, Alessandro Malchiodi, Rosalie Liccardo Pacula, Srikanth Kadiyala, Lila Rabinovich, Barrie Irving. The cost of this study to the Commission was EUR 250 000.

[41] The study was carried out in the context of the implementation of the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Action Plan for the future of Organic Production in the European Union', COM (2014) 179.

verify the underlying data submitted by stakeholders and cannot, therefore, judge the correctness of the calculations performed by external contractors.

2.4.3. It is difficult to verify correctness, completeness and representativeness of information provided voluntarily by firms

Standard consultations typically rely on stakeholders' willingness to participate and provide the requested information. Accordingly, these contributions are assessed by the Commission in the full knowledge that they cannot necessarily be extrapolated to the whole stakeholder community in question (unless all members of that community reply, e.g. all Member States). This self-imposed limitation is mostly due to the fact that the stakeholders who do respond are self-selecting and may therefore over-represent those individuals and special interests who are both the best organised and who hold particularly strong views on the subject.

For example, the 2014 public consultation on the review of the Union's copyright rules attracted considerable interest from stakeholders, with 9 581 replies, the vast majority of which resulted from organised actions, which included **'model responses'** and guides for replying (which were circulated over the internet)[42]. Similarly, the 2016 public consultation on the role of publishers in the copyright value chain and on the 'panorama exception' produced 6 203 replies, 2791 out of which were similar responses sent by an organised campaigner[43]. The analysis of the responses to the 2013 consultation on trade secrets also pointed to a strong mobilisation by special interests (e.g. some groups provided multiple replies via affiliated companies, while a political party provided model responses for citizens)[44].

The accuracy of targeted consultations and external voluntary submissions from market participants cannot be fully relied on either as certain stakeholders may have used the consultation in question to present the facts in a particular way, or not to provide certain information at all.

For instance, the 2010 consultation on country-by-country reporting requirements targeting large multinational companies received 43 answers from preparers of accounts. However, only three of them replied to the question on the estimated cost related to the introduction of such reporting requirements. Moreover, the information provided was aggregated at a corporate level (ranging from $10M to over $100M), thus not allowing for properly detailed analysis[45].

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[42] Example of a guide with model responses by a member of the Swedish Pirate Party in the European Parliament: https://ameliaandersdotter.eu/copyright-consultation-model-responses

[43] European Commission, 'Synopsis reports and contributions of the results of the public consultation on the role of publishers in the copyright value chain and on the 'panorama exception'' , https://ec.europa.eu/digital-single-market/en/news/synopsis-reports-and-contributions-results-public-consultation-role-publishers-copyright-value

[44] Impact assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, SWD(2013)471, 28.11.2013, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD:2013:0471:FIN

[45] European Commission, Consultation on Country-by-Country Reporting by Multinational Companies, Summary Report, April 2011, http://ec.europa.eu/finance/consultations/2010/financial-reporting/docs/consultation_summary_en.pdf

When selection bias is an issue, the Commission sometimes conducts representative Union-wide surveys, for instance through Eurobarometer. This method, however, is much more expensive than a public consultation. A Union-wide representative citizen survey costs around EUR 15 000 per question and is even more expensive when firms are involved. However, even Eurobarometer surveys are not designed for acquiring detailed or confidential firm-level information.

2.4.4. Sufficiently detailed and timely information from the market is otherwise not available

The Commission currently has investigation powers only in the domain narrowly prescribed by the Union competition rules[46]. There, the existing powers help the Commission to be more precise in its economic assessment and enable it to adopt swifter and solid facts-based decisions, reinforcing the basis for infringement actions[47]). However, these powers are limited by their legal basis to narrowly prescribed areas and do not allow for collecting and re-using the information gathered for other single market related policy purposes.

A similar reasoning applies to data gathering under the Regulation on consumer protection cooperation (the 'CPC Regulation')[48]. Under this Regulation, consumer protection authorities have the power to request information from firms, provided this information concerns a suspected intra-Union infringement of Union consumer legislation that is listed in the Annex of the Regulation. The CPC Regulation establishes a cooperation system between competent authorities, which has been designed for the purpose of cross-border enforcement of Union consumer laws but remains limited to this Regulation and other consumer-relevant legislation. The CPC Regulation thus covers the needs of enforcement of Union consumer law in a cross-border context, and is not appropriate to support the enforcement of neither business-to-business relations nor all other single market areas[49].

Last but not least, the Commission also collects a large amount of commercial information available through official statistics. However, such statistics are often produced with a time delay and at a level of aggregation that does not necessarily match the specific needs of firm-level policy making.

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[46] For details on these investigation powers see Annex 6. It also has investigative powers in the trade defence policy area (anti-dumping, anti-subsidies etc.), but this policy does not fall under the single market area.

[47] In principle, information collected using those powers could also potentially be used for policy development in the competition field: e.g. informing Commission's Block Exemption Regulations, which are non-case specific.

[48] Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), OJ L 364, 9.12.2004, p.1.

[49] The May 2016 proposal for a new CPC Regulation strengthens powers and cooperation procedures for national consumer protection authorities to address infringements of Union consumer law in a cross-border context. The proposal also foresees an obligation for the Commission to activate the cooperation procedure at Union level in cases where it suspects that widespread infringements affect a large majority of Union consumers.

For example, the Structural Business Statistics (SBS) provides the most sector disaggregated economic data in Eurostat (offering many economic variables, including auxiliary dimensions not available in national accounts) but no information about individual firms[50]. Moreover, preliminary data are published about one year and final data about 20 months after the end of the reference year, thus often being not suitable to inform a timely policy response. In addition, some surveys are conducted infrequently: for example, the Eurostat Labour Cost Survey and Structure of Earnings Survey are conducted only every four years[51], and the Community Innovation Survey (CIS) is conducted every two years[52].

2.5. How would the problems evolve?

Existing Union information tools may be leaving gaps in the single market enforcement. National tools are generally not designed for cross-border problems. As a result, the Commission and Member States will continue to be confronted by a lack of access to reliable and sufficiently complete firm-level information where such information is really required for identifying and addressing single market malfunctions. The problems identified in this impact assessment would, therefore, remain largely unresolved.

Further data gaps might also arise in the future (the 'known unknowns', as it were), as new economic phenomena appear within the single market (e.g. the collaborative economy or the – up to now – unregulated banking products). The scope of existing information tools may be expanded over time to remedy data gaps where and when they arise. However, any such change involves a long legislative process.

The baseline scenario is described in more detail in Section 5.1.

3. WHY SHOULD THE UNION ACT?

3.1. Legal basis

Article 114 TFEU provides for the adoption of measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States, provided that they are necessary for the smooth functioning of the single market. The use of Article 114 TFEU would therefore aim at preventing the emergence of obstacles to the functioning of the single market and should be an appropriate legal basis for a Union action entrusting Member State authorities with powers to collect information. However, should the policy intervention require an entrustment of the Commission with direct powers to collect information from firms, Article 114 TFEU would need to be supplemented by Article 337 TFEU. The latter entitles the Commission to collect any information required for the performance of the tasks entrusted to it, within the limits and under

[50] Structural Business Statistics, http://ec.europa.eu/eurostat/cache/metadata/en/sbs_esms.htm
[51] Labour Cost Survey (LCS), http://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Labour_cost_survey_(LCS); Structure of earnings survey (SES), http://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Structure_of_earnings_survey_(SES)
[52] Community Innovation Survey (CIS), http://ec.europa.eu/eurostat/web/microdata/community-innovation-survey

the conditions set out by the Union legislator[53]. Since Article 114 TFEU acts as a default legal basis within the single market area, the use of other Articles of the TFEU as additional specific legal basis may be appropriate in order to cover single market fields that rely on specific legal basis within the TFEU for legislative action: e.g. Article 43(2) TFEU (agricultural goods)[54], Articles 91 TFEU and 100 (transport), Article 192 (environment) or Article 194(2) TFEU (energy)[55]. For more details on the legal basis, see Annex 9.

3.2. Necessity and added-value of Union action

An important responsibility of the Commission under Article 17(1) TEU is to ensure that the Treaties and Union legislative acts adopted pursuant to them are correctly applied. The Commission is empowered, as the 'guardian of the Treaties', to oversee the application of Union law in the Member States. In order to correctly perform this function, Commission's access to relevant, reliable, accurate and timely information is essential – including, where necessary, access to firm-level information. The CJEU has progressively been stricter with the Commission in relation to the sufficient factual evidence that it must submit in order to prove '*to the requisite legal standard*' the elements of the allegations made in infringement proceedings[56]. Union action is needed to ensure that the Commission will have access to firm-level information necessary to improve its ability to monitor and enforce Union single market rules. This objective cannot be sufficiently achieved by Member States alone, due to legal barriers to sharing firm-level information with the Commission and uncoordinated national approaches in this area (see Section 2.4.1). In addition, possible national responses would be limited in their geographical scope, while the obstacles to the functioning of the single market are often cross-border[57]. Therefore, the objectives envisaged can be better achieved, by reason of its scale and effect, at Union level. Such Union action would fulfil the necessity test in

[53] Council only, for Article 337 TFEU. It should be noted that Article 114 TFEU, however, provides for legislative acts of the European Parliament and of the Council.

[54] 'Agricultural products' means the products of the soil, of stock farming and of fisheries and products of first-stage processing directly related to these products. References to the common agricultural policy or to agriculture, and the use of the term 'agricultural', shall be understood as also referring to fisheries, having regard to the specific characteristics of this sector" (cf. Article 38(1), second subparagraph, TFEU)

[55] For an example of a similar join use of some of these articles, see Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241, 17.9.2015, p.1. This directive is based on Articles 43, 114 and 337 TFEU.

[56] See e.g. Luca PETRE and Ben SMULDERS, 'The Coming of Age of Infringement Proceedings', Common Market Law Review 47, 2010, po. 9. These authors (p. 38) refer to several judgments of the CJEU supporting this trend.

[57] In general, the Treaties require the existence of a cross-border dimension for the single market rules to be applied. However, purely internal situations (e.g. secondary harmonising legislation) may also result in an infringement of Union law. Such internal situations may be better addressed by the Member State. However, this does not exclude that the Commission may need to address them (e.g. in the event of lack of action by the Member State concerned) and that, in doing so, it may need to have access (where appropriate and justified) to specific firm-level information. It should be noted that CJEU applies a relatively low threshold to show the existence of a cross-border dimension: it has ruled that even when a purely internal situation is concerned national rules may produce effects outside the Member State concerned (e.g. joined Cases C-159/12 and C-161/12, Venturini, par. 25–26); it has also considered, in particular in cases related to public procurement procedures that appeared *a priori* as purely internal situations, that a discrimination against potential competitors from other Member States would be enough in that respect (e.g. case C-231/03, Coname v. Comune di Cingia de'Botti, par. 17–21; case C-458/03, ParkingBrixen GmbH v. Gemeinde Brixe, par. 55).

this regard and would enhance the ability of the Commission to ensure the respect of Union law, in particular with regard to infringement proceedings[58].

The necessity test would also be met regarding the collection of firm-level information for cases where evaluation shows that enforcement deficits are due to flaws in the relevant legislation. As a matter of principle (cf. Article 17(2) TEU), Union legislative acts may only be adopted on the basis of a Commission proposal (except where the Treaties provide otherwise). As demonstrated in the examples in the previous section, there may be instances where the Commission will need to have access to firm-level information to calibrate a regulatory solution. Union action is also needed for this purpose, for the same reasons (e.g. Member States action would not be sufficient) expressed in the previous paragraph. It must be noted that since the aim of this tool is better enforcement of EU law, there is no sharp distinction between infringements proceedings and the use of legislative acts to address serious obstacles to the internal market in case of enforcement deficits, in particular during the period in which the Commission undertakes preparatory work. When the Commission is at the stage of collecting information to assess whether there are obstacles to the functioning of the internal market it may conclude that launching infringement proceedings (which is a faculty, not an obligation of the Commission[59]) would not adequately solve the problem and therefore there is a need to propose a legislative change[60].

In terms of added-value, Union action would ensure that the Commission has access to relevant, reliable, accurate, comparable and timely firm-level information in those (exceptional) instances where access to such information is necessary and cannot be obtained otherwise (e.g. in situations where national authorities cannot have access to the relevant data; where they do not wish to cooperate with the Commission; or where firms do not voluntary agree to share data with the Commission). This would lead to better informed enforcement actions or potentially to policy initiatives (in case of enforcement deficits) by the Commission. Furthermore, when the Commission obtained firm-level data in an infringement proceeding, the concerned Member States could also access this data and improve their application of Union law[61]. For more details on the subsidiarity requirements, see Annex 9.

[58] This is without undermining the role of the Member States in applying Union law and enforcing it vis-à-vis individual companies.

[59] '*In exercising this role* [N.B. as guardian of the Treaties]*, the Commission enjoys discretionary power in deciding whether or not, and when, to start an infringement procedure or to refer a case to the Court of Justice*. […] *It* [N.B. the Commission] *will distinguish between cases according to the added value which can be achieved by an infringement procedure and will close cases when it considers this to be appropriate from a policy point of view*'. Communication from the Commission, 'EU law: Better results through better application", OJ C18, 19.1.2017, pp. 14 and 15.

[60] '*The Commission will exercise such discretion in particular […] in those [cases] where pursing the infringement would be in contradiction with the line taken by the College of Commissioners in a legislative proposal*'. *Ibid*. p. 15.

[61] E.g. in the public consultation, one national authority reported problems with obtaining data from firms located in another Member State, as either firms or foreign authorities did not cooperate.

4. WHAT SHOULD BE ACHIEVED?

4.1. Objectives

The general objective of the initiative is ensuring a better functioning single market through more effective application of single market rules and principles. This particularly relates to improving the Commission's ability to monitor and enforce Union rules in areas of key importance. In addition, the tool may also help the Commission to propose improvements where evaluation shows that enforcement deficits are due to shortcomings of the relevant sectoral legislation. This general objective would be achieved by providing the Commission with easier access to firm-level data where needed to detect and combat obstacles to the functioning of the single market, including misapplication of Union law. This would additionally assist Member States in better applying single market rules at national level.

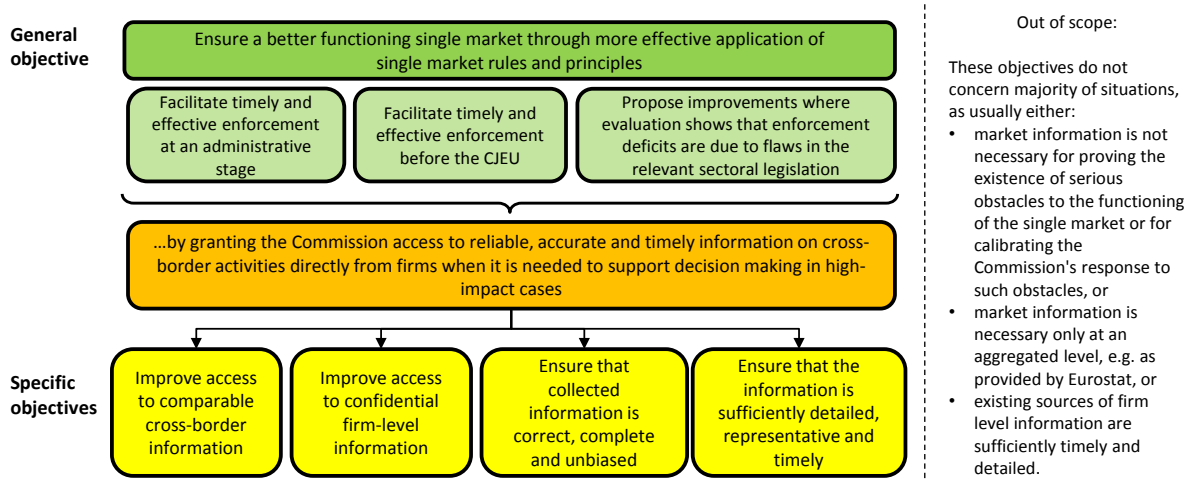

Fig. 4.1 Objectives of the initiative

The specific objectives of the initiative are the following (Fig. 4.1)[62]:

- facilitating access to comparable cross-border data;
- facilitating access to confidential/privileged firm-level information;
- ensuring that collected information is correct, complete and unbiased; and
- ensuring that the information is sufficiently detailed, disaggregated and timely.

It should be emphasized that these objectives do not concern the majority of situations, as usually either: (1) market information is not necessary for proving the existence of particular obstacles to the functioning of the single market or for calibrating the Commission's response to such obstacles; (2) market information is necessary only at an aggregate level, e.g. as provided by Eurostat; (3) existing sources of information are sufficiently timely and detailed.

[62] This initiative concerns solely access to firm-level information as one of the factors affecting single market *acquis* enforcement. Other crucial elements affecting the efficiency of enforcement (e.g. administrative and judicial capacity, lack of resources, clarity of law) are not tackled here.

4.2. Consistency with other Union policies

The initiative is consistent with other Union policies. First and foremost, the initiative will contribute to better enforcement of the Treaty principles on fundamental freedoms (Articles 28, 45, 49, 56, 63 TFEU) as well as single market secondary legislation, in particular in instances which require complex economic analysis and need to be substantiated with economic data. Ultimately, the initiative will contribute to achieving the Union's aim of establishing and ensuring the functioning of the single market and realising its full potential. Pending a final decision by the Union Legislator on the scope of the initiative, it would also allow for better enforcement of single market rules with regard to, for example, agricultural products and in the transport and energy sectors, thus also contributing to the establishment of a common agriculture policy (Article 38 TFEU), a common transport policy (Article 90 TFEU), as well as Union policy on energy (Article 194 TFEU).

This initiative complements existing sector-specific tools in the area of competition and consumer protection law. Although addressing issues in a different domain, this initiative in many dimensions closely corresponds to the Market Investigation Tool (MIT) available to the Commission in the State aid area. Namely, the objectives of the tools are similar, they involve the same stakeholders (the Commission, Member States, and market participants), and would be used for collecting similar type of information under similar extraordinary conditions. Therefore, the anticipated impact of the use of the tool could be compared.

5. WHAT ARE THE VARIOUS OPTIONS TO ACHIEVE THE OBJECTIVES?

5.1. Baseline scenario: no Union policy change

In the baseline scenario, the Commission would continue to rely on current information sources for firm-level information necessary for the purpose of ensuring the correct application of single market rules. These sources would be voluntary submissions through complaints, open public consultation, targeted surveys, reports by stakeholders, commissioned studies, commercial databases, voluntary requests for information, and ad hoc submissions as well as Member States submissions. The Commission could enhance the confidentiality provisions of its consultations to try increasing firms' willingness to provide information. More frequent use of external polling organisations via a Eurobarometer facility could lead to more representative responses, but would substantially burden the European budget since firm surveys are particularly costly (compared to consumer surveys). However, these external surveys could not gather information on complex and confidential issues, like firms' pricing strategies.

In policy areas where the Commission or Member States have the ability to request the necessary information from firms (e.g. in competition, consumer protection law, regulated network industries), the use of existing tools for addressing the single market enforcement remains imperfect[63]. For example, the published results of a sector investigation under Union competition law, like the recent e-commerce one, can be used to support a single market reform outside the narrow competition

[63] Several respondents to the public consultation called for reusing competition powers for acquiring the information necessary for the enforcement of internal market rules (see Annex 2).

policy domain; but using individual replies to such investigations for purposes other than enforcement of competition law will remain legally impossible[64]. Furthermore, existing national information collection powers could be potentially spontaneously extended and used in selected sectorial contexts. However, sharing information between authorities and the Commission would remain an issue. At the same time, the role of the Commission as guardian of the Treaties may be weakened, in so far as infringement proceedings in complex cases would be more difficult, while the importance of preliminary rulings by the CJEU[65] would increase. The disadvantage of relying on preliminary rulings for complex cases in the single market area is that the CJEU will, in the vast majority of cases, have to take a decision based on exchange of legal arguments with lower levels of economic analysis compared to the analysis that the Commission could undertake in the preparatory phase of infringement proceedings.

The Inter-institutional Agreement on Better Law-Making[66] commits the co-legislator to consider including monitoring and evaluation provisions in all new Union acts. It is likely, therefore, that sectorial legislation will include provisions on monitoring and that more firm-level data will gradually become available. However, monitoring indicators cannot in all cases address very specific problems that may arise in the course of application of legislation, nor can they adequately foresee future market developments. Furthermore, monitoring arrangements cannot be designed to cover all issues beyond the scope of existing regulations. Therefore, this would only partially alleviate the identified problems.

5.2. Option 1: Exchange of best practices between Member States and with the Commission

The Commission would recommend to Member States to exchange best practices on collecting specific firm-level information. The experience of dedicated authorities at Union and national level (e.g. National Competition Authorities, Consumer Protection Cooperation Network, Agency for Cooperation of Energy Regulators, Financial Supervisory Authorities like the EBA, the European Insurance and Occupational Pensions Authority, or the European Securities Markets Authority) would be leveraged to develop guidance and recommendations for collecting firm-level information. Best practices to minimise the administrative burden, protect confidential information, treat cross-border cases, and share information among Member States and the Commission would be devised. The Member States would then be encouraged to implement these best practices.

[64] I.e. '*[…] information collected pursuant to Articles 17 to 22 shall be used only for the purpose for which it was acquired*' (cf. Article 28 of Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p.1.

[65] Art. 267 TFEU (upon request of a national court, the CJEU can give preliminary rulings on questions of Union law when a decision on such question is necessary to enable the national court to give judgement).

[66] OJ L 123, 12.5.2016, p.1. http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016Q0512(01)

5.3. Option 2: Lifting regulatory limitations to the sharing of firm-level information between the Member States and the Commission

This option consist in Union legislation (a Directive)[67] lifting national rules (e.g. professional secrecy rules) that prevent Member States' authorities from sharing with the Commission and other Member States firm-level information they already possess or could access on the basis of Union or national law. This option does not foresee granting specific investigation powers to Members States. Nor does it foresee a specific framework for the Commission's requests to Member States. Instead, general rules on cooperation under Article 4(3) TEU would apply.

Launch of requests. Member States would be responsible for ensuring compliance with the requests for information.

Confidentiality and sharing of information. The Commission and the Member States should ensure that the information submitted in reply to a request for information is treated in a manner that ensures its confidentiality, following best practices from the competition policy field and taking due account of the legitimate interests of the replying firms in the protection of their business secrets[68]. Therefore, they would be subject to appropriate professional secrecy obligations in respect of such information[69]. This should not, however, prevent the Commission from using information necessary in the context of infringement proceedings. The Commission could only share information received from one Member State with other Member States if the information-providing Member States agree. However, information should be shared with all Member States concerned in a given investigation. Third party access to confidential information would be governed by the rules on access to documents held by Union institutions. These rules foresee exceptions to disclosure in cases where disclosure would undermine the commercial interests of a person[70].

Use of information. Disaggregated firm-level data shared by a Member State with the Commission (and with other Member States) could only be used by the Commission (and the other Member States) to enforce single market rules relating to the specific subject matter invoked by the Commission when asking the concerned Member States to share the information. However, aggregated and anonymised information could be further used for other purposes.

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[67] In principle, a Directive would be the most suitable legislative instrument to give the power in question to the Member States considering, notably, the fact that it would be necessary to adapt different pieces of legislation domestically. A directly applicable Regulation would not necessarily add legal clarity with regard to the interplay with existing national rules preventing the sharing of information with the Commission. A non-legislative instrument is not considered for this option as its scope would already be covered by option 1.

[68] 80% of firms responding to public consultation found confidentiality as essential or very important preconditions to their participation (See Annex 2).

[69] Information covered by the obligation of professional secrecy may not be disclosed to the general public. See Article 339 TFEU generally (as regards the Commission); see also Article 30 of Council Regulation (EU) 2015/1589 [State aid] for a professional secrecy obligation in secondary legislation on a similar area.

[70] The right of access to the documents of the EU institutions is governed by Regulation (EC) No 1049/2001.

5.4. Option 3: Introducing residual investigative powers through national level single market information tools

This option would build upon Option 2. In addition, Member States would be required by Union legislation[71] to entrust an authority or several authorities with the power to request quantitative and qualitative firm-level information directly from market participants operating within their territories, where such information is needed for proving the existence of serious obstacles to the functioning of the internal market, including possible infringements of Union law in that area, or for calibrating the Commission's response to such obstacles – whether through infringement proceedings or, in case of enforcement deficits, legislative initiatives. This power would be of residual nature, supplementing sector-specific investigative powers already entrusted to Member States by specific Union law[72]. This power would also be without prejudice to the existing investigative powers of national authorities pursuant to national law. This option would not, as such, decide which national authority should be entrusted with the residual investigative powers. Member States would have the freedom to decide which authority or authorities should have that power[73].

Commission's role. As with Option 2, the Commission would be able to request firm-level information from the Member State concerned under Article 4(3) TEU and would need to motivate its request to show that the requested information is necessary for taking timely and informed decisions in relation to possible obstacles to the functioning of the internal market. This option would introduce a coordination role for the Commission in the event that the Commission needs firm-level information from more than one Member State for the same issues, in order to ensure that the national information requests address the same issues and that the addressees of the requests are comparable.

Addressees of requests for information. Information requests would be addressed to undertakings and associations of undertakings (trade organisations and business associations) operating in the Union. Large firms with market power would be the primary addressees, small and medium-sized enterprises (SMEs) could occasionally be concerned, while micro-enterprises would be exempted[74]. Information requests could be addressed to a single or a range of market participants. The Commission and the Member States would take into account the cost for responding parties and

[71] In principle, a Directive would be the most suitable legislative instrument to give the power in question to the Member States considering, notably, the fact that the power would be of residual nature and that the legal instrument would not identify the specific national authority that should be entrusted with such power. A non-legislative instrument is not considered for this option as its scope would already be covered by option 1.

[72] For details see Annex 6.

[73] One could conceive extending the scope of existing investigative powers of identified national authorities already active for specific areas of the single market: i.e. competition or consumer protection. This would allow the Commission to channel its request for information through specific existing networks somehow alleviating the coordination efforts. However, these options are discarded upfront as existing investigative powers are: i) limited to specific and narrowly defined domains; ii) cannot be used to for Commission information request; iii) any extension would endanger the coherence of both systems and distract authorities from their core mission, with potential negative consequences on the quality and effectiveness of protection against anticompetitive behaviour or of consumers. For more analysis see Annex 7.

[74] Micro entities employ less than 10 employees, while SMEs employ between 10 and 249 employees. For a precise definition, see Commission Recommendation 2003/361/EC.

would request information only from targeted market participants. The Commission and the Member States may also request information to be provided in specified formats with common definitions. Such requests would, where possible, be made through electronic means.

Launch of requests. This would be as in Option 2. The addressees of information requests would have the means of judicial redress foreseen at the national level to oppose the national requests for information. The Commission could assist Member States by issuing guidance on best practices to launch requests for information, including setting up appropriate sanctions for intentionally or negligently supplying incorrect or misleading information in response to an information request. Requests from the Commission to the Member States could be enforced through infringement proceedings for failure to comply with Article 4(3) TEU.

Confidentiality and sharing of information. As in Option 2.

Use of information. As in Option 2.

5.5. Option 4: Introducing an EU-level Single Market Information Tool (SMIT)

Under this option, Union legislation would empower the Commission to use a Single Market Information Tool (SMIT) for requesting quantitative and qualitative firm-level information directly from market participants[75]. SMIT would be used where such information is needed for proving the existence of serious obstacles to the functioning of the internal market (incl. possible infringements of Union law in that area) or for calibrating the Commission's response to such obstacles – whether through infringement proceedings or legislative initiatives in case of enforcement deficits.

Conditions for the use of SMIT by the Commission. SMIT would not be used routinely, but rather as an exceptional, 'last resort' tool following a case-by-case assessment by the Commission. In order to issue an information request, the Commission would first need to formally adopt a Decision stating its intention to use SMIT and showing that the following main conditions are fulfilled[76]:

1. There is enough information available suggesting the existence of a serious problem with the application of Union law undermining the attainment of important Union policy objectives in relation to the aim of establishing and ensuring the functioning of the internal market, most notably in terms of economic or social impact[77];

[75] This option would not introduce new enforcement procedures or obligations for the Commission (e.g. pursuing infringement cases against individual market participants). Instead, it would only provide a tool for acquiring information needed for supporting currently available procedures. Moreover, this option is without prejudice to existing powers at national level to gather firm-level information or to additional powers that Member States may decide to grant to their own national authorities.

[76] Such decision would have a role similar, *mutatis mutandis,* to that of the Commission Decision declaring a State aid formal investigation as *'being ineffective'*, pursuant to Article 7(2)(a) of Regulation (EU) 2015/1589 as regards the MIT in State aid. Only following the adoption of the latter decision can the Commission use the powers to request information directly from firms.

[77] To gauge the extent of single market failures, several metrics are possible such as limitation on the free movement of production factors (goods, services, labour capital) due to the suspect single market restriction or a broader assessment such as effect on macroeconomic imbalances. The seriousness test is consistent with the announced Commission's policy as regards enforcement action through infringements proceedings: '*It is*

2. The information to be requested is required for the performance of the tasks entrusted to the Commission by the Treaties in the area of the internal market, notably proving the existence of serious obstacles to the functioning of the internal market or calibrating the Commission's response to such obstacles; and
3. The information is not available elsewhere, meaning it may not be obtained or could not be obtained timely enough through other means[78].

In addition, the Decision should detail the criteria for selecting the addresses of the requests for information. These requests are to be addressed only to market participants that could be expected to provide sufficiently relevant information and for whom the information would be readily available (i.e. acquiring such information does not require extended research or a major effort to retrieve).

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important that the Commission use its discretionary power in a strategic way to focus and prioritise its enforcement efforts on the most important breaches of EU law affecting the interests of its citizens and business. In this context, the Commission will act firmly on infringements which obstruct the implementation of important EU policy objectives, or which risks undermining the four fundamental freedoms […]. *In the light of the discretionary power the Commission enjoys in deciding which cases to pursue, it will examine the impact of an infringement on the attainment of important EU policy objectives, such as breaches of the fundamental freedoms under the Treaty which create particular problems for citizens or businesses wanting to move or carry out transactions between Member States, or where there may be a systemic impact beyond one Member State*.' Communication from the Commission, 'EU law: Better results through better application', OJ C18, 19.1.2017, pp. 14 and 15.

[78] This condition is precisely the one that renders SMIT a tool of 'last resort'. In a recent judgement, the CJEU has indeed outlined that a procedure is of last resort when it is not possible to complete a task/carry out an activity using the normal procedure within a reasonable time/foreseeable future (cf. CJEU judgement in joined cases C-274/11 and C-295/11, §50, as regards the last resort powers of the Council pursuant to Article 20(2) TEU on enhanced cooperation). *Mutatis mutandis*, this criterion is transposed for option 4 which is a last resort procedure to obtain certain information when it is not possible to obtain it from other sources in a timely fashion. It is noted that under option 4, the Commission would need to provide a reasoned explanation of why the relevant information is needed and why other means to obtain it proved ineffective. This is in conformity with the conditions that the CJEU set out in §54 of the judgement referred to above as to the need to show that the [institution] 'has carefully and impartially examined those aspects that are relevant to this point and whether adequate reasons have been given for the conclusions reached by the [institution]'. The conditions in Option 4 are also similar to those in Regulation (EU) 2015/1589 as regards the MIT in State aid, which is also a last resort investigative power.
See also for a similar example the last resort investigative powers granted to the European Union supervisory authorities in the financial sector: '***In order to carry out its duties effectively, the Authority should have the right to request all necessary information.*** *To avoid the duplication of reporting obligations for financial institutions, that information should normally be provided by the national supervisory authorities which are closest to the financial markets and institutions and should take into account already existing statistics. However, **as a last resort**, **the Authority should be able to address a duly justified and reasoned request for information directly to a financial institution where a national competent authority does not or cannot provide such information in a timely fashion.*** *Member States' authorities should be obliged to assist the Authority in enforcing such direct requests. In that context, the work on common reporting formats is essential. […]*' (emphasis added). Cf. recital 45 of Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, OJ L 331, 15.12.2010, p. 48. Similar powers are granted to the European Banking Authority and the European Securities and Markets Authority – See Annex 6 for further detail.

Commission's compliance with the above-described conditions would be subject to judicial review before the CJEU, which could annul a decision failing to show how the conditions are met. The judicial review will therefore guarantee the last resort character of the tool.

Addressees of requests for information. As in Option 3 regarding the type of market participants and the possibility to use specified formats and common definitions. The addressee of a request must be clearly informed about the reasons for such request and will have the possibility to object to the request.

Selective and limited nature of the requests for information. Information requests under Option 4 must be limited to the information which is indeed necessary for the Commission to carry out its tasks, as described in the prior Decision referred to above (cf. conditions). Moreover, the requests should be addressed only to a selected and limited number of market participants: such number will be low (likely below 5)[79] in the context of an infringement procedure, while it could be higher, but still limited (likely below 50) in case of proposing improvements where evaluation shows that enforcement deficits are due to flaws in the relevant legislation, as benchmarking needs may require sending of requests to additional addressees.

Member States' role. The Commission would inform Member States of the requests for information sent to market participants established in their territory.

Forms of requests for information and compliance. Information requests could take either a form of a simple information request (without an obligation to reply) or a formal Commission Decision (compelling the addressee to provide the information)[80]. The Commission would be vested with the responsibility of ensuring compliance with those requests. As in the State aid field, the Commission would be empowered (but not obliged) to impose sanctions on the addressee who intentionally or through gross negligence supplies incorrect or misleading information. In case of an information request by Decision, the Commission could in addition impose sanctions for late or missing replies. Those sanctions would be pecuniary (fines or periodic penalty payments) and their amount modelled on the established rules in the State aid field, which offer sufficient incentives for parties concerned to comply[81]. The Commission would not impose sanctions automatically, but would undertake a case-by-case assessment, with due regard to proportionality and appropriateness, especially in case of SMEs, and due process. The Commission could waive any periodic penalty payment already imposed when the addressee finally provides a reply. The addressees of a Commission Decision imposing sanctions could appeal to the CJEU, in accordance with Article 263 TFEU. The CJEU could cancel, increase or reduce any pecuniary sanction imposed by the Commission.

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[79] For instance, in the two cases in which the MIT has been used in the State aid field under Regulation (EU) 2015/1589 the total number of addressees of requests was six: five addressees in one case and one addressed in another case.

[80] This is in addition to the Commission Decision stating its intention to use SMIT (as described earlier).

[81] Cf. Art. 8 of Council Regulation (EU) 2015/1589: (1) fines not exceeding 1% of the total turnover for supplying incorrect or misleading information or for not replying to requests made by decisions; and (2) periodic penalty payments not exceeding 5% of the average daily turnover for each working day of delay, calculated from the date set in the decision in order to compel them to supply complete and correct information which has been requested.

Confidentiality and sharing of information. Confidentiality and professional secrecy principles as in Options 2 and 3. The Commission shall forward the answers received to the Member State(s) concerned by the request where they are relevant for a formal infringement procedure pursuant to Article 258 TFEU against that Member State(s)[82]. Should a responding firm consider that its reply contains information that should remain confidential vis-à-vis that Member State, it should substantiate its claims and provide additionally a non-confidential reply that can be shared with the concerned Member State(s)[83]. Such non-confidential version should follow the same format as the confidential version, replacing deleted passages by summaries thereof[84].

Use of the collected information. The Commission would be allowed to use the information collected only for the purpose for which it was required. Disaggregated firm-level information could be used by the Commission to prove the existence of obstacles to the functioning of the internal market (incl. possible infringements of Union law) and for informing infringements proceedings. When this information is used for informing legislative initiatives, any information included in documents supporting such initiatives must be in aggregated form or otherwise anonymised such that individual respondents cannot be identified. Where a Member State has access to firm-level information in the context of infringement proceedings, it could use such information only for the purpose of enforcing Union rules.

5.6. Option 5: A 'hybrid' approach combining Options 2 and 4

Option 5 would combine lifting regulatory limitations to the sharing of firm-level information between the Member States and the Commission (Option 2) and introduction of SMIT (Option 4). See above for the details of both options. As described under Option 4, SMIT would be used only if the requested firm-level information is not available anywhere else and could not be obtained in a timely fashion through other means. In Option 5, this would include information that Member States already possess or could already access on the basis of Union or national law. Option 5 would entail a coordination mechanism. It would ensure that national investigation powers are primarily used for the targeted enforcement of Union law at national level while SMIT would be available to the Commission for collecting the information required in instances with a specific cross-border dimension: e.g. enforcing Union law through a cohort of systemic infringement proceedings or calibrating the Commission's response to serious obstacles to the functioning of the internal market through legislative initiatives in case of enforcement deficits.

5.7. Discarded options

Two options contemplated in the inception impact assessment[85] (Option 6 – enhancing the coverage of European statistics – and Option 7 – introducing regular reporting obligations via the Accounting

[82] This is without prejudice to the rights that the Member State may have to access the relevant information, in the context of infringement proceedings.
[83] Exceptionally, should the respondent have reason to believe that their identity should be kept confidential from the Member State, it should indicate the reasons why its identity should remain secret.
[84] See Article 7(3) of Regulation (EU) 2015/1589 for a similar procedure in the State aid domain.
[85] http://ec.europa.eu/smart-regulation/roadmaps/docs/2017_grow_014_single_market_information_tool.pdf

Directive) are discarded upfront. These options would only partly address the specific objectives of this initiative at the cost of imposing significant administrative burden. Although both options could deliver additional representative firm-level information (at least in an aggregate form), they are not suited for obtaining specific confidential information. Thus, protection of sensitive information, which is of key importance to the stakeholders, would be compromised. In addition, Option 6 could not ensure collecting descriptive information. Furthermore, given that statistics are often based on a sample of firms, it could not be guaranteed that firms of interest in a given case would be covered.

As the time lag in both options is more than one year, they would not meet the timeliness criterion. In addition, information obligations could not be swiftly changed as this requires long legislative process. These options would in addition be disproportionate – covering the whole population of enterprises on a regular basis would significantly increase the administrative burden (respectively by EUR 68m and EUR 1.8bn annually). All firms responding to public consultations except one were against the creation of regular reporting obligations and all respondents cautioned against increases in administrative burden. In the view of those considerations, the detailed analysis of these discarded options is discontinued. More analysis of the discarded options can be found in Annex 7.

6. WHAT ARE THE IMPACTS OF THE DIFFERENT POLICY OPTIONS AND WHO WILL BE AFFECTED?

6.1. Impacts of Option 1

The exchange of best practices between Member States in relation to the collection of cross-sector firm-level information to enforce single market rules would face a substantial hurdle. According to the public consultation, only one Member State already has a dedicated authority (UK CMA) empowered to collect such kind of information and therefore having the necessary experience[86]. Therefore, all other Member States would need to first grant similar powers to their authorities in order to benefit from the UK's specific experience[87]. This would be a lengthy process. Also, given the voluntary nature of this exchange, it is unclear how many Member States would choose to grant these information powers to one of their authorities. National authorities in sectors such as competition, consumer protection, financial services or network industries are already organised in Union-wide networks, where information exchange takes place among them (but not always with the Commission). The scope of these networks is limited to a single sector or to specific policy areas (e.g. competition), thus not all relevant requests could be made. Even if all the above restrictions were voluntarily eliminated, the fragmented nature of authorities entails a lengthy and costly coordination. This would include, for example, finding relevant authorities, negotiation agreement to launch information requests, creating common questionnaires with standard definitions and avoiding double counting. The consequence would be a substantial lag in obtaining results. It must be noted that having such powers national authorities would likely use them more often than for a

[86] One regional authority in Spain reported in the public consultation having powers to inquire firms for legislation design purpose.

[87] Of course, other national authorities may have experience in the treatment of confidential information, use of investigative powers or exchange of information within their limited remits of activities (e.g. tax, competition etc).

few cases envisaged in this proposal thus significantly increasing the burden on companies which was the key concern for firms in the public consultation.

Summing up, Option 1 could meet the objective in the long run assuming cooperation of all Member States, agreeing to create new investigative national institutions. Once they have been created, coordination problems and legal limitations to data sharing with the Commission and between Member States would need to be solved to tackle cross-border cases.

The annual Union-wide cost of this option could range from EUR 0 (if no Member State choses to participate) up to EUR 0.59m for firms and EUR 0.44m for national authorities[88] (in case all Member States will follow the recommendation)[89].The lower bound for the potential benefits of this option is estimated at EUR 50m, but the benefits are unlikely to materialise in the short to medium run, as explained above (see also Annex 8).

6.2. Impacts of Option 2

Firms participating in the public consultation preferred using existing information already gathered by different authorities rather than being asked again for the same information (80% of answers). They were against any duplicate requirements (being asked for the same information by different authorities). There were also calls for more exchange of information between Member States.

This option could give the Commission *de iure* access to firm-level information gathered by national authorities. However, the effectiveness of the option largely depends on Member States' capacity to cooperate with the Commission, which is limited for the following reasons. First, authorities will often not possess or be able to obtain the kind of firm-level, disaggregated data that would be needed to address single market malfunctioning cases (e.g. firms' pricing strategy or cost structure). Second, authorities often collect data over particular time periods (e.g. annual income taxes) and store archives only for a specific time, as a consequence such data might not be available to the Commission in a timely fashion or at all. Third, Member States' incentives to share information with the Commission might be eroded, given that firms provided the information being unaware that it would later be shared with the Commission for a different purpose. If firms were granted the right to oppose to their data being shared with the Commission, this would render Option 2 rather ineffective; and, if unlimited Commission's access to national databases is secured, this would give raise to proportionality concerns. Fourth, Member States could be hesitant or unwilling to provide sensitive information in certain instances (e.g. when it could be used for infringement proceedings concerning them) and could potentially be inclined to challenge the need for providing the information[90]. This could lead to submission delays, incomplete information or no submission at all.

[88] In case Member States decide to establish dedicated bodies for issuing information request, the cost on authorities would raise to EUR3.5m (see also footnote 101 and Annex 8).

[89] Under assumption of 4 small-scale information requests covering up to five firms and one larger-scale with up to 50 firms. Maximum cost of individual reply preparation based on data available to firm is EUR4,400 for a large firm, cost of legal advice: EUR4,000. For details see Annex 8.

[90] In the context of infringements proceedings, Member States' failure to achieve full-cooperation during the investigation phase under Article 258 TFEU could amount to an infringement of Article 4(3) TEU: cf. for

There would be two additional obstacles to implementing this option: comparability and proportionality. Data from different authorities may not be comparable across Member States, for example due to different definitions applied when collecting the information at domestic level. This could lead to the need to recalculate the data according to common definitions, which might require additional firm input. There could be additional proportionality concerns when sharing certain types of information (e.g. tax returns), although these could possibly be solved by an exemption.

In summary, although this option would increase access to certain types of firm-level data, its effectiveness is likely to be limited and it seems to be too intrusive into national competencies, thus disproportionate to the objectives at hand.

The annual cost of this option is calculated under an assumption that between 0% and 50%[91] of Commission's information needs could be met by the national authorities. For firms the cost is then between EUR 0 (in case they are not asked) and EUR 0.29m. Expenses of the Member States range from EUR 0.006m to EUR 0.27m and of the Commission - from EUR 0.01m to EUR 0.15. The total cost is between EUR 0.02m and EUR 0.72m. The lower bound for the potential benefits of this option is estimated at EUR 50m. The benefits are moderately likely to materialise due to uncertainty whether information could be provided by national authorities (see also Annex 8).

6.3. Impacts common to Options 3, 4 and 5

The impacts of Options 3 to 5 on market participants, public authorities, and citizens go largely in a similar direction. However, there are also differences in the effectiveness and timeliness of the proposed tools and the resulting administrative burden for the Commission and national authorities.

In the public consultation, two fifths of the firms and authorities and three quarters of the citizens and consumer organisations agreed that authorities at the Union or national level should have the right to ask for confidential firm-level information when it is crucial for solving breaches of citizens' or firms' rights under Union law. One-fifth of the firms, two authorities and a third of the citizens stated that this right should also be granted to prevent future breaches. One seventh of the firms, a third of the authorities and one fifth of the citizens replied that such requests should never be possible. National authorities from two Member States (out of ten who replied) 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.

Market participants:

Those market participants having to comply with the obligation to provide information under Options 3 to 5 would incur costs for extracting and compiling the requested information. These costs are estimated between EUR 1,200 and EUR 4,400 per responding large firm (EUR 300 - EUR 1,000 for

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instance, judgments of the CJEU in C-82/03, Commission vs. Italy, paragraph 18; C-494/01, Commission vs. Ireland, paragraphs 195 and seq.; C-137/91, Commission vs. Greece, paragraphs 5-6.

[91] Please note that due to this assumption the costs of this option cannot be directly compared to costs of other options. In case national authorities could provide all the requested information (100%), the total cost of this option is the same as for Option 3 – see sensitivity analysis in Annex 8.

SMEs), increasing by EUR 4,000 for the cost of legal advice[92]. On average, five firms would be asked to provide information in a case of infringement proceedings. In the event enforcement deficits were demonstrated for which a change in the applicable legislation is needed, a higher number of firms (up to 50) would be addressed (see also Annex 8).

Additional administrative burden may arise if market participants are requested to provide information in a specified format. However, the benefits of having data in a more standard format and avoiding methodological shortfalls could outweigh these costs.

As requested by participants to the public consultation, the Commission would take several measures to minimise this burden, including issuing information requests only in particularly important cases and only requesting information that the firms could easily provide. Electronic data submission would reduce the response burden, increase efficiency in acquisition and processing, and improve timeliness[93].

In addition to the aforementioned administrative burden, replying firms would be differently impacted depending on the role they play in a particular single market malfunctioning instance under examination. On the one hand, the impact would be negative for market participants benefiting from the status quo (i.e. 'favoured' by the obstacles to the internal market that need to be addressed, whether through infringement proceedings or legislative initiatives). On the other hand, firms or consumers whose rights are potentially breached would benefit from better informed enforcement of Union rules and enhanced access to the single market. This should have positive effect on firms' competitiveness, facilitate cross-border expansion and increase availability of goods and services to customers and firms alike.

Overall, market participants would benefit from a better functioning single market thanks to more targeted enforcement actions by the Commission and the Member States. They would also benefit from better designed Union rules and a more fitting regulatory environment. In addition, more robust evidence could prevent the creation of unnecessary or imprecise rules that could potentially distort the market.

Market participants would additionally benefit from enhanced legal certainty, compared to a situation in which the Member States or the Commission would ask for voluntary submissions, and would be protected from adverse consequences resulting from providing data to public authorities[94]: i.e. without options 2 to 5 replying firms may face certain legal constraints, including

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[92] Cost of EUR 4,400 is based on the cost of preparation of notes to the financial accounts of a large firm. It is used as a proxy for the maximum firm cost of replying to information request for all the options in this impact assessment (although information requests are unlikely to ever demand the same amount of information as notes do, it is used not to underestimate the costs). In the minimum scenario the cost is based on 30 man-hours reported in the public consultations. The cost of legal advice was reported in the public consultations as well. For details of cost calculations please see Annex 8.

[93] Administrative burden was one of the key concerns expressed during the public consultation, as well as exceptional usage of information requests (64% of firms). 70% of responding firms said that requested data should be easy to extract and compile. Among burden minimising measures electronic replies were suggested.

[94] See the example of Computer Tomography scanners from chapter 2.4.2 where approached firm was *'unwilling to cooperate in the investigation until the Commission makes a formal request'*.

contractual disclosure rules that prevent them from disclosing information to authorities, which could result in retaliation measures from their contractors/business partners.

Including SMEs in the scope of Options 3 to 5 would contribute to ensuring the effectiveness of the initiative, although they are not considered the primary addressees. When proving the existence of serious obstacles to the functioning of the single market and calibrating a response to such obstacles, the Commission would use firm-level information to assess how widespread the behaviour/practice leading to the single market malfunctioning seem to be (across time and firms) and what the economic/social damage of the practice is. The behaviour of individual large firms can have greater impact than the one of individual SME, given the scale of their operations. Furthermore, large firms tend to have more cross-border operations than SMEs. However, depending on the country or industry, SMEs may be very relevant to analyse the extent of a single market malfunctioning. For example, in some Member States/sectors medium-sized companies are the largest market players. Hence, including SMEs in the scope of Option 3 to 5 would help to ensure that a Commission's response to a single market obstacle will not be detrimental to them and would facilitate addressing obstacles impeding SMEs to benefit fully from the single market. As pointed out by a small craft organisation in the public consultation, requests targeting SMEs should take their capabilities into account and minimise the burden through measures such as a concise and precise questionnaire. This will be ensured for all firms regardless their size, since they will only be asked the strictly necessary information. Exclusion of micro-enterprises from information requests, on the other hand, does not limit the effectiveness of the initiative since their information could be approximated, if necessary, by that of the smaller SMEs.

Public authorities:

The Commission would benefit greatly from being able to access robust, timely and sufficiently detailed information directly from market participants. This would facilitate more targeted and timely enforcement actions through infringement proceedings and a better informed evaluation and preparation of single market policies. The impact of Options 3 to 5 on the national authorities would be equally positive, as enhanced access to information should result in better-informed single market enforcement at Member State level. This, in turn, could limit the instances of formal infringement proceedings against Member States.

Being able to use information collection powers could allow the Commission to reduce the number and hence the cost of external evidence-gathering studies or to commission better targeted studies. The estimated saving on external research on a yearly basis ranges between EUR 0.7m and EUR 1.6m[95].

These options would require that the Commission and the national authorities coordinate their actions, handling of information requests, and the collected information analyses. The associated additional administrative burden on authorities of gathering and analysing a reply from a single firm is estimated at between EUR 1,700 and EUR 6,100[95].

[95] See Annex 8.

Options 3 and 5 entail an additional coordination cost and time, as discussed in the following sections.

Citizens/social impact:

Having robust information on single market malfunctioning would allow the Commission and national authorities to ensure a higher degree of compliance with single market laws, as well as better designed Union policies, thus contributing to a more frictionless functioning of the single market. This would enhance consumer trust in the single market, resulting in wider participation in and use of the single market possibilities such as cross-border working, shopping or access to online content. Moreover, benefits such as e.g. better use of public resources (i.e. lower taxes or better public services) thanks to well-functioning public procurement or financial stability due to better oversight of financial institutions (i.e. safe deposits and investments) bring additional benefits to citizens.

6.4. Additional impacts specific to Option 3

Under Option 3, collecting information may in some situations require complex and lengthy coordination efforts between Member States and the Commission. Such efforts would be particularly high in instances with a strong cross-border dimension involving many stakeholders from several Member States. These coordination efforts would significantly increase the administrative burden placed on the Commission. Furthermore, ensuring a timely access to the information may be impeded. Administrative burden would also be placed on national administrations who would issue and process information requests.

Member States replying to public consultation were advocating need for a strong cooperation in any data collection activities and some suggested that they are best placed to handle it.

Until 2014, Member States were obliged by the Procurement Directives[96] to collect and submit to the Commission annual statistical reports on awarded public contracts. Decades of experience have shown that the quality and soundness of these reports varied widely[97]; problems like missing or contradictory data, non comparability across Member States despite providing them with commonly agreed templates, and substantial delays of up to three years or even non submission of reports. Hence, in spite of hiring external consultants to clean the data, its inherent quality was so low that no meaningful Union wide analysis was possible. As a consequence, since 2014 a centralised web portal run by the Commissions became the principal source of data on European public procurement[98].

Under Option 3, Member States would be responsible for ensuring compliance with information

[96] Starting in 1977 with Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts.
[97] Impact Assessment on Amendments to Procurement Directives: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011SC1585&qid=1480680545446&from=EN
[98] Directive 2014/24/EU on public procurement; Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors.

requests. Therefore, potential sanctions for missing, late, incomplete or misleading replies would not necessarily be harmonised across the Member States. This could lead to several problems. First, a potential lack of sanctions for non-compliant firms in some Member States may reduce the effectiveness of the initiative as market participants may have no incentive to provide the requested information. Second, it would be difficult to ensure that the data is provided on time and that the information is correct and reliable. Third, this could lead to unfair treatment of market participants, particularly in cross-border cases where firms are placed in different Member States and are, therefore, under different regimes of potential sanctions.

Similar to Option 2, an additional obstacle limiting the effectiveness of Option 3 is the potential lack of cooperation of Member States, who may not be willing to request and share information in sensitive cases. Indeed negotiating authorities' agreement to issue information requests on their territory especially in cross border cases is considered one of major drawback of this option.

A further element reducing the efficiency of Option 3 (and of Option 2) is the likely dispersion of national authorities with regard to investigative powers, increasing the difficulty of the coordination efforts. In Option 3, the entrustment of the new residual information collection powers to an appropriate authority (or a ministry) would be left to Member States. The most likely scenario is that information requests would be handled by the relevant authority/ministry, but as authorities/ministries would differ depending on the case and the Member State, any cross-country coordination may be extremely complicated. One could argue that Member States' voluntary use of existing authorities and their coordination networks[99] could overcome this coordination difficulty. Such use, however, proves problematic. For instance, if Member States were to empower their national competition or national consumer protection authorities to gather information for the Commission in the single market area generally, such empowerment is likely to endanger the coherence of both the competition and consumer protection systems and distract those dedicated authorities from their core responsibilities[100], with potential negative implications on the quality of their services (e.g. competition authorities may be involved in long, complex and resource-heavy investigations). For these reasons, the reuse of existing coordination mechanisms and procedures from other policy domains does not appear to be a viable alternative and remains unlikely to happen in practice. Furthermore, the voluntary creation by Member States of new dedicated national

[99] E.g. national competition authorities (NCA) with European Competition Network or consumer protection authorities with the Consumer Protection Cooperation Network. In other sectors (notably in the financial services or network industries), the involvement of specific Union bodies would be needed (e.g. EBA, EIOPA, ESMA, Agency for the Cooperation of Energy Regulators, etc.).

[100] As regards the competition law domain, NCAs are currently not empowered to issue requests for information on behalf of the Commission neither in merger (Regulation 139/2004), antitrust (1/2003) nor state aid (2015/89) regulations. . Moreover, Union rules empowering NCAs to apply the Union competition rules alongside the Commission do not allow the use of information collected for purposes other than the enforcement of the Union competition rules. Similarly, in the consumer protection area, the CPC Regulation does currently not empower the Commission to channel information requests through national authorities. Moreover, the CPC Regulation allows addressing only intra-Community infringements of Union consumer legislation listed in the Annex of the Regulation and does not cover business-to-business legislation. Stakeholders have recently rejected any extension of its scope to cover business-to-business practices (see proposal of 25 May 2016 to replace the CPC Regulation 2006/2004, p. 112: http://ec.europa.eu/consumers/enforcement/cross-border_enforcement_cooperation/index_en.htm).

authorities/bodies with the specific task of using those residual powers does not appear as a likely outcome as it would add considerably to the burden while the new authorities would remain largely idle due to a low number of requests per year [101]. Moreover, the creation of those authorities/bodies, by themselves, would not solve the coordination problem. Another potential issue is that the use of national-level investigative powers could not be limited by a Union legislation (as it is the case in Option 4). Therefore, firms might be addressed more frequently, which would significantly increase their administrative burden[102] (an issue of key importance to firms replying to public consultation).

The estimated annual Union-wide cost of this option for firms ranges between EUR 0.36m and EUR 0.59m. The projected cost to Member States ranges from EUR 0.35m to EUR 0.52m and to the Commission – from EUR 0.07m to EUR 0.26m. Total cost ranges between EUR 0.78m and EUR 1.37m. The expected benefits of the option range from EUR 50m to EUR 6bn for enforcement cases and around EUR 9bn and more in cases when firm-level information collected is used for informing legislative initiatives, with a high likelihood that they will materialize, subject to limitation described above (see Annex 8).

6.5. Additional impacts specific to Option 4

Option 4 would facilitate the enforcement of single market rules, whether through infringement proceedings or, in case of enforcement deficits, through proposals of legislative initiatives. This option would:

- ensure full geographical coverage of the issue under investigation (including the whole Union territory, where necessary in view of the situation at stake);
- facilitate efficient collection of information in situations with a cross-border dimension (i.e. where information from market participants placed in more than one Member State would be necessary), avoiding complex and lengthy coordination efforts with and among Member States;
- circumvent methodological problems that may otherwise be created by uncoordinated action from national authorities (e.g. using different definitions or merging the information with a risk of double counting);
- allow for a more timely access by the Commission to the required information.

Cost-benefit ratio for Option 4

[101] Based on experience with CPC Network the running cost of a single competent authority employing on average 4.4 persons is around EUR 130,000 annually. With EU wide cost of EUR 3.5m for 27 Member States without such dedicated authorities (UK has CMA). The total cost of Option 3 in case new authorities are established is between EUR 3.9m and EUR 4.4m (See Annex 8).

[102] This is not reflected in the administrative burden of this option, as for maintaining comparability of options, calculations for all options are based on the same number of firms.

Benefits:

→ The equivalent investigation powers in the State aid domain have since 2013 allowed the Commission to collect indispensable firm-level information in two large impact cases, resulting in a **recovery of unpaid taxes to the tune of nearly EUR 50 million**[103].

→ Only in the public procurement case introduced in Section 2.2.1[104], the **potential savings on a one concessions case could exceed EUR 3 billion**.

→ Evaluating the extension of the geo-blocking regulation to copyrighted content more precisely could have great implications, since 1% revenue in copyright intensive industries amounts to EUR 9 billion.

Costs:

The **yearly cost of firm-level data collection and analysis for 5 SMIT requests is estimated between EUR 0.5 million and EUR 1 million.**

Ratio:

The **benefits largely outweigh the costs**.

The effectiveness of Option 4 will be particularly strong for those instances where information collected using SMIT will be used as necessary[105] evidence for supporting Commission infringement proceedings or informing legislative initiatives in case of enforcement deficits. However, such effectiveness should be qualified considering that SMIT will be an exceptional tool subject to a rather demanding test: in other words, SMIT will not be the only tool to collect data for infringement proceedings as Member States will remain the first channel source for such data collection; it will also be used as a 'last resort' tool to support the assessment of impacts of selected important initiatives.

In the exceptional circumstances in which the Commission could use SMIT powers, Option 4 would place an administrative burden on the Commission when issuing and processing information requests. Compared to Option 3, SMIT would hardly impose any administrative burden on Member States, since it would consist only of (negligible) cost of confirming that they cannot make the requested information available to the Commission. SMIT would, nevertheless, allow Member States, in the context of infringement procedures, to have access to information necessary for backing up economically significant enforcement cases. Thus, it would guarantee the role of the Member States, alongside the Commission, in securing that single market rules are correctly applied. Overall, Option 4 is likely to result in a more efficient process and less cumulative administrative burden for the Commission and Member States.

[103] Information requests were issued in the FIAT case (SA.38375) and the Starbucks case (SA.387340). For a detailed analysis of these two cases see Annex 5.

[104] Cf. example of enforcement of public concessions rules in the context of large infrastructure projects in Section 2.2.1.

[105] It is recalled that SMIT will only be used where the Commission is able to show the necessity of the firm-level information at stake for the relevant purpose. This will only happen in exceptional cases.

In order to address some concerns of firms[106] as regards the confidentiality of the information and its purported use, individual replies to requests for information would not be forwarded to Member States, unless in the context of formal infringement procedures. Yet, in those cases, respondents will have the possibility to submit an additional non-confidential version to the Commission to be forwarded to the national authorities. In addition, the information will be used only for the purpose for which it was collected[107]. Preparation of an additional non-confidential answer is, however, connected with an additional cost as reported by one business association.

The existence of sanctions for intentionally or negligently providing misleading information would ensure more truthful and reliable replies, thus improving the overall effectiveness of the initiative and clearly improving the status quo[108]. Firms in the public consultation opted for a voluntary-only regime without sanctions, while supporting Member States acknowledge the need for proportionate sanctions[109]. The sanctions proposed in Option 4 do not intended to correct any underlying firm behaviour relating to the practices under examination or to punish firms for creating cross-border obstacles to the functioning of the internal market. Instead, the proposed sanctions would only be issued for the failure to provide the relevant information at its disposal[110]. Such sanctions would not apply automatically, but only after a case-by-case assessment accounting for relevant circumstances and paying particular attention to proportionality (particularly for SMEs). Finally, addressees of a Commission decision imposing sanctions could appeal to the Court to annul such decision or to lower the amount of the fine[111]. The sanctions in option 4 are modelled after the competition law

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[106] One association said in public consultations: *'There are no guarantees that the information provided would remain confidential and only used for the purpose for which it was required. This would require involvement of legal experts (in house or outsourced) which would entail considerable cost*'.

[107] Option 4 also complies with Art. 7 of the Charter of Fundamental Rights (right to private life of businesses) and is consistent with provisions on the same issue in State aid (cf. Art. 7(3) of Regulation (EU) 2015/1589).

[108] In the public consultation, one Member State reported having in certain cases powers to sanction firms for non-compliance with information requests and noted that in areas where sanctions are not available firm participation is negatively impacted.

[109] In a position paper submitted to the public consultation, a Member State suggested using significantly lower pecuniary fines than in the State aid field: *'This is to reflect the fact that, unlike in State aid cases or in competition cases, the businesses are not suspected of any wrong doing. It is important that the fines are high enough to be an effective motivator for compliance but not so high that it would have an undue adverse effect on the businesses.'*

[110] The Commission could also waive a certain type of sanction (i.e. periodic penalty payments) for failure to reply in time, if the reply is finally handed to the Commission.

[111] Important to note, distinguishing the imposition of sanctions to firms depending on the purpose of the request for information (e.g. in the context of infringement proceedings or the development of legislative policy) would intensely reduce the effectiveness of Option 4: this would deprive certain requests from their enforceability character, making them a mere plea for voluntary cooperation and, therefore, not changing the status quo. Moreover, limiting information requests or sanctions to firms that might have performed illegal activities would impose major problems. First, it would imply that the Commission already knows whether firms have engaged in illegal behaviour, for which data would already have to be available. Second, this would tarnish the reputation of the firms that are subject to information requests or fines, since they would be labelled as "illegal" even without having obtained the information that proves this. Third, this is not the rule in the competition domain and could lead to calls for only limiting information requests to offending firms there. In the State aid field, the Commission can request information not only from beneficiaries, but also from competitors. Even in the antitrust and mergers fields, where the Commission does enforce Union law against firms directly, other market players (e.g. buyers, suppliers, competitors) which are not suspected of committing and infringement but may be in possession of relevant information are under the very same

domain, where they have acted largely as a deterrent. In that domain, despite the large majority of information requests being issued only as simple requests (i.e. without an obligation to reply), the requested information was provided in nearly all cases. Moreover, it appears that hardly ever specific sanctions for failure to provide information have been imposed since Regulation No 1/2003 is in force in the antitrust field or since the MIT was introduced in the State aid rules in 2013. This demonstrates that the mere threat of sanctions (which could have only been imposed following a request of information by Decision) works to incentivise firms to provide the information requested. Also the level of the sanctions proposed in Option 4 is consistent with Union competition rules. One could conceive, *in abstracto*, the application of alternative, less far reaching sanctions for non-replying firms in the context of SMIT: i.e. lower levels of fines or non-pecuniary sanctions (e.g. a temporary ban from registration in the Transparency Register[112], thus preventing the non-replying firm from contributing to the debates on the development of Union policy[113]). However, experience in the competition field shows that lower pecuniary sanctions lack the deterrent effect. Indeed, in the 2003 reform of the antitrust procedural rules, the Commission felt necessary to propose increasing the level of then existing procedural fines (limited to €5000)[114] to ensure they would have deterrent effect, which was not the case at that time[115] – the Council accepted such increase. The same, revised, level of sanctions was introduced in 2013 in the State aid rules. Lower levels of sanctions for SMIT would likely result in pressure on the EU legislator to also reduce the level of sanctions in the competition law area, therefore diminishing their already proven deterrent effect. As regards a temporary ban from registration in the Transparency Registry, such ban could have little, if any, deterrent effect on firms not willing to cooperate. At the same time, such ban would introduce a strong restriction of the rights of the firms in question to express their views on Union policy matters. This could be more intrusive and less proportionate in terms of respect of fundamental rights.

The annual Union-wide cost of Option 4 ranges between EUR 0.37m and EUR 0.61m for firms, and between EUR 0.12m and EUR 0.43m for the Commission. There is no cost for Member States. The total cost ranges between EUR 0.49m and EUR 1.04m. The expected benefits of the option range from EUR 50m to EUR 6bn for enforcement cases and around EUR 9bn and more in cases where

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regime on requests for information (including the possibility of being sanctioned in case of failure to reply to those requests).

[112] http://ec.europa.eu/transparencyregister/

[113] The rationale for such ban would be that a firm should not be allowed to attempt to influence the development of Union's policy when such firm is not willing to cooperate with the Commission in replying to a justified request for information.

[114] Cf. Council Regulation No 17 of 1962, which provided for fines in "absolute terms" rather than on "relative terms" (cf. with reference to companies' turnover).

[115] '*Paragraph 1 modifies the fines for breaches of procedural rules [N.B. including requests for information], which in the existing Regulation No 17 can be between EUR 100 and 5 000. These amounts no longer have any deterrent effect. It is proposed that these procedural fines be aligned on the ECSC Treaty, which provides for fines of up to 1% of the total annual turnover for these kinds of infringements (Article 47).*' [emphasis added]. Cf. European Commission, Proposal of 27.9.2000 for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 ('Regulation implementing Articles 81 and 82 of the Treaty'), COM(2000)582 final, p. 27.

firm-level information collected is used for informing legislative initiatives, with a high likelihood that they will materialize (see Annex 8).

6.6. Additional impacts specific to Option 5

Option 5 builds on both Options 2 and 4. The described ineffectiveness of Option 2 would remain (in terms of the difficulties for Member States to cooperate with the Commission, the (in)completeness of information collected domestically, the cross-border comparability of data etc.) as well as the proportionality concerns (mostly due to providing the Commission with access to national databases without consent of firms and use of information for purposes other than originally collected). At the same time, the possibility to use SMIT (Option 4) would relatively diminish (to the extent that the Commission would have access to information stored in national databases under option 2 and the necessity test of option 4 would be more difficult to be met). SMIT would continue to allow the Commission to collect the necessary firm-level information when national tools come short, such as when: (1) national authorities do not possess or are not able to obtain the necessary information using their existing powers; (2) data collected by authorities is not timely or complete; and (3) Member States are hesitant or unwilling to provide sensitive information to the Commission. However, the use of option 2 would result in reducing the efficiency gains of option 4 as regards the comparability of data since the Commission could have access to data in Member States under different formats, making it more difficult for the Commission to justify the use of SMIT in those cases while not obtaining a correspondent advantage because of the timely access to the information. Option 5 adds an additional coordination effort concerning whether investigative powers should be used at national or Union level. As existing national tools are mostly sectorial and differ significantly across the Union, selecting the most appropriate tool on a case-by-case basis may be burdensome and slow. Such efforts would be particularly high in situations involving market participants from several Member States. Therefore, ensuring a timely access to the information may be impeded. Similar to Option 3, sanctions for non-compliance would not be harmonised across Member States in cases when national tools (option 2) are used, therefore potentially reducing the overall effectiveness of the option 4 and the overall initiative.

The annual Union-wide cost of this option is between EUR 0.37m and EUR 0.6m for firms; between EUR 0.01m and EUR 0.27m for the Member States; and between EUR 0.13m and EUR 0.36m for the Commission[Error! Bookmark not defined.]. The total cost ranges between EUR 0.51m and EUR 1.23m. The expected benefits of the option range between EUR 50m to EUR 6bn for enforcement cases and around EUR 9bn and more in cases of informing legislative initiatives. The likelihood of these benefits materialising is high (see Annex 8).

7. HOW DO THE OPTIONS COMPARE?

7.1. Comparison of the options

Table 7.1 provides information comparing the policy options in the light of the effectiveness and efficiency criteria. Table 7.2 compares the impact of the policy options on stakeholders.

Table 7.1 Comparison of policy options against effectiveness and efficiency criteria

	Effectiveness				**Efficiency** (benefit to cost analysis)
	Improve access to comparable cross-border information	Improve access to confidential firm-level information	Ensure that collected information is correct, complete, and unbiased	Ensure that the information is sufficiently detailed, disaggregated, and timely	
Baseline	**0**	**0**	**0**	**0**	**0**
Option 1: Exchange of best practices between Member States and with the Commission	**(0/-)** limited number of best practices; no coordination or exchange mechanism, cross-border jurisdiction issues; comparability of information could be a problem	**(0/-)** no mechanism in place in majority of Member States (MS); potential improvement in long run, assuming all MS would participate			**Net effect: (0/+)** **benefits (0/↑):** potential in the long run (low likelihood) **Costs (0/↑):** creation of new capacity required in all but one MS; new coordination efforts; MS may use the powers rutinely increasing cost on firms; (EUR 0 - 1.27m)
Option 2: Lifting regulatory limitations to the sharing of firm-level information between the Member States and the Commission	**(+)** direct access to some data for the Commission, difficulty in finding responsible authority, some MS may not collect certain data at all, need to harmonise data protection between MS; comparability may be a problem due to differences in e.g. definitions;	**(+)** improved access to information that is already collected; no improvement with regard to access to information that is not already collected by MS (e.g. cost structure, price strategy)	**(0/+)** dependent on national measures; MS would enforce based on national rules; potential for different treatment of stakeholders in single market (e.g. fines for non-compliance)	**(0/+)** dependent on national measures; certain information is not collected by MS; periodic reporting (e.g. annual) means delays in data availability	**Net effect: (+)** **benefits (↑):** potentially high, depending on whether information is available at MS (billions of euro, but with medium likelihood) **cost (0/↑):** no or limited cost to firms; cost to Commission of finding and coordinating different authorities, cost to MS in preparing information; (EUR 0.02m - 0.72m)*
Option 3: Introducing residual investigative powers through national level single market information tools	**(++)** access to information vastly improved both for MS and the Commission**;** comparability ensured due to common formats and definitions; possibility of some MS not cooperating; firms may be unwilling to share all information with MS		**(+)** Potential lack of harmonisation between MS with regard to enforcement of compliance with information request, resulting in a different treatment of stakeholders in the single market (e.g. in terms of fines for non-compliance);	**(+)** access to any kind of information necessary for enforcement would be granted; possible delays due to necessary coordination between 28 MS in cross-border cases	**Net effect: (++)** **benefits (↑↑):** faster enforcement of Union law and prevention of future breaches (billions of euro) **cost (↑):**cost of replying to firms; MS may use the powers rutinely increasing cost on firms; coordination cost for authorities; (EUR 0.78m - 1.37m)
Option 4: Introducing an EU-level Single Market Information Tool	**(++)** as in Option 3; MS cannot block an information request		**(++)** single sanctions system; Clarity which information is shared with MS (possibility of non-confidentail version)	**(++)** access to any kind of information necessary for enforcement would be granted;	**Net effect: (++)** **benefits (↑↑):** faster enforcement of Union law and prevention of future breaches (billions of euro) **cost (↑):** firm cost of replying; (EUR 0.49m - 1.04m)
Option 5: – A 'hybrid' approach combining Options 2 and 4	**(+/++)** as in Opt. 4, but given the necessary sequential nature of requests in this hybrid option, MS would have to be approached before a Union-level request could be issued directly to firms. This could lead to important delays, receivinig non-comparable and incomplete data, making it necessary to eventually contact the firms directly (assuming that the necessity test for the use of SMIT could be met in every case, which is not granted).				**Net effect: (++)** **benefits (↑↑):** as in Opt. 4 **cost (↑):** higher due to potential duplication of activities and coordination cost; (EUR 0.51m - 1.23m)

Note: Assumption of 4 small-scale requests (up to 5 firms) and 1 larger request (up to 50 firms) a year (see Annex 8). Legend: **++** significant positive impact; **+** positive impact; **0** neutral; **-** negative impact; **--** significant negative impact; **↑** increase in cost or benefits; **↑↑** significant increase in cost or benefits; *- not comparable with other options, assumption of 50% of information need covered

Table 7.2 Comparison of the impact of policy options on stakeholders

	Firms	EU institutions	Member States	Citizens
Baseline	0	0	0	0
Option 1 Exchange of best practices	**(0/+)** no change in short run; long term potential improvement in the single marke; information requests might be used rutinely by MS		**(0/+)** positive in long run if MS decide to participate and share data	**(0/+)** no change in short run, potential improvement in the long run
Costs:	EUR 0-0.59m	EUR 0-0.21m	EUR 0-0.47m	EUR 0
Benefits:	Low likelihood: Small-scale requests: EUR 50m-6bn; Larger requests: EUR 9bn and more			
Option 2 Lifting regulatory limitations to the sharing of firm-level information	**(+)** no new or limited cost for firms; potential positive impact on faster detection and prevention of any barrier-creating activity by firms and MS; firm data collected by MS will be used for other purposes to those for which it was collected without agreement of firms	**(+)** better enforcement of Union law by MS could lead to lower number of infringement cases against MS, more data available for cross-border cases; certain information is not collected now; MS may be unwilling to pass self-incriminating evidence	**(0/+)** as each MS already has access to its own info any improvement could come from sharing of information between MS; this could lead to better enforcement of cross-border cases	**(+)** potential positive impact on faster detection and prevention of all kinds of discriminating activities by firms and MS
Costs*:	EUR 0 – EUR 0.29m	EUR 0.01m-EUR 0.15m	EUR 0.01-0.27m	EUR 0
Benefits:	Medium likelihood: Small-scale requests: EUR 50m-6bn; Larger requests: EUR 9bn and more			
Option 3 Introducing national-level single market information tools	**(+/++)** much faster detection and prevention of discriminating activities by firms and MS; more cases solved at MS level; cost of complying with information request and eventual sanctions; no possibility to limit access to sensitive information to MS; might be used rutinely by MS furhter increasing the burden	**(+/++)** better enforcement ofUnion law by MS should lead to less infringement cases against MS; all relevant data could be collected; time delays due to coordination; MS may be unwilling to pass self-incriminating evidence	**(++)** possibility to ask for information not collected now and facility to exchange information between MS should help in enforcement of national and cross-border cases; time delays due to coordination	**(++)** much faster detection and prevention of all kinds of discriminating activities by firms and MS; more cases solved at MS level; some delays in cross-border cases possible due to coordination
Costs:	EUR 0.36m-0.59m	EUR 0.07m-0.26m	EUR 0.35m-0.52m	EUR 0
Benefits:	High likelihood: Small-scale requests: EUR 50m-6bn; Larger requests: EUR 9bn and more			
Option 4 Introducing an EU-level Single Market Information Tool	**(++)** faster detection and prevention of discriminating activities by firms and MS; more cases solved at MS level; cost of complying with information request and eventual sanctions; possible to send only non-confidential version to MS; exemption of micro firms	**(++)** better enforcement of Union law by MS should lead to fewer infringement cases against MS; all relevant data could be collected	**(+/++)** possibility to ask for information not collected now and facility to exchange information between MS should help in enforcement of national and cross-border cases	**(++)** much faster detection and prevention of potentially all kinds of discriminating activities by firms and MS; more cases solved at MS level
Costs:	EUR 0.37m-0.61m	EUR 0.12m-0.43m	EUR 0-0.002m	EUR 0
Benefits:	Very high likelihood: Small-scale requests: EUR 50m-6bn; Larger requests: EUR 9bn and more			
Option 5 'hybrid'	**(+/++)** Same as Option 4, with similar concerns ot Option 2; longer delays due to sequential nature of the procedure, duplication of activities and need for coordination of replies from all Member States concerned			
Costs:	EUR 0.37m-0.6m	EUR 0.13m-0.36m	EUR 0.01-0.27m	EUR 0
Benefits:	High likelihood: Small-scale requests: EUR 50m-6bn; Larger requests: EUR 9 billions and more			

Note: Assumption of 4 small-scale requests (up to 5 firms) and 1 larger request (up to 50 firms) a year (see Annex 8). Legend: **++** significant positive impact, **+** positive impact, **0** neutral, **-** negative impact, **--** significant negative impact; *- not comparable with other options, assumption of 50% of information need covered

Proportionality assessment. Option 4 appears the most proportionate to the objectives pursued by this initiative for the following reasons:

Option 4 is the only option next to Option 5 that provides a clear necessity test to be passed[116] to ensure the exceptional and 'last resort' nature of information requests, thereby guaranteeing that information requests are limited and targeted[117]. At the same time, Option 4 (and Option 5) would facilitate more timely access to relevant information by the Commission than Options 2 and 3, as the Member States could not significantly delay the flow of information.

Option 4 minimises the overall administrative burden on firms and public authorities compared to the other options.

Option 4 is the least intrusive option for businesses. Options 2, 3 and 5 would guarantee the Commission access to any firm's detailed information stored by a national authority without the knowledge of the firm. In addition, Options 1 and 3 could not ensure that the residual powers of the Member States would be used in a moderate manner.

Unlike other options, Option 4 would overcome the coordination problem when it is necessary to obtain information from market participants located in different Member States. Option 4 would achieve the objective at stake, which cannot be attained by Option 2 (not all types of firm-level information could be collected and data might not be comparable) and Option 3 (Member States are not in a position to enforce cross-border requests for information). Option 5 necessarily introduces a more complex coordination mechanism.

The proportionality of Option 4, as well as Option 5, is also reflected in the way it integrates the important role of the Member States, alongside the Commission, in the enforcement of the single market rules. This option does not deprive Member States of such role, who will continue to have their own investigation powers and remain free to extend them (Option 3 would be more intrusive from this perspective as it would force Member States to ensure that residual investigative powers are available at national level). Moreover, the use of SMIT by the Commission, being of 'last resort', will ensure that its use will be limited and targeted at the most appropriate cases where national intervention would not be effective (e.g. for reason of their scale or effects). Furthermore, the role of Member States within the operation of SMIT is also important: a Member State may signal to the

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[116] This test would be subject to appropriate *ex post* judicial control. One could argue, however, that an additional *ex ante* control by another Union institution or body (in the same manner as the Commission must consult the European Data Protection Supervisor as regards personal data protection initiatives could be warranted to ensure that the Commission respects the conditions imposed and does not abuse SMIT (thus resulting in excessive administrative burden). However, such an *ex ante* control could interfere with the balance of powers between Union institutions and bodies, in particular the Commission's right of initiative, unless the task of such body would be to provide a mere opinion. Yet, in the latter case, the result would be a delay in the procedure without any guarantee that such opinion would bring added value to the process, particularly considering the possibility of judicial review on the Commission Decision. Furthermore, it is unclear which body or institution could be entrusted with that role. A different issue would be if the Commission were to establish *ad hoc* internal procedures for such an *ex ante* assessment by a Commission's department specifically entrusted with the task of controlling the quality of the regulation process (such as the Regulatory Scrutiny Board). However, a decision on such an internal allocation of competences would correspond to the Commission itself and it would not be a matter for an inter-institutional legal instrument to address.

[117] It could be argued that in view of the small number of instances in which SMIT could be used the establishment of a new legislative tool would not be justified. However, it is precisely the exceptional and 'last resort' character of the tool, limiting its use in practice, which makes it a non-intrusive and proportionate tool.

Commission a potential enforcement issue and request the Commission to use the investigation powers; Member States are informed of the requests issued by the Commission; and by sharing the information with the concerned Member State in the context of infringement proceedings, both the Commission and that Member State would have the timely access to the needed information, thus ensuring better informed decision-making on both national and Union levels.

Option 4 does not go beyond what is necessary to achieve the stated objectives, thus respecting the principle of proportionality laid down in Article 5(4) TEU[118].

7.2. Preferred option

Option 4 is the most proportionate to the objective pursued; it scores best in terms of achieving all the objectives while minimising the overall administrative burden on firms and public authorities. Table 7.3 summarises the costs and benefits of the preferred option per stakeholder type.

Table 7.3. Total EU28 annual costs and benefits of the preferred option per stakeholder type.

		Costs (EUR)		Benefits	
Option	**Stakeholder**	**Min.**	**Max.**	**Value (EUR)**	**Likelihood**
4	Firms	0.37m	0.61m	- Small requests: EUR 50m-EUR6bn - Larger requests: EUR 9bn and more	Very High
	Commission	0.12m	0.43m	- Savings on external studies: EUR 0.7m – EUR 1.6m	
	Total	**0.49m**	**1.04m**	**From 50m to 9bn of euro and more**	

Note: Based on 4 small-scale requests (up to 5 firms) and 1 larger request (up to 50 firms) a year. (see Annex 8).

The Commission costs indicated above would not require any new budgetary commitments. They would only involve redeployment of existing staff and infrastructure.

The principal parameters of the preferred option are graphically illustrated for overview in Fig. 7.1.

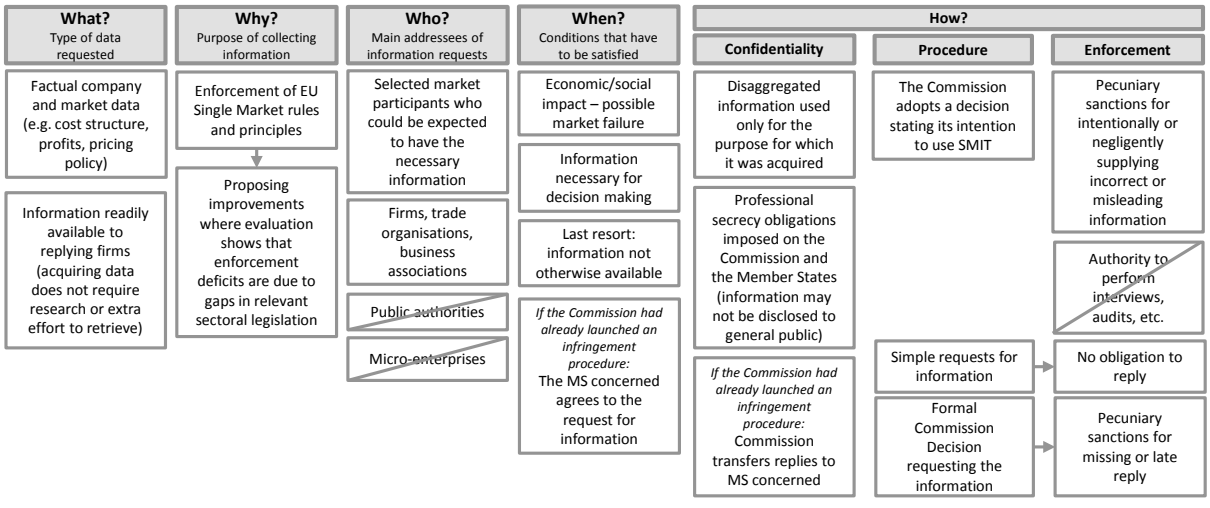

Fig. 7.1. Principal parameters of the preferred option

[118] Option 4 is moreover particularly in line with Article 337 TFEU, which explicitly foresees that the Commission should be able to collect the information required for the performance of the tasks entrusted to it, within the limits and under the appropriate conditions fixed by the Union legislator.

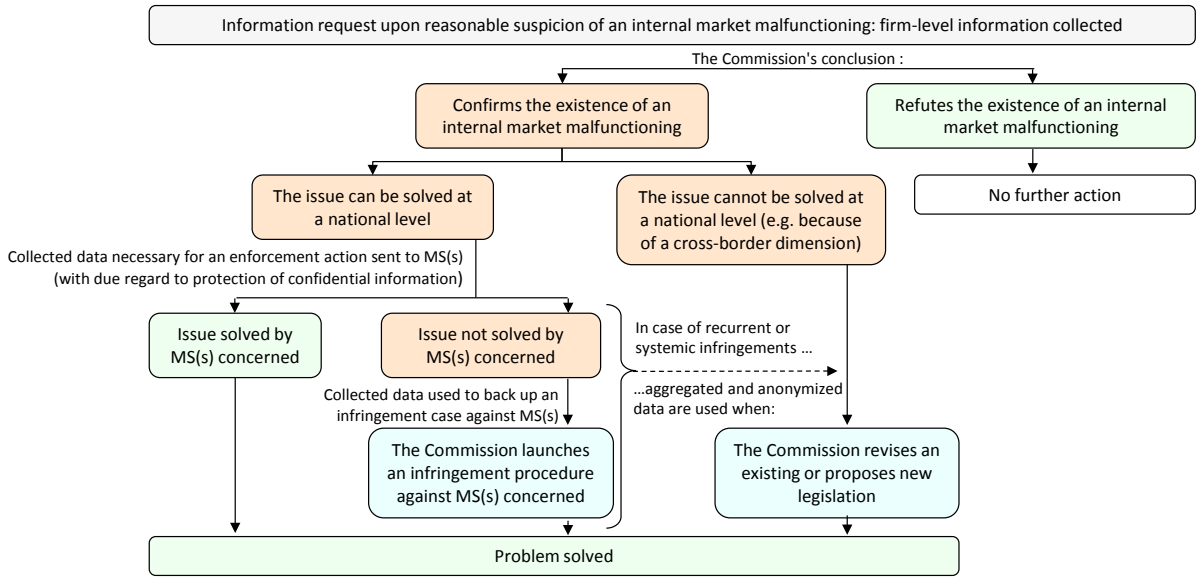

Fig. 7.2. Use of firm-level information by Member States and the Commission

How firm-level information collected under the preferred option is going to be used: The Commission would first use the collected information for confirming or denying the existence of serious obstacles to the functioning of the single market. In the event that the existence of those obstacles is not confirmed, no further action would follow. If the existence of such obstacles is however confirmed, the Commission would need to take action with a view to address the problem. It would need to involve the concerned Member State where the problem could be better addressed at national level: this avenue may lead to formal infringement proceedings if the concerned Member State fails to fulfil its obligations under Union law. Sharing of data with the Member States would take due regard to the protection of firms' confidential information and of the due process principles guaranteeing the rights of defence of the Member States in those proceedings. Alternatively, the Commission may use the relevant data, with due regard to confidentiality obligations, for assessing the need for new or amended Union legislation (especially concerning new market phenomena) and submitting related proposals to the co-legislators (see Fig. 7.2).**Choice of the legal instrument for the preferred option**: A regulation would appear as a suitable and appropriate legal instrument for the preferred option, considering that empowering the Commission to obtain information in a limited set of circumstances would not require, by itself, the approximation of national laws – therefore recourse to a Directive is excluded. In this context, a standalone regulation appears as an appropriate choice in terms of legal clarity, therefore providing higher legal certainty; and of no interference with other policy areas[119].

[119] As an alternative approach, the scope of existing information collection powers available to the Commission in other policy domains (e.g. MIT available in Regulation 2015/1589 on the application of State aid rules) could be, from a formal perspective, extended to allow the Commission to request firm-level information from market participants for a broader scope of cases of internal market malfunctioning. This alternative, however, would require substantial changes to the State aid rules (or the antitrust rules). Regulation 2015/1589 (or Regulation 1/2003) was tailored to the specific objectives, procedural steps and powers of the Commission in this narrowly defined area. Any such extension, mixing the two types of investigative powers in a single legal instrument could raise questions as to its legal robustness. Moreover, it would also likely endanger the

Consistency of the preferred option with Fundamental Rights. The initiative respects the fundamental rights and observes the principles recognised, in particular by the Charter of Fundamental Rights of the European Union (hereinafter, the 'Charter'), notably the right to respect for private and family life (Article 7). Clear safeguards and guarantees taking into account legitimate interest of undertakings in the protection of their business secrets would be provided for in the future Regulation. In particular, any undertaking concerned by the Commission's request for information would be given the opportunity to indicate which information it considers confidential, stating the reasons for such confidentiality. According to the first indent of Article 4(2) of Regulation (EC) No 1049/2001 on public access to documents[120], the Commission shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person. Furthermore, the Commission would share information gathered through SMIT with the Member State concerned by the request, to the extent that this information is not confidential vis-à-vis that Member State. Furthermore, in this initiative, in accordance with Article 339 TFEU, there would be guarantees that any information acquired by the Commission through the application of SMIT would be covered by professional secrecy obligations.

This initiative would not affect the right to the protection of personal data. Furthermore, it would guarantee protection of personal data in order to ensure compliance with Article 8 of the Charter. The initiative also respects the right to good administration (Article 41 of the Charter), and in particular the access to files, while respecting business secrecy as well as the obligation of the Commission to motivate its requests for information. The right of access to documents (Article 42 of the Charter) would be guaranteed in accordance with the provisions of Regulation (EC) No 1049/2001 on public access to documents**Error! Bookmark not defined.**120.

The initiative also respects the right to an effective remedy and to a fair trial (Article 47 of the Charter). Decisions requiring undertakings to supply information taken by the Commission pursuant to SMIT would be subject to review by the CJEU in accordance with Article 263(4) TFEU. This initiative respects Article 48 of the Charter which guarantees presumption of innocence until proved guilty according to law and right of defence of anyone who has been charged[121]. By a request for

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coherence of the systems given the different procedural steps for the investigations and the different policy objectives and could potentially result in implementation problems. Even within the competition area, different legal instruments with investigative powers are used for the State aid and antitrust fields. Moreover, the legal basis for the existing competition instruments and those for the current initiative are different and entail different legislative procedures for the adoption of the rules. While the antitrust or State aid regulations are Council regulations only, the rules to implement Option 4 in the current initiative would require the involvement of the European Parliament in the course of the ordinary legislative procedure.

[120] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

[121] In accordance with Article 52(3) of the Charter, this right has the same meaning and scope as the right guaranteed by the Convention. Article 48 of the Charter corresponds to Article 6(2) and (3) of the European Convention of Human Rights. In deciding whether proceedings concerning misconduct are to be categorised as 'criminal' or not, the European Court of Human Rights (ECtHR) has regard to '*Engel* criteria', in particular the nature of the offence and the degree of severity of the penalty that the person concerned risks incurring. It has in that regard considered it relevant whether the penalty is intended essentially as a punishment to deter offending rather than as pecuniary compensation for damage (judgement of the ECtHR of 8 June 1976 *Engel and Others v. the Netherlands*, 8 June 1976, par 82). The ECtHR recognises that Art. 6 of the European Convention of Human Rights is applicable to cases not strictly belonging to the traditional categories of the

information the Commission would compel undertakings to provide the necessary information available to it, even if it can be used to establish against it or another undertaking, the existence of an infringement of the internal market rules, it may not, by means of a decision calling for information, undermine the rights of defence of the undertaking concerned[122]. In particular, the Commission may not compel an undertaking to provide it with answers to a request for information which might involve an admission on its part of the existence of an infringement.

This initiative also respects Article 49(3) of the Charter according to which '*the severity of penalties must not be disproportionate to the criminal offence*'. This initiative could empower the Commission to enforce compliance with the requests for information by means of proportionate fines and periodic penalty payments. In setting the amounts of fines and periodic penalty payments, the Commission would take due account of the principles of proportionality and appropriateness, in particular as regards SMEs. The rights of the parties requested to provide information would be safeguarded by giving them the opportunity to make known their views before any decision imposing fines or periodic penalty payments is taken. The CJEU would have unlimited jurisdiction with regard to such fines and periodic penalties pursuant to Article 261 TFEU.

The future Regulation will be interpreted and applied with respect to rights and principles recognised by the Charter.

8. HOW WOULD ACTUAL IMPACTS BE MONITORED AND EVALUATED?

The Commission will monitor the application of SMIT with a view to assess the effectiveness and proportionality of this tool based on the following criteria:

Exceptionality of the use of the tool. The Commission will record, in particular, the number of instances SMIT was used per year, the area/domain of the single market concerned, the type/size/number of firms covered (and whether the same firm had to reply to requests for information more than once). Follow-up voluntary feedback surveys will be sent to firms covered by the Commission requests to gauge their views of the process, including associated time/money outlays and their views on the proportionality of the requests. Member States would be encouraged to send similar surveys to their firms in case Options 1, 3 or 5 are chosen. The proportionality of SMIT will also be assessed by the number of instances in which Member States or firms would challenge before the CJEU the justification for collecting the information (i.e. the Commission's initial decision) and/or the proportionality of the extent of the requests for information.

Cooperation of the addressees of the requests in providing the information requested. The Commission will record, in particular, the timeliness of replies, the response rate and whether the information is sufficiently representative considering the response rate. The Commission could use indicators such as whether follow-up action to remind firms that they should reply to simple

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criminal law, e.g. to antitrust proceedings (see e.g. judgment of the ECtHR of 27 September 2011, *Menarini v. Italy*, par 38-44). In the context of this initiative 'Engel criteria' are met because the Commission can enforce compliance with requests for information by means of fines and periodic penalty payments intended essentially as a punishment for missing, late, misleading or incorrect replies.

[122] See, by analogy, judgment of the CJEU of 18 October 1989, in case 374/87 Orkem v Commission, par 34.

requests, including the threat of sanctions if the information is requested by Decision, was necessary to receive replies.

Quality of the information collected. The Commission will record, in particular, information on the quality of responses, that is: their comprehensiveness and completeness, their accuracy, their reliability (e.g. information not biased). It will also record information on the comparability of the data collected from firms situated in different Member States. Beyond the necessary qualitative judgments, some quantitative data could also be recorded: e.g. whether follow-up action (requests for clarification, requests for submitting complementary/supplementary information) was needed.

Usefulness of the information collected. The Commission will record, in particular, whether the information collected through SMIT was actually used in the decision-making process of the Commission and for which purposes: e.g. infringement proceedings against Member States; enforcement action at domestic level following infringement proceedings; informing legislative initiatives. The Commission will also verify whether the use of SMIT, as an ancillary tool, resulted in better Commission's decisions. The following indicators could help in this regard: e.g. the success rate of launched enforcement proceedings at Union level (e.g. whether the CJEU will uphold the Commission's arguments supported by the information collected using SMIT); the success rate of domestic enforcement actions following infringements proceedings where information collected using SMIT was used; ex post feedback from stakeholders on the usefulness of the information collected for the decision-making process, in particular in the case of legislative proposals benefiting from information collected through SMIT. The Commission will also verify whether the use of SMIT resulted in timely decision-making by the Commission: this is likely to require a counterfactual assessment, such as whether the time spent on collecting information through SMIT actually allowed the Commission to accelerate its own procedures after the collection of information.

The results of these monitoring activities would be assessed in a Commission's report after five full years of the tool functioning and could lead to modifications of the legal framework, if appropriate.

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ANNEX 1: PROCEDURAL INFORMATION

Lead Directorate-General. This initiative is led by Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW).

Agenda planning and Work Programme References. The Agenda Planning Reference is 2017/GROW/014. The Single Market Information Tool was announced in the Single Market Strategy (Com(2015)550 of 28.10.2015) and was part of Commission's 2016 and 2017 Work Programme[123].

Organisation and timing. The inter-service steering group for this initiative was chaired by the Secretariat-General. The following Directorates-General (DG) participated: the Legal Service, DG Agriculture and Rural Development; DG Climate Action; DG Communications Networks, Content and Technology; DG Competition; DG Economic and Financial Affairs; DG Employment, Social Affairs and Inclusion; Eurostat; European Political Strategy Centre; DG Financial Stability, Financial Services and Capital Markets Union; DG Justice and Consumers; and DG Mobility and Transport.

The following meetings took place:

- 7 April 2016 – on the inception impact assessment;
- 17 June 2016 – on the public consultations questionnaire;
- 29 September 2016 – on the problem definition;
- 11 November 2016 – on the options and analysis;
- 8 December 2016 – on the final draft of the impact assessment.

The Regulatory Scrutiny Board (RSB) discussed the draft impact assessment on 18 January 2017 and issued a negative opinion on 20 January 2017. The Board recommended the following improvements:

[123] Commission Work Programme 2016, point 9, page 4, http://ec.europa.eu/atwork/pdf/cwp_2016_annex_i_en.pdf; Commission Work Programme 2017 point 6, page 3, http://ec.europa.eu/atwork/pdf/cwp_2017_annex_i_en.pdf

Area	RSB recommendations	Revisions introduced
Scope and objectives	The report emphasises the enforcement dimension of SMIT while barely treating the policy design dimension. The problem definition and the description of objectives should clearly distinguish between the two dimensions.	As stated in the Single Market Strategy, this initiative should allow the Commission to collect information directly from selected market players in order to "*improve the Commission's ability to monitor and enforce EU rules in priority areas*", as well as "*help the Commission to propose improvements where evaluation shows that enforcement deficits are due to flaws in the relevant sectoral legislation*". The problem definition (incl. the problem tree, depicted in Fig. 2.2.) and the objectives (incl. the objectives tree, depicted in Fig. 4.1) of the impact assessment (IA) report have been amended to clearly show both of these 'dimensions'. The IA report also outlines and explains in Section 2.2 that the underlying problem drivers apply in equal manner regardless of whether single market obstacles are addressed through legal actions (i.e. infringement proceedings against Member States), through broader enforcement actions or through the use of firm-level information to inform policy responses. Moreover, the IA report emphasizes that these actions are not easily separable as, for example, individual infringement cases can evolve into new Union legislation, particularly if the single market malfunctioning in question is novel, systematic and persistent. This is in addition supported by additional evidence in Section 2.2.1 (i.e. examples of incomplete information when single market enforcement requires new legislation).
Evidence base	The report should explain past attempts to collect data, and demonstrate that firm-level data are indeed necessary to fill gaps. In this regard, the examples in the report are more convincing for enforcement than for policy design. The report should both strengthen its justification of SMIT for policy design and recognise the limits of empirical evidence to support the policy design dimension of the SMIT.	The impact assessment now presents two realistic, high-impact examples from different policy domains demonstrating the need for firm-level information for the purpose of informing legislative proposals (Section 2.2.1). These examples clearly demonstrate past Commission unsuccessful efforts to get the needed information as well as the potential impact caused by the lack of such information. In particular, the example on interbank exposures limits has been improved by emphasizing difficulties in calibrating these limits, despite regulatory attempts during the past eight years. The example details why firm-level information is indeed crucial for such calibration and emphasizes the preferences of banks for high exposure limits. This explains their reluctance to cooperate with the Commission in terms of voluntary requests for information, which has so far allowed them to circumvent the Union law with potential negative consequences on financial stability. The second example presents how an infringement case led to a legislative proposal on geo-blocking and geographically-based discrimination. It furthermore analyses the need for extending the scope of this legislation to the copyright-protected content and follows on a European Parliament call for an assessment of the current situation based on solid, proprietary, firm-level data. Finally, this example shows past attempts to obtain such data and outlines importance of proper analysis to judge whether any changes would benefit consumers.
Proportionality	The report should do more to explain how the options will ensure proportionate use of an information-gathering tool that is intended as exceptional and of 'last resort'. It should explain what constitutes 'last resort'	The proportionality assessment of the options presented in the IA report has been amended and is now thoroughly described in Section 7.1. The assessment pays particular attention to explaining the exceptional and 'last resort' nature of information requests and explains why the necessity test introduced for Option 4 – particularly when using the information to inform legislative proposals – would indeed guarantee that information requests are

Area	RSB recommendations	Revisions introduced
	with regard to policy design and whether the two objectives are subject to the same safeguards.	limited and targeted. The assessment also compares the necessity test for launching information requests under SMIT with the provisions of existing similar investigation powers (e.g. in State aid) and shows that these conditions are consistent with other policy areas.
	Proportionality also needs to be clear with regard to how firms might face sanctions for not delivering information. The report should explain the rationale of sanctions on firms that do not deliver information that the Commission requests for policy design purposes.	The proportionality with regard to the possibility of imposing pecuniary sanctions to non-compliant addressees of information requests is now discussed in detail in Section 6.5. In the analysis provided in this section, the IA report outlines why distinguishing the imposition of sanctions to firms depending on the use of information (e.g. in the context of infringement proceedings or for the development of legislative policy) would intensely reduce the effectiveness of Option 4. In particular, this would deprive certain requests from their enforceability character, making them a mere plea for voluntary cooperation and, therefore, not changing the status quo. To address further comments made by some stakeholders, Section 6.5 also explains why limiting information requests or sanctions to firms that might have performed illegal activities would impose major problems. First, it would imply that the Commission already knows whether firms have engaged in illegal behaviour, for which data would already have to be available. Second, this would tarnish the reputation of the firms that are subject to information requests or fines, since they would be labelled as "illegal" even without having obtained the information that proves this. Third, this is not the rule in the competition domain and could lead to calls for only limiting information requests to offending firms there. In the State aid field, the Commission can request information not only from beneficiaries, but also from competitors. Even in the antitrust and mergers fields, where the Commission does enforce EU law against firms directly, other market players (e.g. buyers, suppliers, competitors) which are not suspected of committing any infringement but may be in possession of relevant information are under the very same regime for requests for information (including the possibility of being sanctioned in case of failure to reply to those requests).
Subsidiarity	The arguments should address situations where there is no cross-border dimension. They should also address the content of the other options besides option 4.	This comment has been addressed in Section 3.2, which now provides significantly more information and explanation with regard to subsidiarity. The section details the necessity and added value of Union action beyond cases where there is no cross-border dimension.
Options	The report should clarify which legal or policy instruments will be used for options 2 and 3. It should also provide enough detail so that the related implementation costs and the potential benefits can be reliably assessed.	The descriptions of all policy options have been amended to clearly specify and justify envisaged legal instruments. The cost-benefit analysis has also been improved in order to address this comment. In particular, implementation costs are now discussed for Options 1 and 3 and are analysed in detail in Annex 8, together with a sensitivity analysis of all options. The estimation of benefits is based on the examples provided in the IA report and, therefore, includes wide ranges to accommodate uncertainty of results.

Area	RSB recommendations	Revisions introduced
Stakeholders consultation	The report reflects the views of companies and business associations throughout. It should do the same with regard to the positions of Member States.	The IA report has been amended to reflect the views of all Member States who have so far provided their positions on the initiative. This includes the input from a few Member States who participated in the public consultation, as well as information from the Council Working Party and the High Level Working Group on Competitiveness and Growth.
Monitoring / evaluation	The report should describe more clearly what criteria will define success.	Section 8 on monitoring and evaluating the actual impacts of the initiative has been improved and extended to describe more clearly the criteria defining success of the initiative. The IA report now defines a number of criteria for assessing the effectiveness and proportionality of the market information tool and defines methods for measuring such criteria.

The RSB discussed the resubmitted draft impact assessment on 23 March 2017 and issued a positive opinion with reservations. The Board recommended the following improvements:

Area	RSB recommendations	Revisions introduced
Scope and objectives	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.	The report now clearly focuses on alleviating lack of data exclusively connected to enforcement of Single Market rules in selected and most important cases where information is necessary and otherwise not available. The responsibility of the Commission, defined by the Article 17(1) TEU, is to ensure that the Treaties, as well as the secondary rules adopted pursuant to them, are correctly applied. Therefore, enforcement of internal market rules covers both the provisions of the Treaties and the secondary legislation, meaning that it can take form of either infringement proceedings against Member States or (in cases where the evaluation shows that enforcement deficits are due to shortcomings of the relevant sectorial legislation) proposals of legislative initiatives aiming at giving effect to the Treaty rules.
Evidence and proportionality	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.	The report now explains in detail the conditions that need to be satisfied before SMIT is used, including proving a reasonable suspicion of existence of obstacles to the functioning of the single market and that information is not available from the existing sources (the “last resort”). The requirement for the College of Commissioners decision to trigger any kind of SMIT request and a need for a second College decision to launch SMIT request with threat of sanctions is further highlighted.
Stakeholders consultation	The main report still does not reflect clearly enough Member States' and business interests' respective views.	Businesses and Member States’ views (if available) are now more widely featured to underpin the problem definition and options analysis.

ANNEX 2: STAKEHOLDER CONSULTATION

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.

A2.1. Results of the public consultations

The on-line public consultations for this initiative were announced on Your Voice in Europe[124], 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 only[125]. 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.

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 States[126] (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. A2.1.

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 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.

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

[125] 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.

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

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 Register[127].

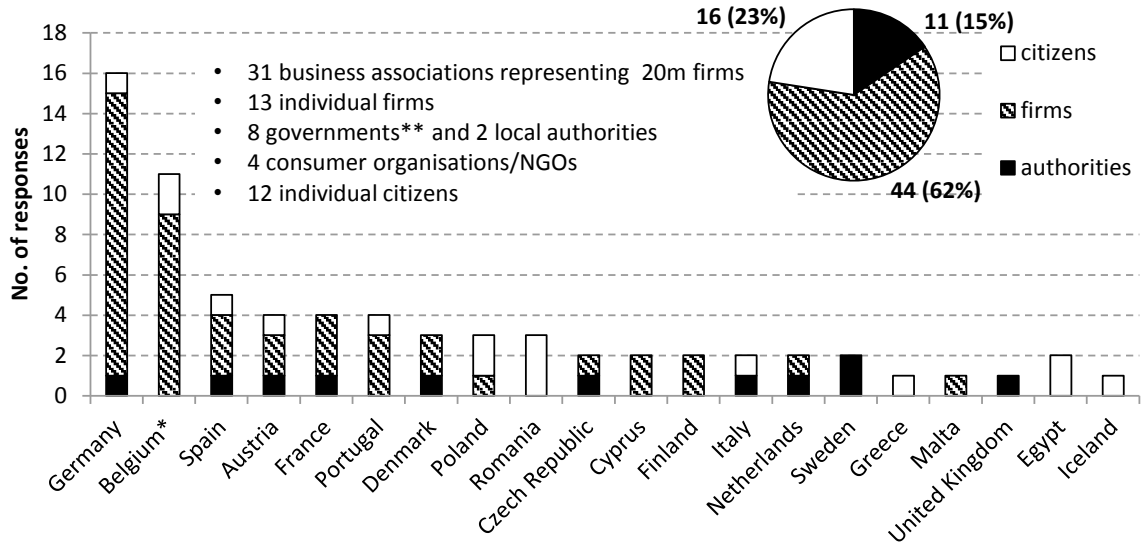

Fig. A2.1. Distribution of answers to public consultations by country and stakeholder type.
Note: * 9 EU wide business associations are located in Belgium; ** 2 replies from Sweden

Analysis of responses

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 A2.1 summarises the responses.

Table A2.1. Types of sensitive information asked in consultations

Information on	**Those participating in consultations and asked for sensitive information*, said that such information was**		Those without experience in consultations said that they 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)

[127] http://ec.europa.eu/transparencyregister/public/homePage.do

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 i**nformation 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).

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.

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. A2.2).

Table A2.2. 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 A2.3. 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.

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.[128]

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.

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).

Table A2.4. 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	18% (8, 26k)	20% (2)	31% (5)

[128] 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

rules			
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 market[129]. 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 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

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

proportionate sanctions are necessary to ensure participation[130]. 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, SOLVIT[131], the Internal Market Information system (IMI)[132], or REFIT[133]. They also found sanctions proportionate only in the event of potential rule-breaking by a company.

A2.2. 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 companies are frustrated by no or slow reaction from the Commission to resolve breaches of single market rules.

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[130] 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.*'

[131] http://ec.europa.eu/solvit/index_en.htm

[132] http://ec.europa.eu/internal_market/imi-net/index_en.htm

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

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.

A2.3. 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 Commissionaires 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.

ANNEX 3: WHO IS AFFECTED BY THE INITIATIVE AND HOW

The tables below present summaries of impacts of the preferred package on the key stakeholder groups.

Table A3.1. Impacts of the preferred option on key stakholders

	Firms	EU institutions	Member States	Citizens
Option 4 Introducing an EU-level Single Market Information Tool	**(++)** faster detection and prevention of discriminating activities by firms and MS; more cases solved at MS level; cost of complying with information request and eventual sanctions; possible to send only non-confidential version to MS; exemption of micro firms	**(++)** better enforcement of Union law by MS should lead to fewer infringement cases against MS; all relevant data could be collected	**(+/++)** possibility to ask for information not collected now and facility to exchange information between MS should help in enforcement of national and cross-border cases; risk that Commission will not agree to conduct SMIT data collection	**(++)** much faster detection and prevention of potentially all kinds of discriminating activities by firms and MS; more cases solved at MS level
Costs:	EUR 0.37m-0.61m	EUR 0.12m-0.43m	EUR 0-0.002m	EUR 0
Benefits:	Very high likelihood: Small-scale requests: EUR 50m-6bn; Larger requests: EUR 9bn and more			

Note: Assumption of 4 small-scale requests (up to 5 firms) and 1 larger request (up to 50 firms) a year (see Annex 8). Legend: **++** significant positive impact, **+** positive impact, **0** neutral, **-** negative impact, **--** significant negative impact

Table A3.2. Total EU28 annual costs and benefits of the preferred option per stakeholder type.

		Costs		Benefits	
Option	**Stakeholder**	**Min. (EUR)**	**Max. (EUR)**	**Value (EUR)**	**Likelihood**
4	Firms	0.37m	0.61m	- Small-scale requests: EUR50m-EUR6bn - Larger requests: EUR9bn and more	Very High
	Commission	0.12m	0.43m	- savings on external studies: EUR0.7m – EUR1.6m	
	Total	**0.49m**	**1.04m**	**From 50m to 9bn of euro and more**	

Note: Based on 4 small-scale requests (up to 5 firms) and 1 larger request (up to 50 firms) a year. (see Annex 8).

ANNEX 4: ANALYTICAL MODELS USED IN PREPARING THE IMPACT ASSESSMENT

No econometric modelling was used to support this impact assessment.

ANNEX 5: EXAMPLES AND CASE STUDIES SUPPORTING THE PROBLEM DEFINITION

Figure A5.1. illustrates the role of access to firm-level information in evidence-based enforcement of single market rules. In the great majority of cases, the Commission is able to acquire necessary information either from the Member States (which are under a duty to cooperate with the Commission as per Article 4(3) TEU) or via currently available tools to prove (or disprove) a single market malfunctioning. Note, however, that although measurements may not be extremely precise, it is in most cases sufficiently clear how the Commission should act. This particular situation is illustrated in Fig. A5.1.A. It demonstrates a hypothetical *status quo* that is clearly negative in regards to, for example, fundamental freedoms and equal treatment. In such cases, the Commission will assess different ways to improve the single market (e.g. assisting Member State authorities, or by opening an infringement procedure, or proposing regulatory improvements) and choose the option producing the best results (shown as Alternative 1 in Fig. A5.1.A).

Sometimes, however, the information at hand (or otherwise easily available) does not allow to: (1) confirm whether the situation constitutes a breach of Union rules and, consequently, whether there should be an enforcement action, and (2) whether such action would improve the situation or not (as illustrated in Fig. A5.1. B1). In such circumstances, more precise information would allow determining whether a problem exists and if an intervention is justified (Fig. A5.1. B2).

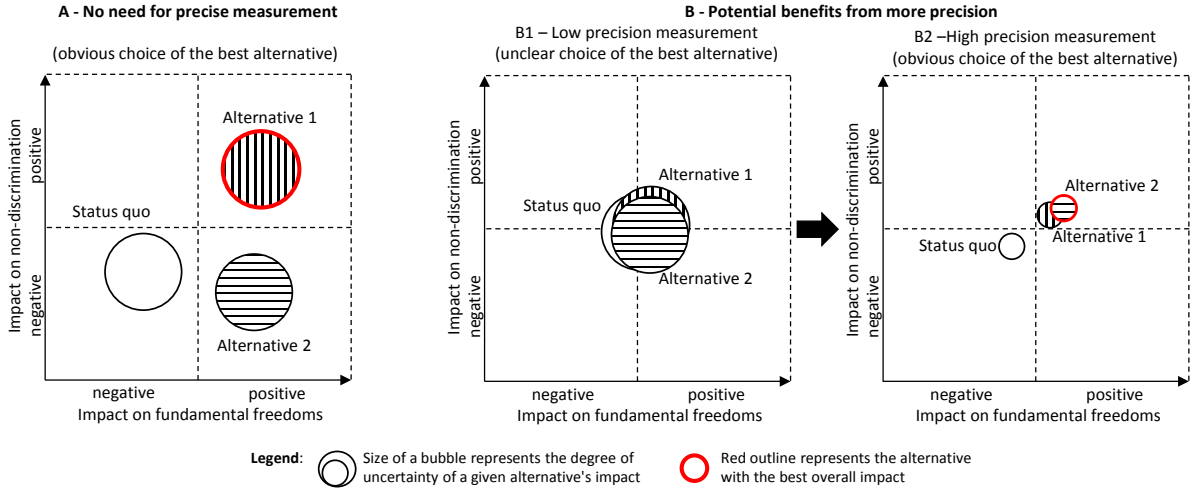

Fig. A5.1. When does a data shortage constitute a problem?

In the remainder of this annex, we analyse several examples and case studies related to information and data gaps in the Commission's claims in the case-law of the CJEU concerning infringement proceedings under Article 258 TFEU. These examples, which span across several policy domains, are not meant to be exhaustive, but rather a small, yet representative, subset to show that reliable, detailed and timely market information would have allowed for more effective and efficient enforcement. In remainder of the annex we also analyse the objectives and the impact of the existing Market Investigation Tool available in State aid in order to anticipate a possible impact of a single market information tool.

A5.1. Examples of incomplete information in infringement proceedings before the CJEU

Infringement proceedings under Article 258 TFEU: burden of proof, collection of information and information gaps

The allocation of the burden of proof: the onus is on the Commission.

Infringements proceedings under Article 258 TFEU[134] are an important tool for the enforcement of EU law[135]. The Commission can bring a Member State (or several Member States) before the CJEU if it believes that the Member State had failed to fulfil an obligation under the Treaties. If the CJEU indeed finds that the Member State had failed to fulfil an obligation under the Treaties, then the CJEU can require the Member State to take the necessary measures to comply with its judgement[136]. It is important to highlight that the parties to the infringement proceedings are the Commission, on the one hand, and the Member State(s) on the other hand. Complainants and generally individuals (including companies) are, strictly speaking, not parties to those proceedings.

An important issue in infringement proceedings is the question of the **allocation of the burden of proof** upon the parties (Commission and Member State(s)). It is settled case-law that the Commission bears the burden of proving that a certain national measure may be in breach of EU law: e.g. '*it is incumbent upon the Commission to prove the allegation that an obligation has not been fulfilled. It is the Commission's responsibility to place before the Court all the factual information needed to enable the Court to establish that the obligation has not been fulfilled and, in so doing, the Commission may not rely on any presumption*.'[137]

The Commission is not allowed to rely on presumptions, but must submit '*sufficient evidence*' to support its claims.

Over time, the CJEU has progressively been stricter with the Commission in relation to the sufficient factual evidence that it must submit in order to prove '*to the requisite legal standard*' the elements of the allegations made[138].

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[134] Article 258 TFEU: '*If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.*
If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.'

[135] To be sure, there are other tools as well: e.g. individuals can defend their rights arising from EU law before national courts thanks to the principle of the primacy of EU law and, where applicable, the principle of direct effect of EU law; in addition, there is the possibility of indirect control exercised by the CJEU via preliminary rules (cf. Article 267 TFEU).

[136] Cf. Article 260(1) TFEU.

[137] Cf. judgment of the CJEU in case C-400/08, Commission vs. Spain, paragraph 58. See also judgments of the CJEU in several other cases, e.g. C-241/08, Commission vs. France, paragraph 22, C-105/08 Commission vs. Portugal, paragraph 26; C-304/05, Commission vs. Italy, paragraph 105; C-419/01 Commission vs. Spain, paragraph 26; C-290/87 Commission vs Netherlands, paragraphs 11 and 12; etc.

[138] See Luca PETRE and Ben SMULDERS, 'The Coming of Age of Infringement Proceedings', Common Market Law Review 47, 2010, po. 9. These authors (p. 38) refer to several judgments of the CJEU supporting this trend. Cf. cases C-532/03, Commission vs. Ireland, paragraphs 36-37; C-507/03, Commission vs Ireland, paragraphs

This standard of proof is higher when the Commission complains about the implementation of a national provision:

> *'In addition, with regard, in particular, to a complaint concerning the implementation of a national provision, proof of a Member State's failure to fulfil its obligations requires production of evidence different from that usually taken into account in an action for failure to fulfil obligations concerning solely the terms of a national provision and, in those circumstances, failure to fulfil obligations can be established only by means of sufficiently documented and detailed proof of the alleged practice of the national administration for which the Member State concerned is answerable (see judgments in Commission v Belgium, C‑287/03, EU:C:2005:282, paragraph 28 and Commission v Germany C‑441/02, EU:C:2006:253, paragraph 49).'*

How does the Commission obtain information? The specific obligation of Member States to cooperate and other sources of information

The Commission relies primarily on information submitted by the concerned Member State. Pursuant to Article 4(3) of the Treaty on European Union (TEU)[139], **Member States are under the duty**, as recalled several times by the CJEU[140], **to facilitate the Commission's tasks**, including in particular its role as guardian of the Treaty (cf. Article 17(1) TEU). '*It follows that Member States are required to cooperate in good faith with the inquiries of the Commission pursuant to Article [258 TFEU], and to provide the Commission with all the information requested for that purpose*.'[141] In practice, this means that Member States must provide the Commission, upon its request, with information and documents when the Commission is investigating possible infringements of Union law.

In addition, the Commission also uses **other sources of information**, voluntarily submitted by third parties: for instance complainant, interested parties, other Member States etc. These other sources may help in filling information gaps, at least partially.

Information/data gaps: Member States do not always cooperate with the Commission's investigations and the Commission does not have investigative powers

A practical problem is that **Member States do not always fully cooperate** with the Commission by submitting all necessary information and documents, which results in an information/data gap. Such failure to achieve full-cooperation during the investigation phase under Article 258 TFEU, in particular by failing to provide information requested, could amount to an infringement of Article 4(3) TEU and the CJEU has stated so several times[142].

32-35; C-293/07 Commission vs. Greece, paragraphs 32-34; C-156/04 Commission vs. Greece, paragraphs 35 and 51; C-237/05 Commission vs. Greece, paragraph 39.

[139] Previously, Article 10 EC; and Article 5 of the original Treaty of Rome.

[140] See, for instance, judgment of the CJEU in case C-494/01, Commission vs. Ireland, paragraph 197.

[141] Judgment of the CJEU in case C-494/01, Commission vs. Ireland, paragraph 198.

[142] See, for instance, judgments of the CJEU in C-82/03, Commission vs. Italy, paragraph 18; C-494/01, Commission vs. Ireland, paragraphs 195 and seq.; C-137/91, Commission vs. Greece, paragraphs 5-6. See also

Any **information/data gap** may have important consequences for certain types of infringement procedures, due to the Commission's lack of investigative powers, as the CJEU has recognised: '*[...] account should be taken of the fact that, where it is a question of checking that the national provisions intended to ensure effective implementation of the directive are applied correctly in practice, the Commission which does not have investigative powers of its own in this area, is largely reliant on the information provided by complainants and by the Member State concerned*'[143] [emphasis added]. To be noted that in a few cases the CJEU referred to the need to rely not only on information provided by complainants and by the Member State concerned, but also information provided by 'public or private bodies' and 'by the press'[144]

Indeed, the negative effects of the **Commission's lack of investigative powers** will be felt with more intensity when examining cases of misapplication of the rules. A Member State's infringement of EU law does not necessarily result from its legislative acts (or the lack of adoption of those acts), but can also originate from its administrative practice provided that such practice is '*to some degree, of a consistent and general nature*'[145].

Consequences of information/data gaps in infringement proceedings

There are two types of consequences:

- First, in the past 20 years, the Commission has lost, either partially or completely, at least 49 infringement cases under Article 258 TFEU because the CJEU considered that the Commission had not submitted sufficient evidence in support of its claims. This is further explained in point 2 of this annex.
- Second, the Commission has allegedly refrained from taking Member States to the CJEU under Article 258 TFEU for possible infringements of EU law where, despite the information provided by the concerned Member State or by interested parties (complainants etc.), the Commission lacked of sufficient relevant information – which could have been provided by a private party had the Commission obtained specific investigative powers to that end. However, there is no public data on this issue.

C-390/07, Commission vs. United Kingdom, paragraphs 44 and 355 (the Commission claimed that the UK had not cooperated, but lost on this point); or case C-490/09, Commission vs. Luxembourg, paragraphs 56-57 (the Commission claimed that Luxembourg had not cooperated, but lost on this point).

[143] Judgment of the CJEU in case C-394/14, Commission vs Portugal, paragraph 47; see also judgments in cases C-301/10, Commission vs. United Kingdom, paragraph 71; C-390/07, Commission vs. United Kingdom, paragraphs 44 and 45; or C-494/01, Commission vs. Ireland, paragraph 43.

[144] See e.g. judgments of the CJEU in cases C-677/13, Commission vs. Greece, paragraph 65, C-297/08 Commission vs. Italy, paragraph 101; or C-135/05, Commission vs. Italy, paragraph 28 (only referring to public and private bodies, not to the press).

[145] See, for instance, judgments of the CJEU in cases C-342/05, Commission vs. Finland, paragraph 33; C-287/03, Commission vs. Belgium, paragraph 29; C-494/01, Commission vs. Ireland, paragraph 28.

Analysis of CJEU case-law: cases lost by the commission in which the question of insufficient evidence was raised

The survey

In the past 20 years, the Commission has lost, either partially or totally, at least 49 infringement cases under Article 258 TFEU in which the CJEU considered that the Commission had not submitted sufficient factual evidence in support of all or part of its claims.

> Methodology. A research was carried out by Commission staff into the CURIA database of the CJEU for the period 01.01.1997 to 25.11.2016[146]. The CURIA database contains 1654 judgments of the Court of Justice on '*actions for a declaration of failure to fulfil obligations*' during that period (784 cases in the period between 01.01.2007 and 25.11.2016). Of those, the Commission lost, either partially or completely, on substantive grounds in 309 cases (177 cases in the last 10 years). This sample was further reduced by using certain search expressions[147]: '*charge de la preuve*' ('burden of proof') and '*éléments nécessaires à la verification*' ('information necessary for it to determine…'). This resulted in 102 cases. One of these cases was removed since it was a false positive (the reference to 'burden of proof' concerned an issue of national law)[148]. Therefore, the final examination concerned 101 judgments. The CJEU considered in 52 of those cases that the Commission had not provided sufficient arguments in support of its claims: the issue was less a question of absence of supporting factual evidence, but rather a lack of sufficient explanation on why an infringement of EU law had been committed[149]. However, in 49 cases, the CJEU considered that the Commission had not provided sufficient factual evidence in support of its claims (36 of these cases in the past 10 years)[150].

Forty-nine is an important number considering the Commission only lost 309 cases (of the 1654 cases decided by the CJEU in that period) on substantive grounds during that period. That is, in 16% of those (partially or totally) lost cases, the Commission lacked enough supporting evidence[151]. This percentage is higher (20%) if only the last ten years are considered.

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[146] The database was accessed on 28 November 2016 for the last time.

[147] N.B. this search was carried out in French, since there is a French version of all judgments, but not an English one.

[148] Case C-137/14.

[149] Cases C-589/14, C-678/13, C-433/13, C-361/13, C-525/12, C-237/12, C-152/12, C-127/12, C-369/11, C-562/10, C-539/09, C-490/09, C-376/09, C-512/08, C-306/08, C-246/08, C-241/08, C-10/08, C-427/07, C-397/07, C-293/07, C-250/07, C-227/07, C-401/06, C-387/06, C-304/05, C-127/05, C-110/05, C-32/05, C-490/04, C-428/04, C-334/04, C-59/04, C-06/04, C-456/03, C-419/03, C-377/03, C-441/02, C-431/02, C-341/02, C-288/02, C-185/02, C-419/01, C-194/01, C-233/00, C-150/00, C-139/00, C-68/99, C-347/98, C-96/98, C-408/97, C-300/95.

[150] Cases C-38/15, C-504/14, C-180/14, C-87/14, C-677/13, C-356/13, C-109/11, C-600/10, C-556/10, C-555/10, C-545/10, C-251/09, C-79/09, C-37/09, C-400/08, C-308/08, C-160/08, C-105/08, C-530/07, C-438/07, C-416/07, C-390/07, C-335/07, C-331/07, C-150/07, C-518/06, C-305/06, C-179/06, C-342/05, C-248/05, C-167/05, C-507/04, C-418/04, C-156/04, C-532/03, C-508/03, C-507/03, C-410/03, C-287/03, C-135/03, C-117/02, C-434/01, C-229/00, C-10/00, C-55/99, C-166/97, C-159/94, C-158/94, C-157/94.

[151] It must be noted that there may be issues of missing evidence also in cases that the Commission won. Take for instance the judgment of the CJEU in case C-491/01, Commission vs. Ireland (Irish Waste case /

The next question is whether the Commission could have obtained the missing information/data by requesting private parties to provide it[152]. From the examination of those 49 cases, it appears that in 17 of those cases, the Commission could have usefully tried to obtain the missing factual evidence from market participants – it is noted that 17 cases correspond to 5,5% of the total 309 cases lost in that period. It should also be noted that 13 of those 17 cases were in the last ten years and corresponded to 7,3% of the total 177 cases lost in that period.

In the remaining 32 cases, the missing evidence at stake could not really have been provided through a market information tool. 19 of those cases concerned the application of environmental protection legislation where the missing evidence was of scientific nature: i.e. the missing evidence could have been obtained from the Member State concerned, through specific studies or inspections etc.; but such information would not be readily available to companies in the market. In the 13 other cases, the missing evidence could possibly have been provided by the Member State concerned or perhaps through other means, but it appears unclear that companies could have been in a position to provide such missing evidence.

Summaries of the 17 cases where the Commission could have usefully tried to obtain missing factual evidence from market participants

These cases are presented in 5 different groups.

First, a group of cases relate to the Commission's attempts to enforce EU Treaty rules on free movement of goods against commercial monopolies in cases concerning network industries and also to enforce secondary EU rules also regulating network industries. Three cases were in the energy sector, the other three in the transport sector.

- **C-159/94, Commission vs. France; C-158/94, Commission vs. Italy and C-157/94, Commission vs. Netherlands (free movement of goods / monopolies / energy).** The Commission brought actions against Netherlands, Italy and France with regard to domestic monopolies in the energy field claiming they were not compatible with the Treaty rules on free movement of goods. The actions concerned: the exclusive import rights for electricity intended for public distribution (Netherlands); import and expert rights in the electricity industry as part of a national monopoly of a commercial character (Italy) and exclusive import and export rights for gas and electricity (France). The Court eventually dismissed the three actions, using similar arguments and language. In the three cases, the Court reproached to the Commission that it '*confined itself essentially to purely legal arguments*', both in the reasoned opinion and in the application, not

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environment), paragraphs 16, 18 and 66 to 68. Ireland did not reply to a Commission's request for information regarding a complaint related to the operation, without a permit, of a private waste storage and treatment facility at Cullinagh, Fermoy, County Cork. In this case (which concerned several other situations of possible infringement), the absence of reply from the Irish authorities did not result in considering that the Commission was unable to supply sufficient evidence – although it is apparent that the Commission could have filled certain information gaps if it had enjoined the operator of the private facility to provide information. The absence of this information was however not decisive, since the Commission eventually won this case.
However, this type of case has not been included in the examination.

[152] To be sure, in some of these cases, the Member State concerned could perhaps have been in a position to also provide the information at stake or part of it.

providing enough factual particulars[153]. The Court further stated that '[...] *the Court can judge only the merits of the pleas in law which the Commission has put forward. It is certainly not for the Court, on the basis of observations of a general nature made in the reply, to undertake an assessment, necessarily extending to economic, financial and social matters*, [...]'[154].

The Commission would have needed additional factual evidence and detailed economic analysis for which firm-level data would have been necessary. It is unclear that the Member States concerned could have been in a position to provide such data. It should be noted that in parallel, the Commission had undertaken the liberalization of the Union energy markets by proposing the enactment of legislation. That second avenue proved successful. In other terms, while enforcement of the Treaty rules proved not possible due to lack of sufficient evidence, policy design through secondary legislation was necessary to achieve the dismantling of import and export rights in the energy sector.

- **C-556/10, Commission vs. Germany and C-555/10 Commission vs. Austria (rail transport / independence of the infrastructure manager).** In these two cases, the Commission claimed that the entities managing the rail infrastructure in Germany (Deutsche Bahn Netz AG – DB Netz) and Austria (ÖBB‑Infrastruktur) were not independent enough from their parent companies which, in both cases, were also providing or supervising other entities that were providing rail transport services (Deutsche Bahn AG – DB AG, in Germany; and ÖBB-Holding in Austria). In both cases, the Court, however, said that the Commission had failed to provide any concrete evidence to show that DB Netz or ÖBB‑Infrastruktur were not independent of DB AG or ÖBB-Holding, respectively, as regards their decision‑making arrangements. The Court stressed that '*[i]t was therefore for the Commission, in the light not only of the objectives of Directives […] but also all the factors pertaining to the relationship between DB Netz and DB AG, including factors of a private nature[155], to prove that, in practice, DB Netz is not independent of DB AG in its decision making'* (emphasis added).[156]

  It appears that the missing evidence that the Commission could have submitted in support of its claim was essentially related to firms' behaviour within, respectively, the DB and ÖBB groups, including contractual arrangements between the holding companies and the entities managing the infrastructure but also other type information concerning the relationship between such firms. Such information could have been directly provided by the companies concerned. It is

[153] Judgments of the CJEU in cases C-157/94, Commission vs. Netherlands, paragraphs 61-62; C-158/94, Commission vs. Italy, paragraphs 57-58 and C-159/94, Commission vs. France, paragraphs 104-105.
[154] Judgments of the CJEU in cases C-157/94, Commission vs. Netherlands, paragraph 63; C-158/94, Commission vs. Italy, paragraph 59 and C-159/94, Commission vs. France, paragraph 106.
[155] For instance, DG Netz and DG AG had entered into an agreement that included provisions specifically directed at guaranteeing that, in practice, DB Netz enjoyed independent decision-making powers vis-à-vis DB AG. Cf. Judgment of the CJEU in case C-556/10, Commission vs. Germany, paragraphs 68.
[156] Judgment of the CJEU in case C-556/10, Commission vs. Germany, paragraphs 66 to 69, in particular 69. Please note that the Commission made additional claims that were rejected on other grounds.
Similar wording was in the judgement of the CJEU in case C-555/10, Commission vs. Austria, paragraphs 62 to 66, in particular 66.

unclear whether the Member State in question could have provided such information had the Commission asked for it compared to a direct request to the firms in question.

- **C-545/10, Commission vs. Czech Republic (rail transport / costs).** The applicable directive on the development of EU railways at the time stated that the charges for the minimum access package and track access to service facilities must be set at 'the cost that is directly incurred as a result of operating the train service'. The Commission claimed that the Czech Republic's approach to calculate that costs was not in conformity with the Directive. The Court however considered that the Czech legislation included the necessary elements for the infrastructure manager to determine, and for the regulatory authority to verify, the amount of the charges in accordance with Article 7(3) of Directive 2001/14. The Court furthermore stated that '*[a]s far as the practical application of those elements is concerned, it is clear that the Commission has not provided any specific examples showing that access charges have been set in the Czech Republic in disregard of that requirement*' (emphasis added)[157].

  It appears that the missing evidence that the Commission could have submitted in support of its claim was essentially related to firm's (rail infrastructure manager) behaviour. This information could have been directly obtained from that firm. It is unclear whether the Member State in question could have provided such information had the Commission asked for it compared to a direct request to the firm in question.

Second, two cases concern the free movement of capital domain in relation to tax issues.

- **C-600/10, Commission vs. Germany (free movement of capital / different treatment of resident and non-resident pension funds as regards deductibility of operating costs).** The Commission claimed that German legislation was discriminating non-resident pension funds, compared to resident ones, since they could not deduct from dividends and interest perceived the operating costs incurred and which are directly linked to that income. This would be contrary to Article 63 TFEU on free movement of capital. The Commission raised that the following operating costs could be directly linked to the perception of dividends and interest by non-resident pension funds: banking expenses and analogous transaction costs; costs linked to disputes on dividends paid by a resident company to a non-resident pension fund; and expenses linked to human resources specifically tasked with the acquisition of shares from which dividends may be obtained. The CJEU considered that for all three types of costs, the evidence submitted by the Commission was insufficient and theoretical, amounting to mere presumptions. The Commission lost the case.

  It appears that the type of evidence that the Commission could have submitted in support of its allegations (detailed and representative examples of operational costs) could have only originated from private parties (pension funds in this particular case)[158].

- **C-105/08, Commission vs. Portugal (free movement of capital / freedom to provide services/ taxation of interest paid to non-residents financial institutions).** The Commission claimed that

[157] Judgment of the CJEU in case C-545/10, Commission vs. Czech Republic, paragraphs 70-72, in particular 72.
[158] Judgment of the CJEU in case C-600/10, Commission vs. Germany, paragraphs 19 to 26.

Portugal infringed EU law by taxing the interest paid to non-resident financial institutions more heavily than the interest paid to financial institutions resident in Portuguese territory (restriction of the freedom of non-resident financial institutions to provide mortgage and other loan services within the single market). The CJEU dismissed the Commission's application which, in order to prove that the Portuguese legislation resulted in higher taxation of non-resident legal entities, relied on an arithmetical example based on the assumption that the profit margin achieved by the entity in question in that example is 10%. The CJEU stated that profit margin played a decisive role in the examination of whether legislation such as that at issue led to higher taxation of non-resident legal entities, as the rate of taxation was not the only component to be taken into consideration in that regard. The CJEU explained that in so far as the calculation in question, which the Commission itself described as 'theoretical', was disputed by the Portuguese Government on the ground that the premises underlying it beard no relation to the true position, and since that government put forward a calculation based on a different profit margin which produced a solution in which resident legal entities are taxed more heavily, the onus was on the Commission to establish that the figures on which its calculation was based reflected the economic reality. The CJEU concluded that '*the Commission failed to produce, either during the written procedure or the hearing, and not even after an express request by the Court, any conclusive evidence whatever which would have been capable of establishing that the figures which it puts forward in support of its argument are in fact borne out by the actual facts and that the arithmetical example on which it relies is not purely hypothetic*al.'[159] The CJEU further explained that, '*the Commission could have furnished, inter alia, statistical data or information concerning the level of interest paid on bank loans and relating to the refinancing conditions in order to support the plausibility of its calculations*' [emphasis added][160]. The Commission lost the case.

It is unclear how the Commission could have obtained the information referred to by the CJEU from the Portuguese authorities. It clearly appears that correct, representative and detailed information could have only come from (resident and non-resident) financial institutions.

Third, other cases relate to freedom of establishment and free provision of services (including in the transport sector).

- **C-400/08, Commission vs. Spain (freedom of establishment).** In this case the Commission claimed that the Spanish restrictions on the establishment of large shopping centres in the region of Catalonia were contrary to the EU Treaty rules on freedom of establishment. In that regard, the Commission argued that the contested legislation had indirectly discriminatory effects as regards operators from Member States other than Spain. The Commission was expected to show that (1) large retail establishments were treated differently from other retail establishments and that that difference constituted a disadvantage for large retail establishments; and (2) that difference in treatment worked to the advantage of Spanish operators (because Spanish operators favour small and medium-sized establishments while operators from other Member States prefer large retail establishments). In order to do so, the

[159] Judgment of the CJEU in case C-105/08, Commission vs. Portugal, paragraph 30.
[160] *Ibid*., paragraph 29.

Commission had submitted a series of figures showing that Spanish operators preferred medium-sized retail establishments and operators from other Member States preferred large retail establishments. However the Court stated that '*[…] The information provided to the Court does not enable it to determine with certainty either the number of establishments concerned or the breakdown between Spanish and non-Spanish control of a significant part of the establishments falling within the category of large establishments, […].Nor has the Court been provided with a breakdown showing the respective shareholdings of the economic operators concerned in the various categories of establishment*' (emphasis added). The Court eventually concluded on this point that '*the Commission has not adduced conclusive evidence capable of establishing that the figures which it has provided in support of its argument actually confirm that its argument is sound. Nor has the Commission put forward other factors to show that the contested legislation indirectly discriminates against operators from other Member States as compared with Spanish operators.*'[161]

It appears that the missing evidence that the Commission could have submitted in support of its claim was essentially firm-level information. This information could have been directly obtained from market participants. It is unclear whether the Member State concerned could have been in position to provide such detailed firm-level information had the Commission asked for it compared to a direct request to the firms in question.

- **C-518/06, Commission vs. Italy (freedom of establishment and freedom to provide services / insurance).** The Italian legislation imposed an obligation on all insurance undertakings to accept applications for motor insurance contracts and the legislation included criteria for the calculation of insurance premiums aimed at ensuring compliance with the obligation to contract. The Commission claimed that those rules were an infringement to the freedom to set premium rates stemming from EU rules. Italy argued that the principles in the law corresponded to the ordinary technical rules for determining premium rates, and to the actuarial principles followed by insurance undertakings. The Court rejected the Commission's claim essentially for insufficient argumentation. However, the Court added that '*[t]he Commission has not, moreover, proved or even alleged, that the rule for calculation imposed by the Italian legislature is incompatible with the technical rules for determination of premium rates, or the actuarial principles which are followed in the insurance sector*'. Had the Commission used that argument, it would it would have needed to rely on detailed market information originating from insurance companies. This information could have been directly obtained from market participants. It is possible as well that the Commission could have obtained the information referred to by the CJEU from the national authorities, had those authorities access to that information.
- **C-305/06, Commission vs. Greece (free provision of services / transport).** Greece had sanctioned an Austrian road transport service provider for allegedly providing *cabotage* transport services in Greece. The Commission claimed that the company in question was providing part of a combined (rail and road) cross-border transport service, as per Directive 92/106, from Austria to Greece (and vice-versa), the road transport being the last (or first) part

[161] Judgment of the CJEU in case C-400/08, Commission vs. Spain, paragraphs 59 to 62, in particular paragraphs 60 and 62. It must be noted that the Court eventually concluded at the existence of a restricting to the freedom of establishment on the basis of a different test: see paragraphs 63 to 72.

of the transport service. However, the Court considered that the Commission had failed to produce the documents proving the combined transport in one of the two examples presented[162] and sufficient evidence on a second example. The Court strongly stated that '*il y a lieu de relever le caractère particulièrement sommaire des éléments de fait et de droit sur lesquels se fonde le présent grief de la Commission*'[163]. It is obvious that the missing evidence could have only come from the transport service provider.

- **C-287/03, Commission vs. Belgium (loyalty programmes / freedom of establishment, free provision of services).** The Commission claimed that certain articles of the Belgian law on commercial practices and consumer information and protection on customer loyalty programmes was misapplied with the result of a discriminatory treatment towards foreign undertakings wishing to enter the Belgian market. The CJEU said that 'sufficiently document and detailed proof of the alleged practice of the national administration and/or courts' was necessary to show the Member State's failure to fulfil the obligations of EU law. In that case, the CJEU considered that the Commission had not shown the existence in Belgium of an administrative practice (or of national case-law) with the characteristics required by the Court's case-law. Commission's reference to a single complaint was not enough to sow evidence of a 'discriminatory and disproportionate' application of the law provisions in question[164].

  It may be argued that the Commission could have obtained from the Member State evidence of administrative practice or national case-law; however, such information could have also been obtained from private parties – in particular those foreign undertakings entering the Belgian market. The latter would have also allowed for faster processing of information since presumably only the relevant administrative practice/case-law to show discriminatory treatment would have been made available by private parties.

Fourth, a few cases relate to public procurement procedures.

- **C-160/08, Commission vs. Germany (free provision of services, freedom of establishment / public procurement).** The Commission claimed that in some areas of Germany, public authorities had failed to respect EU law on freedom of establishment and free provision of services as well as on public procurement by failing to make a public call for tenders or to award contracts in the field of emergency ambulance and qualified patient transport services. The Court explained that it was not in a position to find that there had been a failure to comply with the Treaty rules on freedom of establishment and free provision of services in the absence of sufficient specific information regarding the predominance of the value of health services over transport services in the contracts at stake[165]. The Court was not in a position to find that there had been a failure to comply with Article 10 of Directive 92/50 in conjunction with Titles III or VI thereof (or since 1 February 2006, of Article 22 of Directive 2004/18 in conjunction with Articles 23 to 55 thereof)[166].

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[162] Judgement of the CJEU, in case C-305/06, paragraphs 39, 40 and 42.
[163] *Ibid*., paragraph 48.
[164] Judgment of the CJEU in case C-287/03, Commission vs. Belgium, paragraphs 28 to 31.
[165] Judgment of the CJEU in case C-160/08, Commission vs. Germany, paragraph 123.
[166] *Ibid*., paragraph 122.

It appears that the Commission could have obtained additional data from the firms providing the emergency ambulance and qualified patient transport services, possibly in addition to information provided by the Member State concerned.

- **C-532/03, Commission vs. Ireland (free provision of services, freedom of establishment / public procurement / Dublin City Council).** The Commission claimed that the Dublin City Council was providing emergency ambulance services without a prior advertising by the relevant authority, in violation of the EU rules on public procurement. The Court said that neither the Commission's arguments nor '*the documents produced*' demonstrate that there has been an award of a public contract. The missing evidence could have perhaps been obtained from the service operator and not only from the Member State or the awarding authority.
- **C-507/03, Commission vs. Ireland (free provision of services, freedom of establishment / public procurement / An Post).** Ireland had entrusted the provision of services relating to the payment of social welfare benefits to An Post (Irish postal service) without undertaking any prior advertising. Such prior advertising was not mandatory by Directive 92/50 (applicable at the time) to such type of service. The CJEU considered, nevertheless, that the award, in the absence of any transparency, of that contract to an undertaking located in the same Member State as the contracting authority amounts to a different in treatment to the detriment of undertakings which might be interested in that contract but which are located in other Member States (which would amount to indirect discrimination on the basis of nationality, prohibited by the Treaty articles on freedom to provide services). Yet, the CJEU took the view that it was for the Commission to establish (and to provide sufficient evidence) that such contract was of certain interest to an undertaking located in a different Member State and that that undertaking was unable to express its interest in that contract because it did not have access to adequate information before the contract was awarded. The CJEU decided that the Commission had not provided the necessary evidence: reference to a complaint made in relation to the contract was considered not sufficient to establish that the contract was of certain cross-border interest (which was a pre-condition to show that Ireland failed to fulfil its obligations)[167]. The Commission lost the case.

  It is clear that the Commission could only have obtained the required information (that the contract was of certain interest to an undertaking located in a different Member State and that that undertaking was unable to express its interest in that contract because it did not have access to adequate information before the contract was awarded) from a private party: whether provided voluntarily (by a complainant) or upon request.

Finally, two cases relate to tax issues.

- **C-79/09, Commission vs. Netherlands (Tax / VAT).** The Commission brought an action against the Netherlands for having excluded certain activities from the VAT. Concerning the second part of the action (on the exclusion of the making staff available by public law bodies to the 'euroregions' and in the context of the promotion of professional mobility), the Commission claimed that such exclusion would lead to distortions of competition within the meaning of

[167] Judgment of the CJEU in case C-507/03, Commission vs. Ireland, paragraphs 30 and seq.

Article 13(1), second subparagraph, of Directive 2006/112. However, the Court replied that the Commission had not submitted any information backing its claim: '*Or, force est de constater à cet égard que, dans son recours, la Commission se borne à indiquer qu'elle n'est 'absolument pas convaincue' que les conditions dont la réglementation néerlandaise assortit le non-assujettissement à la TVA permettent d'éviter une distorsion de concurrence. Elle n'apporte cependant aucun élément à l'appui de cette affirmation, en particulier en vue de démontrer que la possibilité de distorsion de concurrence alléguée avec les activités exercées par des opérateurs privés, tels les bureaux de placement, n'est pas uniquement théorique mais bien réelle (voir, par analogie, arrêt du 8 mars 2001, Commission/ Portugal, C-276/98, Rec. p. I-1699, point 28)*.'[168]

It appears that the Commission could have tried to rely on information provided by private parties (i.e. placement agencies) in order to show the alleged distortions of competition in that field. At the same time, it is unclear that such information could have been provided by the Member State concerned given that its interest was totally opposed – according to the Court, the Member State had provided detailed explanations on why competition was not distorted, which the Commission was not in a position to refute[169].

- **C-156/04, Commission vs. Greece (taxation of motor vehicles / determination of residence / tax provisions).** The Commission claimed, inter alia, that Greece was breaching Article 110 TFEU because the system of penalties for offences relating to the declaration of motor vehicles temporarily imported into its territory, in conjunction with the administrative authorities' practice of systematically deciding that the individual importing the vehicle (whether for private or business use) has his normal residence in Greece, was disproportionate. The CJEU explained that the Commission was seeking to prove, 'on the basis of certain individual cases', that there was a consistent administrative practice on the part of the Greek administrative authorities which was incorrect and unlawful, and thereby to obtain a finding that the defendant Member State had generally failed to fulfil its obligations. As a matter of fact, the Commission only submitted 8 individual cases. The CJEU decided that the evidence submitted by the Commission was insufficient: '*[…] given the very large number of Community nationals and Greek nationals established in other Member States who go to Greece by car each year, the eight individual cases to which the Commission refers […] constitute a substantially inadequate percentage, in the light of the requirements set by the case-law of the Court, for the purposes of proving the existence of a consistent administrative practice amounting to a failure to fulfil obligations.*' [170] The Commission lost the case on this point.

  It is unclear how the Commission could have obtained information on a substantial number of additional cases (necessary to prove the administrative practice) unless such information originated from private parties (notably individuals temporarily importing motor vehicles for business use).

[168] Judgment of the CJEU, C-79/09, Commission vs. Netherlands, paragraph 92.
[169] *Ibid*., paragraph 93.
[170] Judgement of the CJEU, in case C-156/04, paragraphs 47 to 51.

A market information tool such as SMIT could be particularly useful to better address 'general and persisting infringements' resulting from administrative practice

A market information tool such as SMIT would allow the Commission to more easily obtain certain information of relevance for certain types of infringement proceedings, such as those concerning the practical application of national law transposing EU law (as opposed to cases looking at the mere transposition of EU law into national law): e.g. when there are administrative decisions, granting of permits or licences, supervisory activity etc.

In this context, SMIT would be a particular useful tool for those infringement proceedings addressing infringements arising from administrative practice that constitute *'general and persisting infringements'* of EU law[171]. In those cases, the Commission needs to document and prove that the Member State's practice amounts to a certain pattern: e.g. by providing several situations illustrating the problem etc. It is unlikely that in those circumstances complainants could be in a situation to fill in all information gaps resulting from lack of cooperation from Member States or from Member States' inability to provide relevant information.

Furthermore, a market information tool such as SMIT could usefully allow the Commission to document additional situations to illustrate the problem which could be produced at later (judicial) stages of the procedure. The CJEU has already accepted that the Commission could adduce in front of the CJEU new examples (not included in the reasoned opinion) of infringements of a given obligation under EU law to the extent that providing the new examples would not constitute new

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[171] The CJEU has accepted that the Commission can bring infringement proceedings under Article 256 TFEU against a Member State when, beyond a specific violation of Union law, there is a general and to some extent structural/continuous infringement by such Member State of its duties under Union law: e.g. *'[…] it should be stated, first, in relation to the subject-matter of the present proceedings, that, without prejudice to the Commission's obligation to satisfy in each and every case the burden of proof which it bears, in principle nothing prevents the Commission from seeking in parallel a finding that provisions of a directive have not been complied with by reason of the conduct of a Member State's authorities with regard to particular specifically identified situations and a finding that those provisions have not been complied with because its authorities have adopted a general practice contrary thereto, which the particular situations illustrate where appropriate*.' [emphasis added] Cf. Judgment of the CJEU in case C-494/01, Commission vs. Ireland, paragraph 27. (see also the Opinion of Advocate General Geelhoed on the same case, paragraphs 43 and seq.)
In the same vein: '*It should also be noted that, without prejudice to the Commission's obligation to discharge the burden of proof upon it in proceedings under Article 258 TFEU, there is nothing precluding the Commission from acting on such a difference of interpretation and bringing proceedings before the Court, alleging a failure by the Member State concerned to fulfil its obligations, putting forward the numerous sets of circumstances which, in its view, are contrary to EU law, even though it does not identify each and every one of them (see, by analogy, inter alia judgment in Commission v Italy, C-135/05, EU:C:2007:250, paragraphs 20 to 22).*
In the present case, the interpretation given by the Member State concerned to a provision of EU law which differs from the one endorsed by the Commission gives rise to a situation in the territory of that Member State where there is an administrative practice whose existence is undisputed even though it is not generalised. Accordingly, the fact that the Commission has given only a few examples of that practice in support of its argument does not mean its action lacks the necessary detail to enable an assessment to be made of the subject-matter of the action.' Cf. Judgment of the CJEU in case C-512/12, Commission vs. Germany, paragraphs 25-26.
See as well Pal WENNERAS, 'A New Dawn for Commission Enforcement under Articles 226 and 228 EC: General and Persistent (GAP) Infringements, Lump Sums and Penalty Payments', Common Market Law Review 43, p. 31, 2006.

pleas (this would not be admissible at this stage of the procedure) but rather mere additional evidence in support of a claim of general and persistent infringement:

> *'[…] in so far as the action seeks to raise a failure of a general nature to comply with the Directive's provisions, concerning in particular the Irish authorities' systemic and consistent tolerance of situations not in accordance with the Directive, the production of additional evidence intended, at the stage of proceedings before the Court, to support the proposition that the failure thus alleged is general and consistent cannot be ruled out in principle.*
>
> *It should be noted that in its application the Commission may clarify its initial grounds of complaint provided, however, that it does not alter the subject-matter of the dispute. In producing fresh evidence intended to illustrate the grounds of complaint set out in its reasoned opinion, which allege a failure of a general nature to comply with the provisions of a directive, the Commission does not alter the subject-matter of the dispute (see, by analogy, the judgment of 12 October 2004 in Case C-328/02 Commission v Greece, not published in the ECR, paragraphs 32 and 36).'*[172]

A5.2. Examples from the State aid domain

Although addressing issues in a different domain, a single market information tool would in many dimensions be closely analogue to the MIT available to the Commission in the State aid area. Namely, the objectives of the tools are similar, they involve same stakeholders (the Commission, Member States, and private firms), and would be used for collecting similar type of information under similar conditions. Therefore, in the remainder of the annex we analyse the objectives and the impact of the existing MIT tool in order to anticipate a possible impact of a single market information tool. The frequency of use, as well as regulatory cost and benefit of MIT is possibly the best available real life proxy for the impact assessment of SMIT.

Since the introduction of MIT in 2013, information requests have been issued only in two cases for large-impact cases of selective tax advantages provided to firms through tax rulings on intra-group transfers. In these cases, information requested was very specific, readily available to the relevant market participants, and the information was not voluntarily provided by firms nor could be obtained otherwise. In both cases, information was acquired through simple procedures and the requested information was collected fully and timely (i.e. there was no need for fining the replying firms).

Selective tax advantages to companies through tax rulings on intra-group price transfers

[172] Judgment of the CJEU in case C-494/01, Commission vs. Ireland, paragraphs 37 and 38. See also paragraph 20 explaining that the Commission, in the reasoned opinion, stated that the complaints referred to did not constitute the only cases of non-compliance with the Directive and that it reserved its right to cite other examples in order to illustrate the breaches of a general nature in implementing the provisions of the Directive of which it accused the Irish authorities.

Since June 2013, the Commission has been investigating public allegations of favourable tax treatment of certain companies (in particular in the form of tax rulings[173]) by several Member States voiced in the media and in national Parliaments. The Commission extended this information inquiry to all Member States in December 2014. Overall, the Commission (DG Competition) has looked at more than 1000 tax rulings.

The issue at stake was whether those Member States practices resulted in granting selective tax advantages to certain companies that could constitute illegal State aid, incompatible with the internal market under Article 107(1) TFEU.[174] While the Member States enjoy fiscal autonomy, a measure by which the public authorities grant certain undertakings a favourable tax treatment which places them in a more favourable financial position than other taxpayers amounts to State aid within the meaning of Article 107(1) TFEU.[175]

The inquiry focused on tax rulings which endorse transfer pricing arrangements[176] proposed by the taxpayer for determining the taxable basis of an integrated group company. A particular problem arising is the existence of national schemes or individual aid measures allowing multinational companies to price their intra-group transactions in a manner that does not reflect the conditions that apply between independent companies at arm's length. The arm's length principle requires that intra-group transactions are remunerated as if they were agreed to by independent companies negotiating under comparable circumstances.

The Commission opened several formal investigations. Some of them have been completed and the Commission has already adopted final decisions in the following four cases:

1. SA.38373 (Ireland – Apple)[177], decision of 30 August 2016;
2. SA.38374 (The Netherlands – Starbucks)[178], decision of 21 October 2015;
3. SA.38375 (Luxembourg – Fiat)[179], decision of 21 October 2015; and
4. SA.37667 (Belgium – Art. 185§2b 'excess profit scheme') CIR92)[180], decision of 11 January 2016.

Three formal investigations (against Luxembourg) remain open[181].

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[173] Tax rulings are comfort letters issue by tax authorities to give company clarity on how its corporate tax will be calculated or on the use of special tax provision. They are a tool that provides legal certainty to tax payers. At such, tax rulings are not illegal.

[174] Article 107 TFEU: '*1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market. […]*'

[175] See generally European Commission (DG Competition) working paper on State aid and tax rulings of June 2016: http://ec.europa.eu/competition/state_aid/legislation/working_paper_tax_rulings.pdf

[176] Transfer prices refer to the prices charged for intra-group transactions concerning the sale of goods or services between associated group companies.

[177] http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38373

[178] http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38374

[179] http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38375

[180] http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_37667

[181] http://ec.europa.eu/competition/state_aid/tax_rulings/index_en.html

Requests for information made by the Commission to private parties

The Commission used the possibility to request information directly from companies in two of the tax ruling cases referred to above: in the FIAT case (SA.38375) and the Starbucks case (SA.38734). In both cases, the Commission had requested the Member States subject to the State aid investigations (Luxembourg and the Netherlands, respectively), both during the preliminary examination phases and after opening the two formal investigations procedures on 11 June 2014[182], to submit certain information, but this proved to be ineffective – essentially because the information in question was not available to the Member States in question[183]. Therefore, the Commission adopted a decision that entitled it to use, in accordance with Article 7 of Council Regulation (EU) 2015/1589 [Art. 6a of Council Regulation (EC) No 659/1999 at the time], the new market investigation tool.

- **The Fiat case**: The Commission sent a simple request for information to FIAT on 20 February 2015, which was replied by FIAT on 31 March 2015.[184] The information requested (and submitted) concerned[185]:
  - financial information on FIAT group treasury companies (incl. annual reports, description of the functions of the group treasury companies, participations by the Fiat group treasury companies in affiliated companies);
  - information on the asset and liabilities of the FIAT treasury company established in Luxembourg (incl. data on deals with counterparties within the group, average outstanding positions, issuance of debt);
  - individual intra-group transactions and a document on the FIAT group liquidity policy (incl. single rules for investment of cash by the group); and
  - information on FIAT group's single transfer pricing policy (incl. a document titled 'Transfer Pricing Policy' explaining the pricing of intra-group loans and deposits).

  FIAT also submitted information to the Commission voluntarily, as interested party, following the publication of the decision on the opening of the formal investigation procedure[186].
- **The Starbucks case:** The Commission also sent a simple request for information to Starbucks on 16 March 2015, 6 May 2015 and 5 August 2015, which was replied by Starbucks on 13 April

[182] For a summary of the information requests, see Commission Decision C(2015)7152 of 21.10.2015, in particular §§11-19 (FIAT case); and Commission Decision C(2015)7143 of 21.10.2015, in particular §§1-15 (Starbucks case).
[183] FIAT case: §20 of Decision C(2015)7152 (it is noted that the Commission had already anticipated in its Decision C(2014)3627, of 11 June 2014, opening the formal investigation procedure in this case that requesting information from FIAT could eventually be necessary: see §93 of that decision). Starbucks case: §16 of Decision C(2015)7143.
[184] Decision C(2015)7152, §§21 and 27. It is noted that the Commission granted an extension of the deadline to respond, following a request by the company.
[185] *Ibid*. §§110-126.
[186] *Ibid*. §17 and §§158 -183.

2015, 29 May 2015, 29 June 2015, 24 July 2015 and 10, 11 and 23 September 2015 respectively.[187] The information requested (and submitted) concerned:

- information on the activities and risks of certain Starbucks subsidiaries (incl. structure of the subsidiary's costs, breakdown of sales by products, data on pricing of products, data on expenses including salary expenses);
- data on royalty payments paid by a subsidiary in the Netherlands to another subsidiary in the UK and on the calculation of the tax base;
- information on the subsidiary in the UK (incl. data on employees performing certain operations, data on the functioning of the company within the group);
- data on intra-group payments (incl. data on payments to parent company in the US, on royalty payments and group organisation);
- information on the operations of a subsidiary in Switzerland (incl. financial information, prices of products (green coffee beans) used by Starbucks, transfer pricing policy, transfer pricing reports (covering the pricing of green coffee beans, prices actually paid by the subsidiary in the Netherlands to that in Switzerland);
- information and figures on Starbucks shops (incl. information on licensee programmes and eligibility criteria to develop shops, license fees percentage over turnover paid by the licensees);
- information on the profitability of other roasting facilities operated by Starbucks (incl. accounts);
- contracts between Starbucks and third parties relating to the manufacturing and the sale of coffee, including contracts on the licencing of intellectual property[188].

Starbucks had also submitted information to the Commission voluntarily, as interested party, following the publication of the decision on the opening of the formal investigation procedure[189].

In addition to this, the Commission also addressed simple requests for information to 4 competitors of Starbucks on 7 April 2015 who replied in 27 April, 20 May and 26 May 2015[190]. Other interested parties voluntarily submitted comments in that case[191].

In the other two tax ruling cases where the Commission has taken a final decision, recourse to the new investigations tool was not needed to the extent that the Member States concerned (and/or State aid beneficiaries voluntarily) provided sufficient information that allowed the Commission to complete its investigation.

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[187] Decision C(2015)7143, §§18 and 21. The Commission eventually sent additional requests of information to Starbucks: *ibid*., §§24, 28, 31 to 35.
[188] *Ibid*. §§91 to 154.
[189] *Ibid*. §14 and §§187-195. Note that in certain cases, Starbucks was not in a position to provide the requested information, as not available to it.
[190] *Ibid*. §§20, 22 and 26. See also §§202-212 for the description of the information supplied.
[191] *Ibid*. §§196-201.

Benefits of the use of the market information tool in the State aid context

Direct benefits: possibility to satisfactorily conclude two State aid investigations

In both the FIAT and Starbucks cases, the use of the Market Investigation Tool under the State aid Procedural Regulation allowed the Commission to obtain relevant information that it would have not obtained otherwise. Indeed, the Commission was not in a position to obtain the relevant information from other sources (the Member States in question did not have the requested information).

The information submitted by FIAT, Starbucks and the latter's competitors proved to be of crucial importance for allowing the Commission to finalise the investigation and to prove the existence of State aid incompatible with the single market. The Commission eventually concluded[192] that the two tax rulings under investigation endorsed artificial and complex methods, not reflecting economic reality, to establish taxable profits for the companies. This was done, in particular, by setting prices for goods and services sold between companies of the FIAT and Starbucks groups that did not correspond to market conditions. As a result, most of the profits of Starbucks' coffee roasting company were shifted abroad, where they were also not taxed, and FIAT's financing company only paid taxes on underestimated profits.

Direct benefits: recovery of unpaid tax and stop to unfair advantages

The conclusion of the investigation allowed the Commission to order Luxembourg and the Netherlands to recover the unpaid tax from FIAT and Starbucks, respectively, in order to remove the unfair competitive advantage they have enjoyed and to restore equal treatment with other companies in similar situations. The amounts recovered amounted to EUR23 million (FFT) and EUR25.7 million (Starbucks).

In addition, the companies in question no longer benefit from the advantageous tax treatment granted by these tax rulings.

Indirect benefits: increased voluntary cooperation by State aid beneficiaries in the future?

The Commission used the market investigation tool in the State aid area for the first time in these two cases. These first uses could have an exemplary value for the future. The fact that the Commission can and is prepared to use MIT may lead to an increase of voluntary cooperation by State aid beneficiaries with the Commission during the investigation phase – thus alleviating the need for the Commission to have recourse to what remains an exceptional information tool in the State aid area.

[192] See, IP/15/5580 of 21 October 2015: http://europa.eu/rapid/press-release_IP-15-5880_en.htm

ANNEX 6: OVERVIEW OF EXISTING POLICY FRAMEWORKS

This Annex gives an overview of different policy areas where the European Commission (section I), EU bodies and agencies (section II), national authorities in Member States (section III) are empowered to gather information directly from market players in the exercise of the full range of their responsibilities under the EU regulatory framework. Section IV presents a specific example of UK Competition and Market Authority which under national law has horizontal (generic) tools for requesting information from firms. Section V presents examples of different tools for exchange of information between national authorities among themselves and between these authorities and the Commission.

A6.1. Investigative powers of the European Commission

1. Competition law

Enforcement of Articles 101 and 102 TFEU

In the field of antitrust (application of Articles 101 and 102 TFEU), the Commission has powers since 1962 to request information from undertakings[193]. These powers are regularly used when the investigations are directed at possible infringements of EU law by undertakings.

Requests for information can be addressed to undertakings either in the context of so-called case-specific investigations or "sector inquires"[194].

Table. A6.1. Competition "sector inquires" in the antitrust and state aid areas– frequency and firm coverage

	Year	No. of firms covered
E-commerce	2015	1800[195]
Electric supplies (State aid)	2015	124[196]
Pharmaceutical	2008	70[197]
Retail Banking	2005	250[198]
Insurance	2005	425[199]
Telecommunication (3G)	2004	227[200]
Telecommunication (local loop)	2001	150[201]
Telecommunication (roaming)	2000	200[202]

[193] See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. This Regulation repealed Council Regulation No 17 of 1962 (First Regulation implementing Articles 85 and 86 of the Treaty).
[194] It would be more appropriate to refer to those as "investigations into sectors of the economy and into types of Agreements", as in the title of Article 1 of Council Regulation (EC) No 1/2003.
[195] http://europa.eu/rapid/press-release_IP-16-3017_en.htm
[196] http://ec.europa.eu/competition/sectors/energy/capacity_mechanism_report_en.pdf page 5
[197] http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/staff_working_paper_part1.pdf page 13
[198] http://ec.europa.eu/competition/sectors/financial_services/inquiries/sec_2007_106.pdf page 8
[199] http://ec.europa.eu/competition/sectors/financial_services/inquiries/final_report_annex.pdf page 3
[200] http://ec.europa.eu/competition/sectors/media/inquiries/final_report.pdf page 1
[201] http://ec.europa.eu/competition/sectors/telecommunications/archive/inquiries/local_loop/local_loop_unbundling_inquiry.pdf page 8
[202] http://ec.europa.eu/competition/sectors/telecommunications/archive/inquiries/roaming/working_document_on_initial_results.pdf page 1

Telecommunication (leased lines)	1999	92[203]

Source: http://ec.europa.eu/competition/antitrust/sector_inquiries.html

According to Article 17 of Regulation 1/2003, '*where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors. In the course of that inquiry, the Commission may request the undertakings or associations of undertakings concerned to supply the information necessary for giving effect to Articles [101 and 102 TFEU] and may carry out any inspections necessary for that purpose. The Commission may in particular request the undertakings or associations of undertakings concerned to communicate to it all agreements, decisions and concerted practices*'.

Under Article 18(1) of Regulation 1/2003 '*in order to carry out duties assigned to it by this Regulation, the Commission may, by simple request or by decision, require undertakings and association of undertakings to provide all necessary information*'.

The Court of Justice has confirmed that the Commission benefits from a wide margin of discretion in deciding whether particular information is necessary to enable it to bring to light an infringement of the competition rules[204]. The Court has also held that in addressing requests for information to undertakings the Commission is bound by the principle of proportionality[205]. The necessity of the information sought must be judged in relation to the purpose stated in the request for information, that purpose must be indicated with sufficient precision[206].

Under Article 18 of Regulation 1/2003 the Commission can require undertakings to provide information either through a simple request[207] or through a request by decision[208]. Where the Commission requires undertakings to supply information both through a simple request and a request by decision, it has to state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which the information is to be provided. No sanctions can be imposed if information is not provided in response to simple requests. The answer to requests by decision is compelled by fines or periodic penalty payments. Supplying incorrect or misleading information can be sanctioned both under simple requests and requests by decision.

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[203] http://ec.europa.eu/competition/sectors/telecommunications/archive/inquiries/leased_lines/working_document_on_initial_results.pdf page 5

[204] Judgment of the Court in case 374/87 Orkem v Commission, paragraph 15.

[205] Judgment of the Court in C-36/92 P SEP.

[206] Judgment of the Court in case C-247/14 P HeidelbergCement AG, paragraph 24. That judgment related to the formal request for information, which included a questionnaire of 67 pages, issued in the context of cartel investigation in the cement industry. In that judgment the Court held that matters covered in the questionnaire addressed to HeidelbergCement were extremely numerous and covered very different types of information. The decision to request information did not disclose, clearly and unequivocally, the suspicion of infringement which justified the adoption of that decision and did not make it possible to determine whether the requested information was necessary for the purpose if the investigation. The Court found that the statement of reasons in the Commission's decision to request information was excessively brief, vague, generic and in some respect, ambiguous.

[207] Article 18(2) of Regulation 1/2003.

[208] Article 18(3) of Regulation 1/2003.

According to Article 18(5) of Regulation 1/2003, '*the Commission shall without delay forward a copy of the simple request or of the decision to the competition authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated and the competition authority of the Member State whose territory is affected*'.

Recital 37 of Regulation 1/2003 also clarifies that the Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, the Regulation is interpreted and applied with respect to those rights and principles.

Confidential information is protected under Article 27 of Regulation 1/2003 which stipulates that the right of access to the file of the parties concerned shall not extend to confidential information and under Article 28 of Regulation which contains rules on professional secrecy.

Under Article 12(1) of Regulation 1/2003 '*for the purpose of applying Articles [101 and 102 TFEU] the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information*'. Paragraphs 2 and 3 of Article 12 further circumscribe the exchange of information between the Commission and the national competition authorities (e.g. information exchanged shall only be used in evidence for the purpose of applying Articles 101 and 102 TFEU and in respect of the subject-matter for which it was collected by the transmitting authority).

For the purpose of enforcing Article 101 and 102 TFEU the Commission has also the power to: (i) interview any natural or legal person who contents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation[209], (ii) inspect business premises of undertaking and associations of undertakings[210], (iii) inspect other premises, including private homes[211].

Control of concentrations

In the field of control of concentrations, the Commission is entitled to request information from undertakings. The legal basis for such requests is provided in Article 11 of Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ('the EC Merger Regulation'). Article 11 of Regulation 139/2004 mirrors Article 18 of Regulation 1/2003 and also distinguishes between simple requests for information and requests by decision.

State aid

Similarly to the infringement procedures under Article 258 TFEU, State aid procedures under Article 108 TFEU are addressed against Member States. In that context, the Commission traditionally relied on information provided by complainants and by the concerned Member State. Member States have

[209] Article 19 of Regulation 1/2003.
[210] Article 20 of Regulation 1/2003.
[211] Article 21 of Regulation 1/2003.

a duty to cooperate with the Commission under Article 4(3) TEU and procedural rules on State aid allow the Commission to request Member States to provide information[212].

Nevertheless, in July 2013, the European Commission was entrusted with the possibility, in the context of formal investigation procedures in the area of State aid, to directly require undertakings and associations of undertakings to provide information to the Commission[213]: i.e. MIT.

The Commission now can, if the information provided by the Member State subject to the State aid investigation is not sufficient, ask that companies (whether a company benefitting from the contested aid measure or third parties) to provide directly to the Commission market information necessary to enable it to complete its State aid assessment. The Commission may also use these powers in the context of wider State aid investigations into sectors of the economy. The Commission may request such information through a simple request for information or through a formal Commission decision.

These powers are, however, of last resort: the Commission can only use them within a formal investigation procedure under Article 108 TFEU if the information provided by the Member State concerned (whether in the context of the preliminary examination or in the context of the formal investigation procedure) is not sufficient and if the Commission adopts a formal decision stating that the formal investigation procedure in question is ineffective. These powers are without prejudice to the possibility for interested parties to submit observations following the publication of decisions to open formal investigations.

Trade defence policy

The EU uses trade defence instruments to re-establish a competitive environment for the EU industry when harmed by dumped or subsided imports. There are three types of trade defence instruments[214]:

- anti-dumping measures (a company is dumping if it is exporting a product to the EU at prices lower than the normal value of the product);
- anti-subsidy measures (a subsidy is a financial contribution from a third-country government or public body which, in the case of trade, affects the pricing of goods imported into the EU); and
- safeguards (safeguards are intended for situations in which an EU industry is affected by an unforeseen, sharp and sudden increase of imports. The objective is to give the industry a temporary breathing space to make necessary adjustments – safeguards always come with an obligation to restructure).

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[212] See Council Regulation (EU) No 2015/1589 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union (codification).

[213] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union, as amended by Council Regulation (EU) 734/2013 of 22 July 2013. Council Regulation (EC) No 659/1999 has in the meantime been repealed by Council Regulation (EU) No 2015/1589 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union (codification). See the correlation table in Annex II to Regulation (EU) No 2015/1589.

[214] For a general introduction, see: http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_151014.pdf

The Commission is empowered to take decisions on these three areas, after consulting the Trade Defence Committee (which can block adoption of measures by a qualify majority). The Commission is also responsible for carrying out investigations, either *ex officio* or upon complaints.

Following the initiation of proceedings for anti-dumping and anti-subsidy measures, the Commission commences an investigation at Union level covering, as appropriate, either both dumping and injury or subsidisation and injury.

The Commission may send questionnaires to 'parties', who shall be given at least 30 days to reply. The Commission may also request EU Member States to supply information as well as to carry out checks and inspections[215].

There are consequences in case of non-cooperation by an interested party (including if an interested party refuses to supply information). The Regulation foresees that if an interested party does not cooperate, or cooperate only partially, so that relevant information is thereby withheld, the result of the investigation may be less favourable to the party than if it had cooperated[216].

Both in the case of anti-dumping investigations and anti-subsidy investigations, there are rules on the treatment of confidential information[217].

The Commission has developed standard questionnaires used to collect information in the context of anti-dumping investigations, although the questionnaires are systematically adapted on a case by case basis[218].

It must be noted that, contrary to the case of dumping, in the case of subsidies the 'infringer' is a public authority from a third country. This means that when the Commission directly requests information from private parties (e.g. beneficiaries), it is in a position similar to that of State aid investigations.

The procedure for adopting safeguards is slightly different from that for adopting anti-dumping and anti-subsidy measures. This procedure is hardly used.

The Commission may invite interested parties to submit information. Also, the Commission has some investigative powers, including the possibility to '*seek all information it deems to be necessary*'[219].

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[215] See Article 6(2), (3) and (4) of Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (codification); or Article 11(2), (3) and (4) of Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union (codification).

[216] See Article 18 of Regulation (EU) 2016/1036; and Article 28 of Regulation (EU) 2016/1037.

[217] See Article 19 of Regulation (EU) 2016/1036 and Article 29 of Regulation (EU) 2016/1037.

[218] http://ec.europa.eu/trade/policy/accessing-markets/trade-defence/actions-against-imports-into-the-eu/anti-dumping/#_templates

[219] Article 6(2) of Council Regulation (EC) No 260/2009, of 26 February 2009, on the common rules for imports; and Article 5(2) of Council Regulation (EC) No 625/2009, of 7 July 2009, on common rules for imports from certain third parties.

A6.2. Investigative powers of EU bodies/agencies in the financial services sector

The European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA), the European Securities and Market Authority (ESMA)

General power to collect information of the EBA, the EIOPA and the ESMA

The general principle

Article 8(2)(h) of the EBA Regulation[220], Article 8(2)(h) of the EIPOA Regulation[221] and Article 8(2)(h) the ESMA Regulation[222] grant each of these authorities a general power (among other powers[223]) to '*collect the necessary information concerning*' '*financial institutions*' (EBA, EIOPA[224]) or '*financial market participants*' (ESMA). In the three cases, it is also stated that this should be done '*as provided for in Article 35*'.

The Article on 'Collection of Information'

Article 35 in the three Regulations contains provisions (paragraphs 6 and seq.) on the possibility of obtaining information directly from financial institutions or financial market participants.

1) Power of last resort. It is a power of last resort, when obtaining information from national authorities has proven unsuccessful[225]. The relevant text (N.B. the EBA Regulation is slightly different, since it was amended in 2013 on this point[226]) is as follows:

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[220] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC.

[221] Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC.

[222] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.

[223] Article 8 in each of the three regulations deals with 'Tasks and Powers of the Authority'.

[224] The term 'financial institution' is defined differently in the EBA and the EIOPA Regulations.

[225] See also recital 46 of the EBA Regulation or recital 45 of the EIOPA Regulation(recital 46 of the ESMA Regulation has similar language, slightly adapted to refer to financial market participants rather than financial institutions):

'*In order to carry out its duties effectively, the Authority should have the right to request all necessary information. To avoid the duplication of reporting obligations for financial institutions, that information should normally be provided by the national supervisory authorities which are closest to the financial markets and institutions and should take into account already existing statistics. However, as a last resort, the Authority should be able to address a duly justified and reasoned request for information directly to a financial institution where a national competent authority does not or cannot provide such information in a timely fashion. Member States' authorities should be obliged to assist the Authority in enforcing such direct requests. In that context, the work on common reporting formats is essential. The measures for the collection of information should be without prejudice to the legal framework of the European Statistical System and the European System of Central Banks in the field of statistics. This Regulation should therefore be without prejudice both to Regulation (EC) No 223/2009 of the European Parliament and of the Council of 11 March 2009 on European*

EBA Regulation

'*6. Where complete or accurate information is not available or is not made available in a timely fashion under paragraph 1 or 5*[227]*, the Authority*[228] *may request information, by way of a duly justified and reasoned request, directly from:*

(a) relevant financial institutions;

(b) holding companies or branches of a relevant financial institution;

(c) non-regulated operational entities within a financial group or conglomerate that are significant to the financial activities of the relevant financial institutions.

The addressees of such a request shall provide the Authority promptly and without undue delay with clear, accurate and complete information.

[…].'

EIOPA and ESMA Regulations

'6. Where information is not available or is not made available under paragraph 1 or 5 in a timely fashion, the Authority may address a duly justified and reasoned request directly to the relevant financial institution [/financial market participant in the ESMA text]. The reasoned request shall explain why the information concerning the respective individual financial market participants is necessary.

[…]'

2) Information of national authorities. If the EBA, EIOPA or ESMA request financial institutions or financial markets participants to provide information, they must inform the relevant competent authorities of such requests (cf. third subparagraph of paragraph 6 in the EBA Regulation; second subparagraph of paragraph 6 in the EIOPA and ESMA Regulations).

3) Enforcement of the request. The EBA, EIOPA or ESMA lack enforcement powers (contrary to the faculty of the Commission under State aid rules, they do not have possibility to impose sanctions for missing or misleading replies). They need to rely on national competent authorities for assistance:

EBA, EIOPA and ESMA Regulations:

'6. […] *At the request of the Authority, the competent authorities shall assist the Authority in collecting the information*.'

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statistics and to Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank.'

[226] The text of Article 35 of the EBA Regulation was amended in 2013, by Regulation (EU) No 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013).

[227] N.B. on the possibility to request national authorities to provide information.

[228] i.e. the European Banking Authority.

The EBA, EIOPA and ESMA Regulation assume that those national competent authorities do have the necessary and relevant powers.

The EBA Regulation has additional language in this regard:

> *'7a. Where the addressees of a request under paragraph 6 do not provide clear, accurate and complete information promptly, the Authority shall inform the European Central Bank where applicable and the relevant authorities in the Member States concerned which, subject to national law, shall cooperate with the Authority with a view of ensuring full access to the information and to any originating documents, books or records to which the addressees have legal access in order to verify the information.'*

In addition, a recital provides some clarification on whether the addresses of a request could oppose to providing information [emphasis added]:

> *'(9) Requests for information by EBA should be duly justified and reasoned. Objections to specific requests for information on grounds of non-compliance with Regulation (EU) No 1093/2010 should be raised in accordance with the relevant procedures. Where an addressee of a request for information raises such objections, this should not absolve him from providing the information requested. The Court of Justice of the European Union should be competent to decide, in accordance with the procedures set out in the Treaty on the Functioning of the European Union, whether a specific request for information by EBA complies with that Regulation.'*[229]

4) Type of information concerned. The three Regulations did not specify the type of information that could be collected[230]. Yet, for the EBA Regulation, amending Regulation (EU) No 1022/2013 provided some clarification, in its recitals 8, on the type of information that could be required:

> *'(8) EBA should be able to request information from financial institutions in accordance with Regulation (EU) No 1093/2010 in relation to any information to which those financial institutions have legal access, including information held by persons remunerated by those financial institutions for carrying out relevant activities, audits provided to those financial institutions by external auditors and copies of relevant documents, books and records.'*

5) Use of the information collected. The EBA, EIOPA or ESMA may use the confidential information received by under this provision only for the purpose of carrying out the duties assign to them by the three Regulations (cf. paragraph 7 of Article 35 in the three Regulations).

Specific additional information collection power for the EBA

[229] It is recital 9 of amending Regulation (EU) No 1022/2013.

[230] In certain cases, there are provisions in other legal instruments in which these authorities may be specifically empowered to collect certain information. For instance, ESMA is empowered to '*request from any person all relevant information regarding the size and purpose of a position or exposure entered into via a derivative*' (cf. Article 45(1)(a) of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012.

In addition, there is a specific provision added in 2013 to the EBA Regulation, Article 32(3a), on the collection of information from financial institutions in connection to '*Union-wide assessments of the resilience of financial institutions to adverse market developments*'. See the following text [emphasis added]:

> *'[…]*
>
> *3a. For the purpose of running the Union-wide assessments of the resilience of financial institutions under this Article[231], the Authority may, in accordance with Article 35 and subject to the conditions set out therein, request information directly from those financial institutions. It may also require competent authorities to conduct specific reviews. It may request competent authorities to carry out on-site inspections, and may participate in such on-site inspections in accordance with Article 21 and subject to the conditions set out therein, in order to ensure comparability and reliability of methods, practices and results.*
>
> *3b. The Authority may request that the competent authorities require that financial institutions subject to an independent audit information that they must provide under paragraph 3a.*
>
> *[…].'*

Specific additional information collection power for the ESMA

According to Regulation No 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies and Regulation No 648/2012 of the European Parliament and the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, ESMA has direct supervisory powers on registered Credit Rating Agencies and trade repositories. In the areas where it exercises its direct supervision ESMA can request or require by decision that directly supervised entities or related third parties provide all information that is necessary in order to carry out its duties. ESMA can also conduct general investigations and on-site inspections and has extensive data-gathering powers in that context.

Protection of confidential information

[231] Paragraph 2 of the same Article states the following:
'*2. The Authority shall, in cooperation with the ESRB, initiate and coordinate Union-wide assessments of the resilience of financial institutions to adverse market developments. To that end it shall develop:*
(a) common methodologies for assessing the effect of economic scenarios on an institution's financial position;
(b) common approaches to communication on the outcomes of those assessments of the resilience of financial institutions;
(c) common methodologies for assessing the effect of particular products or distribution processes on an institution; and
(d) common methodologies for asset evaluation, as necessary, for the purpose of the stress testing.

Protection of confidential information is addressed in Article 70 of the three Regulations, on '*Obligation of professional secrecy*'. See the following text, identical in the three Regulations [emphasis added][232]:

> *'1. Members of the Board of Supervisors and the Management Board, the Executive Director, and members of the staff of the Authority including officials seconded by Member States on a temporary basis and all other persons carrying out tasks for the Authority on a contractual basis shall be subject to the requirements of professional secrecy pursuant to Article 339 TFEU and the relevant provisions in Union legislation, even after their duties have ceased.*
>
> *Article 16 of the Staff Regulations shall apply to them.*
>
> *In accordance with the Staff Regulations, the staff shall, after leaving service, continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits.*
>
> *Neither Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence staff members of the Authority in the performance of their tasks.*
>
> *2. Without prejudice to cases covered by criminal law, any confidential information received by persons referred to in paragraph 1 whilst performing their duties may not be divulged to any person or authority whatsoever, except in summary or aggregate form, such that individual financial institutions cannot be identified.*
>
> *Moreover, the obligation under paragraph 1 and the first subparagraph of this paragraph shall not prevent the Authority and the national supervisory authorities from using the information for the enforcement of the acts referred to in Article 1(2), and in particular for legal procedures for the adoption of decisions.*
>
> *3. Paragraphs 1 and 2 shall not prevent the Authority from exchanging information with national supervisory authorities in accordance with this Regulation and other Union legislation applicable to financial institutions.*
>
> *That information shall be subject to the conditions of professional secrecy referred to in paragraphs 1 and 2. The Authority shall lay down in its internal rules of procedure the practical arrangements for implementing the confidentiality rules referred to in paragraphs 1 and 2.*
>
> *[…]'*

It must be noted that the EBA, EIOPA and ESMA are subject to Regulation (EC) No 1049/2011 on access to documents (cf. Article 72 and recital 64 of the three Regulations).

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[232] See also recital 62 of the three Regulations:
'*It is essential that business secrets and other confidential information be protected. The confidentiality of information made available to the Authority and exchanged in the network should be subject to stringent and effective confidentiality rules*.'

Sharing of information with the Commission by the EBA, EIOPA and ESMA

The EBA, EIOPA and ESMA are not expected to share confidential supervisory information with the Commission: e.g. no mentioning of the Commission in article 70(3) as regards the exchange of confidential information with national authorities.

Yet, there is a case when the three authorities should provide data to the Commission, in relation to breaches of EU law. Article 17 ('Breach of Union Law') in each of the three Regulations[233] provides for a 3-step graduated response involving the EBA, EIOPA or ESMA and the Commission in case that a national competent authority does not properly apply EU relevant law (cf. as referred to in Article 1(2) of each of the Regulations, mostly financial services law):

- First, the EBA (or EIPA or ESMA) may investigate the alleged breach or non-application of Union law by the national authority and may address a recommendation to the competent authority concerned setting out the action necessary to comply with Union law (cf. Article 17(2) and (3)[234];
- Second, if the national authority does not follow the recommendation, the Commission may be involved in the procedure, as stated in paragraph 4 of Article 17 of each Regulation[235], and in particular the Commission shall receive all necessary information:

  '*4. Where the competent authority has not complied with Union law within 1 month from receipt of the Authority's recommendation, the Commission may, after having been informed by the Authority, or on its own initiative, issue a formal opinion requiring the competent authority to take the action necessary to comply with Union law. The Commission's formal opinion shall take into account the Authority's recommendation.*

  The Commission shall issue such a formal opinion no later than 3 months after the adoption of the recommendation. The Commission may extend this period by 1 month.

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[233] See recital 27 of the EBA Regulation (identical text is found in recital 26 of the EIOPA Regulation and recital 27 of the ESMA Regulation):
'(27) Ensuring the correct and full application of Union law is a core prerequisite for the integrity, transparency, efficiency and orderly functioning of financial markets, the stability of the financial system, and for neutral conditions of competition for financial institutions in the Union. A mechanism should therefore be established whereby the Authority addresses instances of non-application or incorrect application of Union law amounting to a breach thereof. That mechanism should apply in areas where Union law defines clear and unconditional obligations.'

[234] See also recital 28 of the EBA Regulation (identical text is found in recital 27 of the EIOPA Regulation and recital 28 of the ESMA Regulation):
'(28) *To allow for a proportionate response to instances of incorrect or insufficient application of Union law, a three-step mechanism should apply. First, the Authority should be empowered to investigate alleged incorrect or insufficient application of Union law obligations by national authorities in their supervisory practice, concluded by a recommendation. […]*'

[235] See also recital 28 of the EBA Regulation (identical text is found in recital 27 of the EIOPA Regulation and recital 28 of the ESMA Regulation):
'(28) […] Second, where the competent national authority does not follow the recommendation, the Commission should be empowered to issue a formal opinion taking into account the Authority's recommendation, requiring the competent authority to take the actions necessary to ensure compliance with Union law.'

The Authority and the competent authorities shall provide the Commission with all necessary information.'

The extent to which this reference to 'all necessary information' includes firm-level confidential information is unclear. But it appears the only instance in which the EBA, EIOPA or ESMA would forward supervision-related information to the Commission.

- Third, Article 17 of each Regulation further foresees that the EBA, EIOPA or ESMA may, under certain circumstances, address an individual decision to a financial institution (EBA, EIPOA) or to a financial market participant (ESMA)[236], without prejudice to the Commission's powers pursuant to Article 258 TFEU.

The Single Resolution Board (SRB)

The SRB Regulation[237] established a Single Resolution Board (SRB), which is a Union agency with legal personality.

Investigative powers

[236] See also recital 29 of the EBA Regulation (identical text is found in recital 28 of the EIOPA Regulation and recital 29 of the ESMA Regulation):
'(29) Third, to overcome exceptional situations of persistent inaction by the competent authority concerned, the Authority should be empowered, as a last resort, to adopt decisions addressed to individual financial institutions [N.B. financial market participants in the ESMA Regulation]. That power should be limited to exceptional circumstances in which a competent authority does not comply with the formal opinion addressed to it and in which Union law is directly applicable to financial institutions by virtue of existing or future Union regulations.'
See paragraphs 5 to 7 of Article 17 of each of the Regulations, as well:
'5. The competent authority shall, within 10 working days of receipt of the formal opinion referred to in paragraph 4, inform the Commission and the Authority of the steps it has taken or intends to take to comply with that formal opinion.
6. Without prejudice to the powers of the Commission pursuant to Article 258 TFEU, where a competent authority does not comply with the formal opinion referred to in paragraph 4 within the period of time specified therein, and where it is necessary to remedy in a timely manner such non-compliance in order to maintain or restore neutral conditions of competition in the market or ensure the orderly functioning and integrity of the financial system, the Authority may, where the relevant requirements of the acts referred to in Article 1(2) are directly applicable to financial institutions, adopt an individual decision addressed to a financial institution [N.B. 'financial market participant' in the ESMA Regulation] requiring the necessary action to comply with its obligations under Union law including the cessation of any practice.
The decision of the Authority shall be in conformity with the formal opinion issued by the Commission pursuant to paragraph 4.
7. Decisions adopted under paragraph 6 shall prevail over any previous decision adopted by the competent authorities on the same matter.
When taking action in relation to issues which are subject to a formal opinion pursuant to paragraph 4 or a decision pursuant to paragraph 6, competent authorities shall comply with the formal opinion or the decision, as the case may be.'
[237] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010.

The SRB Regulation grants extensive investigative powers to the SRB, for the purpose of performing its tasks under that Regulation[238].

Requests for information to natural and legal persons (cf. Article 34)

The SRB may require certain (legal or natural) persons to provide '*all of the information necessary to perform the tasks conferred on it by [the SRB] Regulation*'.

The addressees of the requests are: certain credit institutions and investment firms (defined in Article 2 of the SRB Regulation), including other entities within the group; employees of those institutions and entities; third parties to whom the institutions/entities have outsource functions or activities.

The SRB does not need to ask permission from national authorities [emphasis added]: '*[…] the Board may, through the national resolution authorities or directly, after informing them, making full use of all of the information available to the ECB or to the national competent authorities*[239]*, require the following […] persons to provide […]*' (cf. Article 34(1)). If the SRB obtains the information directly from the addressees of the requests, it must make that information available to the national resolution authorities concerned (cf. Article 34(3)).

At the same time, national authorities must cooperate with the SRB in finding the information: '*National competent authorities, the ECB where relevant, and national resolution authorities shall cooperate with the Board in order to verify whether some or all of the information requested is already available. Where such information is available, national competent authorities, the ECB where relevant, or national resolution authorities shall provide that information to the Board*.' (cf. Article 34(6)).

General investigations (cf. Article 35)

The SRB is empowered, '*subject to any other conditions laid down in relevant Union law*', to conduct all necessary investigations of the same legal or natural person referred to in Article 34(1). It may do so directly or through the national authorities. A decision of the Board is needed in order to launch an investigation.

On-site inspections (cf. Article 36 and 37)

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[238] See recital 93: '*In order to perform its tasks effectively, the Board should have appropriate investigatory powers. It should be able to require all necessary information either through the national resolution authorities, or directly, after informing them, and to conduct investigations and on-site inspections, where appropriate in cooperation with national competent authorities, making full use of all information available to the ECB and the national competent authorities. In the context of resolution, on-site inspections should be available for the Board to ensure that decisions are taken on the basis of fully accurate information and to monitor implementation by national authorities effectively*.'

[239] National resolution authorities are under the obligation to submit information to the SRB (cf. Article 8(4)). Those authorities are empowered by Directive 2014/59/EU to obtain information.

The SRB is also empowered to conduct on-site inspections at the business premises of the natural and legal persons concerned. A decision by the Board is needed (cf. Article 36). An authorisation by a judicial authority must be sought, where needed (cf. Article 37).

Type of information concerned

Concerning the requests for information (cf. Article 34), the SRB Regulation states that the SRB '*shall be able to obtain, including on a continuous basis, any information necessary for the exercise of its functions under this Regulation, in particular on capital, liquidity, assets and liabilities concerning any institution subject to its resolution powers*.' (cf. Article 34(4)).

Concerning the general investigations (cf. Article 35), the SRB may:

> *'(a) require the submission of documents;*
>
> *(b) examine the books and records of any legal or natural person referred to in Article 34(1) and take copies or extracts from such books and records;*
>
> *(c) obtain written or oral explanations from any legal or natural person referred to in Article 34(1) or their representatives or staff;*
>
> *(d) interview any other natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation.'*

Enforcement

The addresses of the requests for information must supply the information requested under Article 34(1) and they cannot oppose any duty of professional secrecy (cf. Article 34(2)[240]).

Concerning the general investigations, '*where a person obstructs the conduct of the investigation, the national resolution authorities of the participating Member State where the relevant premises are located shall afford, in accordance with national law, the necessary assistance including facilitating the access by the Board to the business premises of the natural or legal persons referred to in Article 34(1), so that those rights can be exercised*.' (cf. Article 32(2) second subparagraph).

In addition, the SRB Regulation foresees the application of fines (cf. Article 38)[241]) where the legal or natural person concerned does not supply the information requested under Article 34 or does not submit to a general investigation (under Article 35) or an on-site inspection (under Article 36). Article 38(3) establishes the basic amount of fines, by setting a lower and a higher limit. There are additional detailed rules of the application of the limits, including by applying aggravating factors.

The SRB Regulation also foresees the application of periodic penalty payments in order to compel the legal or natural person concerned: to comply with a decision of the SRB adopted under Article 34; to supply complete information which has been required by a decision pursuant to Article 34; to submit to an investigation under Article 35 (e.g. by providing complete records, data, procedures or any other material required and by completing and correcting other information already provided); to submit to an on-site inspection under Article 36.

Protection of confidential information

Protection of confidential information is primarily addressed in Article 88 of the SRB Regulation, on '*Professional secrecy and exchange of information*'. See also recitals 116 and 117.

There are also rules on the protection of business secrets and confidential information in the context of the hearings of the persons subject to the proceedings (cf. Article 40(2)).

The SRB is subject to Regulation (EC) No 1049/2011 on access to documents (cf. Article 90).

Sharing of information with the Commission

Article 34(5) foresees that, for the information collected under Article 34, '*the Board, the ECB, the national competent authorities and the national resolution authorities may draw up memoranda of*

[240] See also recital 94: '*In order to ensure that the Board has access to all relevant information, the relevant entities and their employees or third parties to whom the entities concerned have outsourced functions or activities should not be able to invoke the requirements of professional secrecy to prevent the disclosure of information to the Board. At the same time, the disclosure of such information to the Board should not be deemed to infringe the requirements of professional secrecy*.'

[241] See also recital 95: '*In order to ensure compliance with decisions adopted within the framework of the SRM, proportionate and dissuasive fines should be imposed in the event of an infringement. The Board should be entitled to impose fines or periodic penalty payments on undertakings for failure to comply with its decisions addressed to them*.'

understanding with a procedure concerning the exchange of information.' The Commission does not participate in that arrangement[242].

However, the Commission has some role in the resolution procedure (cf. Article 18). In that context, the SRB Regulation foresees that the Commission will have access to information (cf. Article 18(10)[243]:

> '10. *Commission shall have the power to obtain from the Board any information which it deems to be relevant for performing its tasks under this Regulation. The Board shall have the power to obtain from any person, in accordance with Chapter 5 of this Title* [N.B. Articles 34 to 37]*, any information necessary for it to prepare and decide upon a resolution action, including updates and supplements of information provided in the resolution plans.*'

In addition, there are some cooperation obligations in Article 30:

> '*1.The Board shall inform the Commission of any action it takes in order to prepare for resolution. With regard to any information received from the Board, the members of the Council, the Commission as well as the Council and the Commission staff shall be subject to the requirements of professional secrecy laid down in Article 88.*
>
> *2.In the exercise of their respective responsibilities under this Regulation, the Board, the Council, the Commission, the ECB and the national resolution authorities and national competent authorities shall cooperate closely, in particular in the resolution planning, early intervention and resolution phases pursuant to Articles 8 to 29. They shall provide each other with all information necessary for the performance of their tasks*.
> […]'

A6.3. Examples of investigative powers of national authorities in Member States

1. Competition law

Regulation 1/2003 empowers national competition authorities to apply the EU competition rules alongside the Commission. However, it does not regulate how national competition authorities (NCAs) apply those rules. The investigative powers and sanctioning mechanisms are not governed by EU law but are determined by national law.

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[242] In addition, Article 30(7) foresees that the SRB should conclude, where necessary, a memorandum of understanding with the ECB and the national resolution authorities and the national competent authorities describing in general terms how they will cooperate under paragraphs 2 and 4 of Article 30 in the performance of their respective tasks under Union law. See also recital 54 in that regard. Again, the Commission is not part of that arrangement.

[243] See also recital 56 [emphasis added]: '*In order to minimise disruption of the financial market and of the economy, the resolution process should be accomplished in a short time. Depositors should be granted access at least to the guaranteed deposits as promptly as possible, and in any event within the same deadlines as provided for in Directive 2014/49/EU of the European Parliament and of the Council (1). The Commission should, throughout the resolution procedure, have access to any information which it deems to be necessary to take an informed decision in the resolution process*.'

The 2012 Report on investigative powers of NCAs conducted within the European Competition Network[244] demonstrates that competition authorities in all Member States have the power to request information in the context of investigations of competition law infringements.

According to such report, the "*scope of such requests is generally comprehensive (e.g. all kind of information necessary/relevant for the investigation*", "*any question regarding the alleged infringement)*"[245]. The information which can be requested includes documents and data.

The competition authorities usually state the legal basis and the purpose of the request for information, specify what information is required and within which time-limit[246]. The power of NCAs to ask for information is limited, for example, by legal professional privilege or privilege against self-incrimination[247]. In all jurisdictions, fines or penalty payments may be imposed in case of non-compliance or refusal by an undertaking to submit a reply to a request for information. Most jurisdictions equally provide for periodic-penalty payments as a means to enforce requests for information[248].

In most Member States NCAs can issue requests for information in the context of sector inquiries[249]. A large number of such inquiries have been used by NCAs in a broad variety of sectors since 2004[250].

Requests for information are subject to judicial control, either directly (an application can be made against the request) or indirectly (the request can be appealed in the context of an appeal against the final decision).

Cases dealt with by NCAs often have cross-border dimension. For this reason Regulation 1/2003 introduces close cooperation between NCAs in the field of fact-finding and exchange of information, in particular within the European Competition Network.

In 2013/2014, the Commission conducted the assessment of the functioning of Regulation 1/2003. Based on the results of this assessment, the Commission identified areas for action to make the enforcement of competition rules by NCAs more effective, in particular to ensure that NCAs: have a complete set of effective investigative and decision-making powers at their disposal and can impose effective and proportionate fines[251].

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[244] ECN WORKING GROUP COOPERATION ISSUES AND DUE PROCESS, 'Investigative Powers Report', 31 October 2012, http://ec.europa.eu/competition/ecn/investigative_powers_report_en.pdf
[245] See page 29 of the Report.
[246] *Ibid*.
[247] According to the Report, '*[o]ther limitations may also play a role in certain very limited circumstances, […]*'. See page 31 of the Report.
[248] See page 33 of the Report.
[249] See page 37 of the Report.
[250] For details see Commission Staff Working Document, 'Ten Years of Antitrust Enforcement under Regulation 1/2003', SWD(2014) 230/2.
[251] See Communication from the Commission to the European Parliament and the Council, 'Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives', COM(2014) 453.

2. Consumer protection

The CPC Regulation [252] lays down a framework for cooperation between the competent authorities in the EU and the Commission in cases of 'intra-Community infringement' of Union consumer law. In its annex, the CPC Regulation includes a list of EU legal acts in the field of consumer protection that are subject to this enforcement cooperation.

Article 4(6) of the CPC Regulation establishes certain minimum investigative and enforcement powers of the competent authorities in relation to their obligations under the CPC Regulation, in particular to address intra-Community infringements:

a) to have access to any relevant document, in any form, related to the intra-Community infringement;
b) to require the supply by any person of relevant information related to the intra-Community infringement;
c) to carry out necessary on-site inspections;
d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;
e) to obtain from the seller or supplier responsible for intra-Community infringements an undertaking to cease the intra-Community infringement; and, where appropriate, to publish the resulting undertaking;
f) to require the cessation or prohibition of any intra-Community infringement and, where appropriate, to publish resulting decisions; and
g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.

Depending on the enforcement system in place, the CPC competent authorities either exercise these powers directly (possible subject to judicial supervision) or indirectly by applying to competent courts to seek the necessary judicial orders.

On 25 May 2016, the Commission presented a legislative proposal[253] to review the existing rules on consumer protection cooperation between enforcement authorities. The aim is to clarify the rules and to provide national enforcement authorities with additional powers (e.g. require the supply of information from any public authority or banks, or internet service providers for the purpose of among others identifying and following financial flows or of ascertaining the identity of persons who own websites) most importantly to enable them to address unlawful intra-Union online practices and improve coordination among them. The proposal also foresees a new procedure, which will be trigged at the Union level by the Commission to permit closer coordination of enforcement actions when harmful practices concern a large majority of European consumers.

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[252] Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.
[253] COM(2016)283, 25.5.2016.

3. Financial supervision

National financial supervision authorities, being part of the European System of Financial Supervision, have extensive investigative powers. To give an example, under Regulation 596/2014 on market abuse (Market Abuse Regulation) those powers include, among others:

a) the access to any document or data in any form and the right to receive or take a copy thereof;
b) powers to require or demand information from any person, including those who are successively involved in the transmission of orders or conduct of the operations concerned, as well as their principals, and if necessary, to summon and question any such person with a view to obtain information;
c) in relation to commodity derivatives, powers to request information from market participants on related spot markets according to standardised formats, obtain reports on transactions, and have direct access to traders' systems;
d) powers to carry out on-site inspections and investigations at sites other than at the private residences of natural persons;
e) powers to enter the premises of natural and legal persons in order to seize documents and data in any form where a reasonable suspicion exists that documents or data relating to the subject matter of the inspection or investigation may be relevant to prove a case of insider dealing or market manipulation infringing the Market Abuse Regulation; and
f) powers to require existing recordings of telephone conversations, electronic communications or data traffic records held by investment firms, credit institutions or financial institutions.

4. Market surveillance

Market surveillance ensures that non-food products on the EU market conform with the rules and in particular, with product safety requirements. Market surveillance covers a wide variety of sectors such as medical devices, toys, machinery, lifts, and cosmetics. There is a plethora of market surveillance authorities in Member States. Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 gives market surveillance authorities the powers to obtain all necessary documentation from manufacturers to evaluate product conformity, to enter manufacturers' premises and take samples for testing, and in extreme cases to destroy products[254].

5. Energy sector

Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC ('Electricity Directive') and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC

[254] Article 19(1) of Regulation 765/2008.

('Gas Directive') introduce rules with regard to the national regulatory authorities. Article 35 of the Electricity Directive and Article 39 of the Gas Directive enhance the independence of regulatory authorities. In addition, Articles 36 and 37 of the Electricity Directive and Articles 40 and 41 of the Gas Directive provide for National regulatory Authorities to be assigned objectives, duties and powers.

Under Article 37(4) of the Electricity Directive and Article 41(4) of the Gas Directive '*Member States shall ensure that regulatory authorities are granted the powers enabling them to carry out the duties referred to in paragraph 1, 3 and 6 in an efficient and expeditious manner. For this purpose, the regulatory authority shall have at least the following powers: (…) (c) to require any information from [electricity and natural gas] undertakings relevant for the fulfilment of its tasks, including the justification for any refusal to grant third-party access, and any information on measures necessary to reinforce the network'.*

Regulation 1227/2011 on wholesale energy market integrity and transparency (REMIT) establishes an EU-wide monitoring framework for the integrity and transparency of wholesale electricity and gas markets. The Regulation aims at preventing use of insider information which distorts wholesale energy prices. REMIT empowers the Agency for the Cooperation of Energy Regulators to monitor trading activity in wholesale energy products to detect and prevent trading based on inside information and market manipulation. Member States may provide for their national competition authority or a market monitoring body established within that authority to carry out market monitoring with the national regulatory authority. Market participants are obliged to provide the Agency and national regulatory authorities with information related to the capacity and use of facilities for production, storage, consumption or transmission of electricity or natural gas or related to the capacity and use of liquefied natural gas (LNG) facilities, including planned or unplanned unavailability of these facilities, for the purpose of monitoring trading in wholesale energy markets[255]. REMIT also stipulates that the reporting obligations on market participants shall be minimised by collecting the required information or parts thereof from existing sources where possible[256]. This Regulation does not empower the Commission to request firm-level information from the Agency or the national authorities.

6. Telecommunication sector

The regulatory framework in the telecommunication sector consists of five Directives[257] and two Regulations[258].

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[255] Article 8(5) of Regulation 1227/2011.
[256] *Ibid*.
[257] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic

In order to carry out their functions under EU regulatory framework, national regulatory authorities in the telecommunication sector were granted investigative powers by EU legislation.

The Commission may obtain information, upon a reasoned request, from national authorities provided such information is necessary for the Commission to carry out its tasks under the Treaty. The request may concern information that the national authorities have previously obtained from firms.

Article 5 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) on provision of information reads as follows:

'*1. Member States shall ensure that undertakings providing electronic communications networks and services provide all the information, including financial information, necessary for national regulatory authorities to ensure conformity with the provisions of, or decisions made in accordance with, this Directive and the Specific Directives. In particular, national regulatory authorities shall have the power to require those undertakings to submit information concerning future network or service developments that could have an impact on the wholesale services that they make available to competitors. Undertakings with significant market power on wholesale markets may also be required to submit accounting data on the retail markets that are associated with those wholesale markets.*

Undertakings shall provide such information promptly upon request and in conformity with the timescales and level of detail required by the national regulatory authority. The information requested by the national regulatory authority shall be proportionate to the performance of that task. The national regulatory authority shall give the reasons justifying its request for information and shall treat the information in accordance with paragraph 3.

2. Member States shall ensure that national regulatory authorities provide the Commission, after a reasoned request, with the information necessary for it to carry out its tasks under the Treaty. The information requested by the Commission shall be proportionate to the performance of those tasks. Where the information provided refers to information previously provided by undertakings at the request of the national regulatory authority, such undertakings shall be informed thereof. To the extent necessary, and unless the authority that provides the information has made an explicit and reasoned request to the contrary, the Commission shall make the information provided available to another such authority in another Member State.

Subject to the requirements of paragraph 3, Member States shall ensure that the information submitted to one national regulatory authority can be made available to another such authority in

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communications networks and services (Universal Service Directive), Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector.

[258] Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and of the Office and Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union.

the same or different Member State, after a substantiated request, where necessary to allow either authority to fulfil its responsibilities under Community law.

3. Where information is considered confidential by a national regulatory authority in accordance with Community and national rules on business confidentiality, the Commission and the national regulatory authorities concerned shall ensure such confidentiality.

4. Member States shall ensure that, acting in accordance with national rules on public access to information and subject to Community and national rules on business confidentiality, national regulatory authorities publish such information as would contribute to an open and competitive market.

5. National regulatory authorities shall publish the terms of public access to information as referred to in paragraph 4, including procedures for obtaining such access'.

7. UK Competition and Markets Authority (CMA)

CMA combines the powers of initial and in-depth investigations and it uses criminal and civil powers to gather information and conduct cases related to competition and consumer protection problems. These powers allow to examine why particular markets may be malfunctioning, taking an overview of regulatory and other economic drivers and patterns of consumer and business behaviour.

CMA applies a range of analytical techniques, both qualitative and quantitative, so as to understand the nature of competition in the market under investigation as well as the impact of any features. CMA will seek data and information about a range of factors, including the pricing and quality of goods and services supplied in the market under investigation. The extent to which the CMA seeks to quantify particular effects and the degree of precision with which this is attempted normally varies from case to case.

Market studies are one of a number of tools at the CMA's disposal to address competition or consumer protection problems, alongside its enforcement and advocacy activities. On the other hand, market investigations are more detailed and targeted examinations. Formally, market investigations consider whether there are features of a market that have an adverse effect on competition. If there is an adverse effect on competition, the CMA has the power to impose its own remedies, but if it exceeds a competition law problem CMA can also make recommendations to other bodies such as sectoral regulators (e.g. Ofcom, Ofgem, and others) or the government when new legislation might be required. Investigation references can be ordinary (not cross-market references and without public interest issues) or cross-market (in respect of specific features or combinations of features that exist in more than one market).

Where the CMA considers that a person has, without reasonable excuse, failed to comply with any requirement of a notice issued by the CMA using its statutory investigatory powers, the CMA has the power to impose an administrative penalty (non-compliance includes failures to attend interviews or meetings with the CMA, failure to provide evidence, and failure to produce documents required by the CMA). Failure to provide requested information to CMA is considered a criminal offence.

A6.4. Examples of information exchange tools between different authorities

1. Internal Market Information System (IMI)[259]

IMI was established by Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC. The purpose of IMI is to improve the functioning of the single market by providing an effective, user-friendly tool for the implementation of administrative cooperation between Member States and between Member States and the Commission[260]. IMI enables different authorities in Member States to exchange information with one another and with the Commission. Whereas IMI reinforces administrative cooperation and allows for information exchange between different authorities, it does not empower such authorities to gather information directly from market participants.

2. Information exchange between market surveillance authorities – RAPEX and ICSMS

Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93, sector specific EU harmonization legislation aligned to Decision 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC, Directive 2001/95/EC of 3 December 2001 on general product safety and current administrative practice provide tools for the pooling of information and cooperation between market surveillance authorities in different Member States. They include:

Rapid Information System (RAPEX)[261] - an alert system that facilitates the rapid exchange of information among EU countries and the Commission;

Information and Communication System on Market Surveillance (ICSMS)[262] – the system for information exchange that includes best practices, results of joint actions, details of non-compliant products and information on national market surveillance programmes.

3. SOLVIT

SOLVIT is an on-line network, created by the Commission and the Member States, with the aim to solve cross-border problems that arise for individual citizens and businesses from the misapplication of single market law by public administrations. All EU Member States as well as Norway, Iceland and Liechtenstein, have created a SOLVIT Centre, in most cases within their ministry of foreign or economic affairs. These centres cooperate directly and share information via an on-line database (a module of the Internal Market Information system, IMI) to solve this kind of problems free-cost, rapidly and pragmatically. As such, the SOLVIT Recommendation neither empowers any national

[259] http://ec.europa.eu/internal_market/imi-net/index_en.htm
[260] Recital 4 of Regulation 1024/2012.
[261] http://ec.europa.eu/consumers/consumers_safety/safety_products/rapex/index_en.htm
[262] https://webgate.ec.europa.eu/icsms/

authority nor the Commission to gather information directly from market participants for enforcement purposes.

4. Body of European Regulators for Electronic Communications (BEREC)

To ensure that the EU regulatory framework in the telecommunication sector is applied consistently, Regulation 1211/2009 established the Body of European Regulators for Electronic Communications (BEREC) and the Office. Currently BEREC is a forum for cooperation among national regulatory authorities, and between National regulatory authorities and the Commission, in the exercise of the full range of their responsibilities under the EU regulatory framework. BEREC does not have investigative powers of its own. Nonetheless, in its proposal for a Directive establishing the European Electronic Communications Code[263], presented on 14 September 2016, the Commission proposes to reinforce BEREC's powers, by giving it the power to request information directly from market players.

5. European Competition Network (ECN)

Under Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty '*the Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation. For that purpose it is necessary to set up arrangements for information and consultation. (…)*'[264]. For that purpose the European Competition Network was created. A key element of the functioning of the network is the power of all the competition authorities to exchange and use information (including documents, statements and digital information) which has been collected by them for the purpose of applying Article 101 or Article 102 of the Treaty[265]. Article 12 of Regulation 1/2003 provides that '*for the purpose of applying Articles [101 and 102 TEFU] the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information*'.

6. Consumer Protection Cooperation Network

Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws ('the CPC Regulation') provides a cooperation system among competent authorities, which is designed for the purpose of cross-border enforcement of Union consumer laws. Those authorities cooperate within the Consumer Protection Cooperation Network which is a **network of authorities** responsible for enforcing EU consumer protection laws in EU and EEA countries. The network allows, for example, for information exchange between competent national authorities, as provided in the CPC Regulation.

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[263] COM(2016) 590 final/2 2016/0288(COD).
[264] Recital 15.
[265] Commission Notice on cooperation within the Network of Competition Authorities, 2004/C 101/03, paragraph 26.

A6.5. Examples of investigative powers of third country authorities

Enforcement Action and Investigative Powers of the US Federal Trade Commission [in the context of its consumer protection mission]

The US Federal Trade Commission (FTC)[266]

The FTC was created in 1914 by the Federal Trade Commission Act (FTCA). Originally, its main mission was to enforce federal antitrust rules.

Later on, however, the FTC received additional powers in relation to consumer protection. Since 1938, it deals with '*unfair and deceptive acts or practices*'. Section 5(a)(1) FTCA provides that '*[…] unfair or deceptive acts or practices*[267] *in or affecting commerce*[268] *[…] are hereby declared unlawful.'* Additionally, the scope of action of the FTC under this second mission expanded to other (federal) consumer protection laws[269].

The following paragraphs deal with the enforcement action and the investigative powers of the FTC in relation to its second mission (protecting consumers).

Enforcement action of the FTC in relation to consumer protection: introduction.

Following an investigation (ex officio or upon complain), the FTC may initiate an enforcement action if it has '*reason to believe*' that the law is being or has been violated (cf. Section 5(b) FTCA). The FTC is empowered to:

- (i) stop unfair, deceptive or fraudulent practices in the market[270], through administrative enforcement, by issuing cease and desist orders[271];

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[266] See generally: www.ftc.gov/

[267] According to Section 5(n) FTCA, unfair acts or practices are those *'likely to cause substantial injury to consumers who are not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition'.*

[268] 'Commerce' is to be understood as inter-State commerce or commerce between the US and a third country. The 'commerce' clause in the US constitution is the one that entitles the Federal legislator to act (Section 8 of the Constitution says that '*The Congress shall have Power […] to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes* […]'). This clause is, broadly speaking, the equivalent of the single market clauses enabling the EU legislator to act.

[269] Other federal consumer protection laws state that certain (defined) trade practices must be considered as if they were 'unfair or deceptive' acts or practices under Section 5(a) FTCA. These laws include e.g. the Equal Credit Opportunity Act, Truth-in-Lending Act, Fair Credit Reporting Act, the Cigarette Labelling Act, the Do-Not-Call Implementation Act of 2003, the Children's Online Privacy Protection Act, Fair and Accurate Credit Transactions Act of 2003, the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 and others. For a description of these laws, see https://www.ftc.gov/enforcement/statutes

[270] Section 5(a)(2): '*The Commission is hereby empowered and directed to prevent persons, […], from using […] unfair or deceptive acts or practices in or affecting commerce*.'

[271] Section 5(b) provides for the procedural steps. Appeals for review of cease and desist orders may be brought before an US Court of Appeals. In addition, the FTC may seek, by civil action before a federal district court, consumer redress from the infringer for the consumer injury caused by the act or practice that was at issue in the administrative proceeding (cf. section 19 FTCA).
The FTC may also obtain, before a federal district court, civil penalties from the infringer who does not respect the cease and desist order (cf. Section 5(m) FTCA)

- (ii) directly sue infringers before federal district courts, seeking preliminary and permanent injunctions to remedy '*any provision of law enforced by the [FTC]*'[272]; and
- (iii) develop (since 1975) trade regulation rules to remedy unfair or deceptive practices that occur on an industry-wide basis (cf. Section 18 FTCA)[273].

The FTC has also a role in educating market participants (both businesses and consumers).

Investigative powers of the FTC in relation to its consumer protection mission[274]

Under its consumer protection mission, the FTC may use **two different investigative tools**[275]:

- **Section 6(b) order**. Under Section 6(b) FTCA, the FTC may require (by order) the filing of '*annual or special […] reports or answers in writing to specific questions*'[276] for the purpose of obtaining information about '*the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals*' of the entities to whom the inquiry is addressed.

  Section 6(b) orders enable the FTC to conduct wide-ranging economic studies that do not have a specific law enforcement purpose. The FTC may make public portions of the information that it obtains, where disclosure would serve the public interest (cf. Section 6(f)), unless information is a trade secret or privileged.

- **Civil Investigative Demands (CIDs)** – Section 20 FTCA. The FTC Bureau of Consumer Protection uses CIDs to investigate possible '*unfair or deceptive acts or practices in or affecting commerce*'. Similarly to subpoenas[277], a CID may be used to obtain existing documents or oral testimony. In addition, a CID may also be used to require that the recipient files written reports or answers to questions and to submit tangible things.

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[272] Section 13(b) FTCA. Following case-law development, courts grant, in addition to injunctions, monetary equitable relief (such as restitution and rescission of contracts) to remedy past infringements.

[273] The FTC is enabled to prescribe *'(A) interpretative rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section [5(a)(1) FTCA]), and (B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of section [5(a)(1) FTCA])*' (cf. Section 18(a)(1) FTCA). Other statutes also provide rulemaking power to the FTC.
The FTC may only prepare such rules where '*it has reason to believe that the unfair or deceptive practices which are the subject of the proposed rulemaking are prevalent*' (cf. Section 18(a)(3) FTCA).
Infringers of FTC rules of this kind are liable for civil penalties (cf. Section 5(m)(1)(A) FTCA) and for any injury caused to consumers (cf. Section 19 FTCA).

[274] See generally: www.ftc.gov/about-ftc/what-we-do/enforcement-authority

[275] The FTCA provides the FTC with a general investigative authority in so far as the FTC '*may prosecute any inquiry necessary to its duties in any part of the United States*' (cf. Section 3 FTCA). Also, Section 6(a) FTCA states that the FTC may '*gather and compile information concerning, and to investigate from time to time, the organisation, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan institutions […], Federal credit unions […] and common carriers* […], *and its relation to other persons, partnerships, and corporations.*'.

[276] Emphasis added.

[277] Subpoenas under Section 9 FTCA are only used by the FTC Bureau of Competition for the purpose of enforcing antitrust law.

A recipient of a Section 6(b) order or of a CID may raise objections by filing a petition to modify or set aside the order/CID.

If a recipient of the request fails to comply with a Section 6(b) order or with a CID (either without filing a petition to modify/set aside, or after a duly filed petition is denied), the FTC may seek enforcement of the order or CID before a federal (district) court (cf. Section 9 FTCA and Section 20(e)). The court may issue an order requiring compliance.

In addition, in the case of a Section 6(b) order, there are penalty payments for failing to provide information within the time-limit set by the FTC (USD 110 per day of non-compliance). The FTC may bring a civil suit before a federal court to recover the relevant amount (cf. Section 10 FTCA).

How different are the FTC powers compared to other US executive agencies?

Administrative subpoena authority. The US legislator has granted some form of 'administrative subpoena authority' to most federal agencies and entities (with many agencies/entities holding several such authorities), for use in civil (or criminal) investigations. Administrative subpoena authorities allow executive branch agencies/entities to issue a compulsory request for documents or testimony without prior judicial approval (i.e. from a grand jury, court or other judicial entity). A report made by the Office of Legal Policy of the US Department of Justice to Congress identified more than 300 existing administrative subpoena authorities held by various executive branch entities under the law applicable at the time of the report[278].

Judicial review. The issuance of an administrative subpoena is subject to judicial review: either upon a recipient's motion to modify or quash the subpoena or upon an agency/entity's initiation of a judicial enforcement action.

The US Supreme Court has construed administrative subpoena authorities broadly and has consistently allowed expansion of the scope of administrative investigative authorities, including subpoena authorities, in recognition of the principle that overbearing limitation of these authorities would leave administrative entities unable to execute their respective statutory responsibilities.

Enforcement of administrative subpoenas. Federal agencies/entities depend on federal district courts to enforce administrative subpoena requests. Depending on the authority received, the agency/entity may do this directly or may need to request the assistance of the Attorney General.

Non-compliance with an (enforced) administrative subpoena is subject to sanctions. Most statutes authorizing administrative subpoena enforcement in federal district court authorise the court to impose contempt sanctions upon a recipient who continues to refuse to comply even after a court order of compliance. Certain statutes authorising enforcement by a federal district court also provide for specific penalty ranges or limitations for findings of criminal or civil contempt of court based on non-compliance with a court order to comply with an administrative subpoena request.

[278] US Department of Justice, Office of Legal Policy, 'Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities', pursuant to Public Law 106-544. 13 May 2002.

Australian Government Productivity Commission

The Productivity Commission[279] is the Australian Government's independent **research and advisory body on a range of economic, social and environmental issues**, located within the Treasury. It was created by an Act of Parliament in 1998, to replace the Industry Commission, Bureau of Industry Economics and the Economic Planning Advisory Commission.

The core function of the Commission is to conduct **public inquiries** at the request of the Australian Government **on key policy or regulatory issues**. The subject-matter of public inquiries ranges widely from childcare or access to justice to public infrastructure or electricity networks. In the context of public inquiries the Commission provides the Government with policy options representing alternative means of addressing the issues, as well as a preferred option. It may also make recommendations on any matters it considers relevant to the inquiry. A public hearing or other consultative forums are held in the inquiry process.

The Commission also undertakes **a variety of research** at the request of the Government and to support its annual reporting, performance monitoring and other responsibilities. For example, the annual Report on Government Services provides information on the equity, effectiveness and efficiency of a range of government services in Australia, including health, education, justice, housing and community services.

A separate unit within the Commission, the Australian Government Competitive Neutrality Complaints Office, handles **private sector complaints about unfair competition from the public sector**. Any individual, organisation or government body with an interest in the application of competitive neutrality may lodge a complaint.

To conduct its inquiries with hearings and to assess complaints, the Commission is **empowered to request information from any person**. If the Commission has reason to believe that a person is capable of giving information or producing documents relevant to the inquiry, the Commission may issue a notice to that person obliging it to provide the relevant information and documents. The notice must specify the period within which information must be provided. The **intentional failure to provide information to the Commission is a criminal offence**, subject to the **penalty of up to 6 months imprisonment**. A court may impose an appropriate fine instead of or as well as imprisonment.

[279] Source: website of the Commission: http://www.pc.gov.au/, Productivity Commission Act 1998 available at: https://www.legislation.gov.au/Details/C2016C00867

ANNEX 7: DISCARDED OPTIONS

A7.1. Reuse of Competition and Consumer Protection tools for coordination in Option 3

Under Option 3, one could conceive extending the scope of existing investigative powers of identified national authorities already active for specific areas of the single market: i.e. competition[280] or consumer protection. This would allow the Commission to channel its request for information through specific existing networks somehow alleviating the coordination efforts.

As the arguments for discarding those sub-options are largely similar, they are discussed jointly in the remainder of this section.

Competition. The Commission could in theory rely on the NCAs to carry out the necessary information collection and use the ECN for coordinating purposes[281].

However, the reuse of existing procedures in the competition area however does not appear to be a viable option.

First, this new task would go well beyond the existing role of NCAs in enforcing Union rules on competition. Regulation 1/2003 (on antitrust) empowers the NCAs to co-enforce the Union competition rules, but it does not provide for a mechanism whereby information is collected by the NCAs on behalf of the Commission. This is also the case for Regulation (EU) 2015/89 (on State aid). Moreover, in the area of merger control, Regulation 139/2004 only applies to concentrations with an Union dimension, based on turnover thresholds, for the review of which the Commission has exclusive competence; mergers below these thresholds are assessed by NCAs on the basis of national law. The NCAs are therefore not empowered to issue requests for information on behalf of the Commission pursuant to Regulation 139/2004. Additionally, the legal basis in Regulation (EC) No 1/2003, Regulation (EU) 2015/1589 and Regulation (EC) No 139/2004 does not allow the use of information collected for purposes other than the enforcement of the Union competition rules. Legislating at Union level to ensure that the NCAs have such new role would seem disproportionate as it would go well further than is provided for in Union law on competition enforcement.

Second, obliging NCAs to undertake such information collection task would risk undermining their ability to carry out their core competition enforcement activities unless they were given additional resources to do this. Currently, not all NCAs have the means and instruments they need to effectively enforce the EU competition rules. A number of NCAs do not have effective tools to

[280] In the domain of competition law, the Commission is already empowered to issue requests for information from market players in the area of antitrust, mergers, and State aid. The Commission uses these tools to enforce the Union antitrust and merger control rules and to ensure that State aids are compatible with Union rules, as well as to launch investigations into sectors of the economy or into certain aid instruments across several Member States (so-called 'sector inquiries').

[281] NCAs are empowered by Regulation 1/2003 to apply the EU competition rules alongside the Commission. To that end, the NCAs and the Commission cooperate together in the ECN.

request information which would be backed up by deterrent fines to compel companies to comply. Some NCAs also lack the resources they need to effectively enforce the Union competition rules, let alone take on a new task. The Commission is looking into how to resolve these issues.[282]

Consumer protection. In the domain of consumer protection, enforcement of Union consumer legislation is in the competence of the Member States. The Commission does not have investigation and enforcement powers.

The CPC Regulation[283] currently vests the national authorities with a set of minimum investigation and enforcement powers to combat transnational infringements to Union consumer legislation listed in the Annex of the CPC Regulation. Investigation powers currently available for the CPC authorities include among others (1) access to any relevant document, in any form, related to the intra-Community infringement, (2) possibility to require the supply by any person of relevant information related to the intra-Community infringement, and (3) the possibility to carry out necessary on-site inspections. Depending on the enforcement system in place, the competent authorities either exercise these powers directly (possible subject to judicial supervision) or indirectly by applying to competent courts to seek the necessary judicial orders.

These powers and cooperation mechanisms available for national authorities under the CPC Regulation are used to address intra-Community infringements of Union consumer legislation listed in the Annex of the Regulation. For example, enforcers using these minimum powers ensure that consumers have easily accessible information on the key characteristics of the products, contact details of traders or that consumers are adequately informed about the price of products/services and payment arrangements. The CPC Regulation does not specify what type of information collection methods Member States should apply and does not detail the procedure on penalties or sanctions that can be imposed on the companies for incomplete, misleading, or missing information. Member States retain flexibility when it comes to the exercise of the powers and the use of national procedures for the exercise of these powers. The time limits for providing the information are also not precisely defined[284]. However, this should change in the future, as the Commission's proposal to revise the CPC Regulation foresees time-limits and more streamlined procedures for cooperation.

The CPC Regulation provides a complete cooperation system among competent authorities, which was specifically designed for the needs of consumer protection and cross-border enforcement of Union consumer laws. The scope of the CPC cooperation is defined by its annex which already

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[282] European Commission, 'Inception Impact Assessment on Enhancing Competition in the EU for the Benefit of Businesses and Consumers – Reinforcement of the Application of EU Competition Law by National Competition Authorities', November 2015, http://ec.europa.eu/smart-regulation/roadmaps/docs/2017_comp_001_iia_ecn_project_en.pdf

[283] Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ L 364, 9.12.2004, p. 1.

[284] According to Article 2 of the implementing rules, the requested authorities shall respond to requests for mutual assistance from applicant authorities to the best of their ability, making use of all the appropriate investigation and enforcement powers and without delay. Moreover, the time-limits for addressing requests for mutual assistance under Articles 6 and 8 of Regulation (EC) No 2006/2004 shall be agreed by the applicant authority and the requested authority on a case-by- case basis, using the database standard forms.

contains consumer-relevant legislation. This annex can be amended easily, if, for example, there is a need to add a piece of concrete consumer legislation so that it is enforceable in a cross-border context.

The CPC Regulation applies only to Business-to-Consumers legislation. It works with the concepts that pertain to consumer protection, such as '*collective interest of consumers*', '*consumer harm*', or '*effect on consumers*'. These concepts cannot be transferable to other fields such as Business-to-Business or Business to end-user relations. The evaluation of the CPC Regulation in 2012, among other matters, also looked at the possible extension of the CPC cooperation to Business-to-Business legislation[285]. Business-to-business provisions are laid down in acts like the misleading and comparative advertising legislation[286], where it is acknowledged that micro and small businesses face the same difficulties as consumers when trading cross-border. The evaluation concluded that while there was some rationale for the inclusion, there was little support from the CPC stakeholders as business-to-business was not their main responsibility. Further, changes to substantive consumer laws concerned would be necessary to extend the protection to business-to-business relations and only subsequently enable responsible national competent authorities to enforce these aspects. The inclusion of business-to-business aspects was therefore not recommended[287].

The current provisions of the CPC Regulation endow the Commission with a coordinating role or an opinion formulating role in cases where CPC competent authorities have not found a satisfactory solution. However, the proposal for a new CPC Regulation of 25 May 2016 contains a stronger role for the Commission in coordinating the authorities. It proposes to put in place a stronger coordinated mechanism to tackle practices which harm a large majority of consumers (in 75% of Member States or more that are amounting to 75% of the Union population or more). In such cases the Commission will launch a procedure requiring national authorities to coordinate a common position assessing the problematic practices. Overall Member States are and will remain in charge of investigation and enforcement. Under the CPC proposal, in specified cases of Union dimension, Member States' authorities will do so with the assistance of the Commission in a coordinated manner by pooling their resources, expertise and thus saving resources and time.

However, the reuse of existing procedures in the consumer protection area for collecting firm-level information for horizontal single market purposes does not appear to be a viable option either. Entrusting consumer protection authorities with a new task of collecting information for the Commission in other areas than consumer protection would go well beyond their existing role. The

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[285] P. 9 of the evaluation report: http://ec.europa.eu/consumers/enforcement/docs/cpc_regulation_inception_report_revised290212_en.pdf

[286] Directive 2006/114/EC concerning misleading and comparative advertising, OJ OJ L 376, 27.12.2006, p. 21.

[287] In January 2016, the Commission published a roadmap on the REFIT Fitness check of consumer law (http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_just_023_evaluation_consumer_law_en.pdf). Next to their application in the business-to-consumer relations, the Fitness Check will analyse the need and potential for the application of the existing consumer rules also in business-to-business (B2B) transactions, in particular the transactions with the SMEs, by taking account of the B2B rules already laid down in the Misleading and Comparative Advertising Directive, and in transactions between businesses and non-for-profit entities that do not qualify as consumers under the current rules. The Fitness Check will also analyse the issues arising in consumer-to-consumer (C2C) transactions (increasingly relevant due to the rise of the sharing economy) and in consumer-to-business (C2B) relations.

CPC framework has worked well for enforcement of Union consumer protection legislation[288], which is listed in the annex of the CPC Regulation, in a cross-border context. However, turning this instrument into a tool for all single market information requests appears disproportionate considering the current responsibilities of consumer protection authorities. This would completely change the nature of these authorities.

Moreover, in case the CPC model were to be extended to the rest of the single market acquis, significant changes would have to be introduced to the CPC framework (such as the extension of the CPC to business-to-business legislation). This would be complex and costly. Furthermore, such extension of the CPC framework to business-to-business legislation was not supported by the CPC stakeholders. Thus, the cooperation framework under the CPC Regulation is not suitable, without fundamental changes, to cover the complete scope of the SMIT initiative.

A7.2. Options not discussed in the impact assessment

Two options that were considered at the phase of inception impact assessment[289] were discarded upfront as not proportional: enhancing the coverage of European statistics (option 6) and introduction of regular reporting obligation via Accounting Directive (option 7). They are analysed in more detail below.

Option 6: Enhancing the coverage of European statistics

This Option would enhance the coverage of official statistics gathered by Eurostat through introducing new questions to the appropriate official statistical surveys. The new questions would aim at collecting the information needed for single market enforcement. In addition to this, access to Eurostat's micro data could be considered (e.g. access to individual anonymised responses to surveys with full respect of statistical confidentiality) in order to allow for firm-level analysis.

Such new statistical obligation would have to be very wide in order to anticipate future data needs and different scenarios. This would make new surveys very long and potentially unacceptable, both to national statistical offices and to surveyed companies. Frequent changes to statistical questionnaires would also be required. Adapting the questionnaires usually takes a lot of time and statistical variables, in addition, cannot be changed at short notice as such change would generally require an amendment of concerned regulations. Any change to the questionnaires additionally disrupts data continuity (long time series are preferred to one-off observations). It also introduces uncertainty to market players who need to provide such information.

In terms of addresses of the obligation, this option would target entire populations: i.e. all 21 million companies in the European Union would be covered, as statistical units, by this obligation to provide data periodically (depending on the statistics even several times per year).

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[288] See the Commission's report on assessing the effectiveness of the CPC Regulation, COM(2016) 284 final: http://ec.europa.eu/consumers/consumer_rights/unfair-trade/docs/cpc-revision-report_en.pdf

[289] http://ec.europa.eu/smart-regulation/roadmaps/docs/2017_grow_014_single_market_information_tool.pdf

There could be problems with timeliness of information as (a) there is a delay between data collection and presentation of information by Eurostat, and (b) some Eurostat surveys are not conducted frequently enough.

The question of the confidentiality of the information collected and any issue related to non-compliance with the obligation would be dealt with by default national statistics rules. It should be noted, however, that no sectorial statistical legislation foresees explicit sanctions for firms which do not provide data to Eurostat. The relations between national statistical authorities and statistical units/respondents are regulated in national law. A Member State could thus include sanctions in its national statistical law in case of lack of reply from the statistical units. Article 26 of Regulation (EC) No 223/2009 on European statistics[290] establishes that the Member States and the Commission shall take appropriate measures to prevent and penalise any violations of statistical confidentiality.

More importantly, in terms of use, data from official statistics can only be used in cases where aggregated information would be needed. Therefore, option 6 would be of little use for infringement cases where, firm-level specific information would be required.

Official statistics rely on the concept of statistical confidentiality: information gathered from individuals or legal persons (enterprises) is treated as confidential. This is a fundamental principle in statistics as it ensures confidence of the persons/organisations providing such information. Therefore, all data gathered for statistical purposes can only be used for statistical and scientific purposes, and it can only be disseminated in aggregated format (thus protecting the identity of the respondents). Regulation 223/2009 states in its recital 23 that '*the confidential information which the national and Community statistical authorities collect for the production of European statistics should be protected, in order to gain and maintain the confidence of the parties responsible for providing that information*'.

Thus, firm-level statistical data and information (often referred to as 'micro data') is strictly confidential and it is protected by the statistical confidentiality rule (see Regulation 223/2009, Articles 2, 18, 20-26). Access to firm-level confidential data may only be granted to researchers under strict conditions and only for statistical or scientific purposes.

Therefore, even if some new variables are included in official statistics, these would only be available for administrative use in aggregated format, and no data on specific firms would be available (the same holds of course also for all already available statistical data).

This option presents obvious limitations towards the achievement of the objectives discussed in Section 4 of this impact assessment. Under this option, information is collected on a regular basis, whereas the essence of the problem is to react with surgical information requests only when and where the specific single market problem arises. In particular, requests for information under Option

[290] Regulation (EC) 223/2009 of the European Parliament and of the Council of 11 March 2009 on European statistics and repealing Regulation (EC, Euratom) No 1101/2008 of the European Parliament and of the Council on the transmission of data subject to statistical confidentiality to the Statistical Office of the European Communities, Council Regulation (EC) No 322/97 on Community Statistics, and Council Decision 89/382/EEC, Euratom establishing a Committee on the Statistical Programmes of the European Communities, OJ L 87, 31.3.2009, p. 164.

6 would not target specific companies (but rather entire populations) nor would the requests for information be triggered by specific instances of single market malfunctioning. Instead, Option 6 would oblige all European companies to provide information that could cover a large part of potential instances of single market malfunctioning. This option would, therefore, on the one hand, significantly increase the administrative burden for the European companies while, on the other hand, it would not allow ensuring that the information received through such means will be available timely or that it will cover the needs of targeted enforcement.

Administrative burden could be partially addressed by the Framework Regulation Integrating Business Statistics (FRIBS) initiative[291], which aims at creating a single streamlined framework for business statistics data collection. By using common definitions, eliminating overlaps, improving data interconnection and exchange as well as better use of existing sources, it will reduce the administrative burden on companies and improve quality, comparability and timeliness of data. This initiative has a special focus on delivering high quality information on service, globalisation and entrepreneurship, which are priorities for the Commission. Being part of the Regulatory Fitness programme, FRIBS emphasises burden reduction and simplification, thus keeping the burden on companies at a minimum: for instance, the introduction of new data requirements is usually balanced by the elimination of an existing requirement which is deemed less useful by users. However, as option 6 would require the addition of numerous extra variables, it is unlikely that even an initiative like FRIBS would be able to compensate for such an increased burden.

Therefore option 6 is neither a time-effective nor a cost-effective option.

Option 7: Introduction of regular reporting obligation via Accounting Directive

Under this option, the Commission would amend companies' reporting obligations in the relevant sector legislation. For example, in order to facilitate the potential enforcement of single market rules and the design of Union policy the Commission could propose amendments to the existing Accounting Directives that would oblige companies to provide factual market and firm data (e.g. cost structure, profits, pricing policies, cross-border transaction costs, volumes, supply contracts, employment contracts) and other information as part of their annual financial reporting obligations. In terms of addressees of such obligation, 1.7 million limited-liability companies, already in the scope of these directives, would be covered.

In order to obtain information relevant for the preparation, evaluation, and enforcement of EU single market policy, the reporting obligation would either have to be very wide (so as to anticipate *in abstracto* future data needs and different single market enforcement scenarios) or frequent changes to the directive would be necessary. The question of non-compliance with the obligation would be dealt by the default Directive rules. Furthermore, the obligation to audit the additional information (as specified in the Accounting Directives) would be maintained.

[291] Inception Impact Assessment on Framework Regulation Integrating Business Statistics (FRIBS), January 2016, http://ec.europa.eu/smart-regulation/roadmaps/docs/2012_estat_011_regulation_integrating_business_stats_en.pdf

Very wide reporting obligation would increase the administrative burden for the replying companies. Moreover, introduction of frequent changes to the accounting directives to adjust the scope of the obligations would further increase the administrative burden (time to adjust) and would result in uncertainty to market players. Companies and accounting service providers would thus need to frequently accommodate their reporting systems and data gathering methods.

The effectiveness of Option 7 is similar to that of Option 6. It also presents obvious limitations towards the achievement of the objectives discussed in Section 4 of the impact assessment. This option would also collect information on a regular annual basis, whereas the essence of the problem is to react with surgical information requests only when and where the specific single market problem arises. The requests for information would not target specific companies nor would such requests be triggered by specific instances of single market malfunctioning. Option 7 would significantly increase the administrative burden for European companies, but it would not allow ensuring that the information is received timely and that it is fit for purpose.

Conclusions

Table A7.1. Comparison of total EU28 annual costs of discarded options per stakeholder type.

		Costs	
Option	**Stakeholder**	**Min. (EUR)**	**Max. (EUR)**
6	Firms	10.5m	38.5m
	Member States	8.1m	29.6m
	Total option 6	**18.6m**	**68.1m**
7	Firms	537m	1, 807m
	Firms audit	274m	931m
	Total option 7	**811m**	**2,738m**

Note: See Annex 8 for calucation details

In conclusion, solutions proposed in both Options 6 and 7 would introduce significant administrative burden to the replying companies as well as the institutions responsible for collecting and processing the information (Tab A7.1). Moreover, they would only partially alleviate the existing problems as they would not be suitable for targeted, timely information requests. The generation of more information does not necessarily mean better or more-informed decision making. For information to be effective, it must address specific needs and be in a form that can be accessed, processed, and used by policymakers. For the reasons described above, Options 6 and 7 have been discarded upfront and their impacts are not fully assessed in the impact assessment.

ANNEX 8: COST-BENEFIT ESTIMATION

This annex estimates the costs and benefits of the different options. It is based on available studies, evidence from public consultations and assumptions on the operation and use of different options.[292] The figures presented here should be interpreted as rough estimations rather than an exact monetary outcome.

A8.1. Costs

Availability of cost data

Data on firms' costs of replying to public inquiries are not collected. Therefore, a dedicated question quantifying such costs was included in the firm questionnaire of the public consultation accompanying this initiative. Only one (large) firm replied stating that it had taken 30 man-hours to prepare a response, noting however that this number was relatively low because the data had already been gathered earlier for another purpose. This firm had also paid around EUR4,000 for legal advice. The other respondents only replied qualitatively, stating that providing answers to information requests is very burdensome. These scarce answers confirm the problem driver that firms are reluctant to share any cost data. In order to estimate the costs of preparing and submitting information, other data/assumptions are needed.

Assumptions on cost per reply to a request for information

The notes to financial accounts provide additional detailed numerical and descriptive analyses to support the financial statements. They contain around 50 different disclosure requirements (the precise number depends on the size and operational complexity of each firm). Information on firms' costs of preparing these notes was gathered in several studies in 2009 and 2010.[293]

The cost of preparing notes to financial accounts will be used as a proxy for the cost of replying to information requests for the following reasons. First, the costs reported in the aforementioned studies refer to preparing information that is already available, which is in line with SMIT principles. Second, the information quality to be requested via SMIT is likely to be similar to the notes' quality, which combine numbers with descriptions (although it is unlikely to cover as many items as current full notes do).

Two scenarios will be analysed: (1) maximum, based on the cost of preparing full notes, and (2) minimum, based on the number of hours provided in response to the public consultation. To estimate the cost of legal advice, the figure provided in the public consultations is used. The

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[292] The following costs are excluded from the computation given the difficulty of assigning monetary value to them: costs resulting from a lengthy coordination process, from associated delays in receiving data and costs related to introducing changes to national laws.

[293] CSES (2010), '4th Company Law Directive and IFRS for SMEs', http://ec.europa.eu/finance/accounting/docs/studies/2010_cses_4th_company_law_directve_en.pdf; Ramboll, CapGemini (2009), 'Final Report for Priority Area Annual Accounts/Company Law', http://ec.europa.eu/dgs/secretariat_general/admin_burden/docs/enterprise/files/abst09_companylaw_en.pdf

maximum scenario is likely to overestimate the costs as SMIT information requests are very unlikely to cover as many items as notes to the financial statements do.

Table. A8.1. Estimated cost of replying to information requests by firms (EUR per company)

Scenario	SMEs (except micro)		Large	
	Preparation	Legal advice	Preparation	Legal advice
Maximum scenario (disclosure of several items)	1,000	1,000**	4,400	4,000
Minimum scenario (based on 30 man-hours)	300**		1,200*	

Note: numbers rounded to the nearest hundreds
* calculated based on EU average hourly salary of senior officials and managers of EUR41.50 (based on adjusted Eurostat Structure of Earnings Survey from 2010)
** calculated in proportion to min and max scenario for large firms
Source: Commission own calculations based on: public consultations (minimum scenario and legal advice), CSES. 2010. 4th Company Law Directive and IFRS for SMEs and Ramboll, CapGemini. 2009. Final Report for Priority Area Annual Accounts/Company Law.[293]

The analysis below will be based on a conservative assumption that only large firms are queried (except in Option 7[294]) – were only SMEs involved the cost below would be 75% lower. We assume that firms will always use legal advice in order to screen the information that could potentially be used against them.

Assumption on variable costs of administration

The cost of hiring an external auditor could be considered as a prudent proxy for the maximum cost that authorities would incur for processing and analysing the information. The aforementioned accounting studies[293] will be used for these estimates, since they also provide the cost of auditing the notes. Moreover, when computing the administrative burden of authorities, it is assumed that half of the cost stems from collecting the firm responses (this includes sending the requests, responding to questions, sending reminders, converting data to electronic format if not submitted electronically, requesting firms' authorization to share the information with other authorities if needed). The remaining cost corresponds to the cost of analysing the data, including econometric analyses, data aggregation and reporting (Tab. A8.2).

Table. A8.2. Estimated cost of authorities in gathering and analysing information (EUR per responding company)

Scenario	Administration cost per single firm reply			
	SMEs		Large	
	Collection	Analysis	Collection	Analysis
Maximum	850	850	3,050	3,050
Minimum*	250	250	850	850

Note: based on cost of audit of notes to financial statements; numbers rounded to nearest hundred; s
* calculated as proportion of firm costs reported in Tab. A8.1
Source: As in Tab.A8.1.

Assumption on fixed cost of administration

[294] Discarded option, see Annex 7.

Options 1 and 3[295] could be implemented by the Member States either i) by using their existing resources (e.g. relevant ministries or authorities) or ii) by establishing new authorities/bodies. The cost of both scenarios will be assessed. In case of i), only the variable cost as presented in Table A8.2 will be used. In case of ii), the calculations will be based on the experience from the Consumer Protection Cooperation (CPC) network.

The 2012 study on the evaluation of the CPC network[296] estimates the average annual operating cost of a national competent authority regarding CPC-related tasks at around EUR130,000 per Member State. Average employment in such a body amounts to 4.4 persons in terms of full time equivalents.

When analysing options 1 and 3 with new authorities, it will be assumed that these bodies will be established in all but one MS (the UK has already an equivalent dedicated authority - CMA). Moreover, we will assume that such bodies will have the capacity to handle all SMIT requests both in terms of data collection and analysis. Therefore, no variable cost will be added (this assumption holds as long as the number of SMIT requests is relatively low, see the sensitivity analysis below).

Assumption on coordination cost

For options 1, 2, 3 and 5 it is necessary to estimate the coordination costs for national authorities (Option 1) and the Commission (Option 2, 3, 5). These include identifying relevant authorities, negotiating their agreement to issue information requests on their territories, defining common templates, definitions of variables and calculation methods, avoiding duplicate reporting (e.g. by parts of the same consortium) and other contacts with national authorities to solve potential issues with implementation of information requests.

Based on the CPC study[296], one can estimate the share of coordination cost in the cost of data gathering and analysis to roughly 9%[297], but for the ease of calculations we herewith use 10%.

Assumption on the number of firms queried

It is assumed that in a large majority of cases, requests for information would be addressed to a low number of market participants (likely below 5), particularly in the context of an infringement procedure. This assumption comes from the experience with investigations in the State aid domain, where the number of firms asked is usually very low (e.g. in the Fiat case[298], only the beneficiary was asked; in the Starbucks case, in addition to the beneficiary, also a few competitors were asked). With regard to the examples used in this impact assessment (Section 2.2.1), this would concern e.g. the case of infrastructure concessions (information request could be addressed to the concessionaire and a handful of competitors) or geo-blocking (e.g. in the music sector information requests could address four major market players).

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[295] See chapters 6.1 and 6.4

[296] CPEC. 2012. (External) evaluation of the Consumer Protection Cooperation Regulation. pp.107-114. http://ec.europa.eu/consumers/enforcement/docs/cpc_regulation_inception_report_revised290212_en.pdf

[297] The annual cost of all CPC's Single Liaison Offices (coordination offices) divided by the cost of all National Competent Authorities (offices gathering the information and processing cases). See CPEC. 2012. Page 111.

[298] For details see Annex 5.

In less frequent occasions, and particularly (although not exclusively) in the context of informing legislative initiatives, the number of addressees of information requests could be higher, but still limited - likely below 50. This assumption seems reasonable considering the number of firms surveyed by the European Banking Authority's 2016 bank stress test, which addressed 51 biggest European banks covering 70% of banking assets.[299] It should be noted, however, that in some sectors even a smaller number of firms could be representative for the overall sector (e.g. there are only 5 European major cement producers[300]). With regard to the examples presented in this impact assessment (Section 2.2.1), such larger-scale information requests could be used e.g. to support the decision of a potential extension of the scope of the geo-blocking regulation.

It is also assumed that all firms queried will reply to the information request.[301]

Assumption on the number of information request per year

Considering the 'last resort' nature of SMIT, it is assumed that there will be up to 4 small-scale (i.e. up to 5 addressees) and 1 larger-scale information requests (i.e. up to 50 addressees) per year. This seems reasonable as, for example, in the State aid domain, information requests have been issued only twice since 2013[302]; the Commission has lost 17 cases in front of the Court due to the lack of firm information in 20 years (i.e. on average less than once per year). It is important to emphasize that launching an information request under SMIT would require a formal Commission Decision, which would in reality certainly further limit the number of SMIT uses.

Table. A8.3. Estimated number of firms covered by information requests per year

Request type	No. of request per year	Firms per request	Total number of firms covered
'Small-scale' request	4	up to 5	20
'Larger-scale' request	1	up to 50	50
Total	5		70

Summary of calculations

Based on the above assumptions, the following analysis shows estimated total annual EU28 burden per option per minimum and maximum scenario.

[299] http://www.eba.europa.eu/-/eba-publishes-2016-eu-wide-stress-test-results
[300] http://www.globalcement.com/magazine/articles/822-top-75-globalcementcompany
[301] Costs of sanctions or any potential legal challenges to the Commission's decision requesting information are not considered.
[302] For details see Annex 5.

Table. A8.4. Detailed EU28 total annual cost of options calculations per scenario (in thousands of Euros)

	Data gathered using			
	Existing resources		New authorities (Opt. 1 and 3)	
	Min.	Max.	Min.	Max.
Option 1 (Exchange of best practices between Member States)				
Firms (preparation)	0	308	0	308
Firms (legal advice)	0	280	0	280
Member States (collection, analysis)	0	427	0	3,510
Member States (coordination)	0	43	0	43
Commission (analysis)	0	214	0	214
Total	0	1,271	0	4,354
Option 2 (No barriers to information sharing with the Commission)				
Firms (preparation, 50%)	0	154		
Firms (legal advice, 50%)	0	140		
Member States (search, 2.5%)	6	21		
Member States (collection, 50%)	0	107		
Member States (legal advice, 50%)	0	140		
Commission (analysis, 50%)	0	107		
Commission (coordination)	12	43		
Total	18	712		
Option 3 (national SMIT)				
Firms (preparation)	84	308	84	308
Firms (legal advice)	280	280	280	280
Member States (Opt. 2: 2.5%)	6	21		
Member States (collection)	60	214	3,510	3,510
Member States (legal advice)	280	280		
Commission (analysis)	60	214	60	214
Commission (coordination)	12	43	12	43
Total	781	1,359	3,945	4,354
Option 4 (EU SMIT)				
Firms (preparation)	84	308		
Firms (legal advice)	280	280		
Firms (non-confidential version, 25%)*	6	22		
Commission (collection, analysis)	119	427		
Total	489	1,037		
Option 5 (combination of Options 2 and 4)				
Firms (preparation)	84	308		
Firms (legal advice)	280	280		
Firms (non-confidential version, 25%)	6	11**		
Member States (search, Opt. 2)	6	21		
Member States (collection, Opt. 2)	0	107		
Member States (legal advice, Opt. 2)	0	140		
Commission (collection)	60**	107**		
Commission (analysis)	60	214		
Commission (coordination)	12	43		
Total	507	1,230		
Option 6 (Eurostat)* **				
Firms	10,511	38,540		
Member States	8,067	29,580		
Total	18,578	68,120		

Option 7 (Accounting Directive)* **	**Min SMEs**	**Min. large**	**Min. total**	**MaxSMEs**	**Max large**	**Max total**
Firms (preparation)	485,006	51,959	536,965	1,616,687	190,516	1,807,203

Firms (audit)	200,886	73,608	274,494	666,516	264,124	930,640
Total	685,892	125,567	811,459	2,283,203	454,640	2,737,843

Note: Assumption of 4 small-scale requests (up to 5 firms) and 1 larger request (up to 50 firms) a year. * based on small request only (infringement requests); ** all collection done by Commission (Min.) or following option 2 - half done by Member States (Max.); *** discarded option.

Option 1. Exchange of best practices between Member States and with the Commission

The additional cost of this option to large firms is as assumed above between zero and EUR0.59m. A situation with no cost occurs if none of the 27 Member States currently without inquiry powers would decide to implement them. The maximum cost would occur if all Member States introduced investigative powers.

The same logic applies to additional cost to national authorities that could be between EUR0 and EUR0.47m including coordination costs of EUR0.04m. Additional burden on the Commission to analyse responses amounts to between zero and EUR0.21m.

If all 27 Member States without dedicated bodies decided to set them up, the maximum cost of this option would increase for authorities to EUR3.5m. The coordination cost is as above. Although creating new bodies only to handle a low number of request envisaged in this proposal does not seem proportional and reasonable, it might be justified if Member States decided to additionally use them for internal purposes. In case of the latter, the administrative burden on firms would raise significantly. However, for the purpose of comparability, all options are assessed based on the same scenario of 4 smaller and 1 larger requests per year (as in Tab. A8.3).

The total cost of Option 1 is between zero and EUR1.27m (if existing authorities are used) and up to EUR4.4m (if new dedicated authorities are created).

Option 2. Lifting regulatory limitations to the sharing of firm-level information between the Member States and the Commission

Under this option, Member States would share with the Commission firm-level information already available to them or that can be obtained using existing Union or national level powers. No new investigative powers would be granted.

To evaluate this option, future data needs of the Commission have to be estimated. This is rather difficult since it requires foreseeing future obstacles to the functioning of the single market. Consequently, it would have to be estimated to what extent the future data requirements by the Commission could be covered with the information that Member States would already have or be able to request with their existing powers at that point in time.

In order to compute a ballpark estimate, we will assume optimistically that 50% of future data needs by the Commission could be met by existing investigation powers of national authorities. In this scenario, the Member States do not have any information readily available, but would have to request it from the relevant firms. It should be noted, however, that the real number will depend on the nature of the individual cases. Based on the analyses in Section 2.4.1 and Annex 6, it can be inferred that there are common instances in which the Member States would not have any information needed by the Commission available nor it would be able to acquire it using their

existing investigation powers. In this scenario, the cost to firms and authorities would be close to zero and would consist only in checking if information is available to national authorities.

Cost on firms will range from zero (when no information is requested from firms) to EUR0.29m (if firms are asked for information using the existing national investigation powers). Public administration would be responsible upon Commission's request for checking if information is in their possession and forwarding it to the Commission. Since this should be a largely mechanical exercise, the additional cost is considered very low. It is assumed at 10% of collection cost reported in Option 3 and EU-wide could range between EUR6,000 and EUR21,000, depending on the amount of data requested. We further assume that the data is not in the archives, but its collection is within the existing powers of the Member State which would gather it at the cost of EUR0.11m. We further assume that Member States would do legal vetting of all data before it is sent to the Commission (as it may be used for infringement proceedings against that Member State). This would cost between EUR0 (when no information is sent) and EUR0.14m (calculated on the basis of legal advice cost – Tab.A8.1). The coordination cost of the Commission would consist in finding whether the information is available at the national level and what national authorities it should contact (potentially different authorities in different Member States). This cost is estimated to between EUR12,000 and EUR43,000. The cost of data analysis ranges from EUR0 (no data) to EUR0.11m. Thus the total cost of this option for all stakeholder is estimated between EUR18,000 and EUR0.71m[303].

Option 3. Introducing residual investigative powers through national level single market information tools

Under this option, Member States would have to ask firms for information upon the Commission's request. The EU-wide cost of this option to firms would range between EUR0.36m and EUR0.59m (preparation cost and cost of legal advice). In case Member States would apply the new investigation powers using existing resources, the burden on administration would consist of a negligible cost of checking if the information is already available (as in Option 2 – EUR6,000-EUR21,000), the direct cost of gathering this information (between EUR0.06m and EUR0.21m), and the cost of legal vetting before it is sent to the Commission (EUR0.28m). The Commission's coordination cost (e.g. cooperation with authorities, agreeing on common questionnaire and definitions, avoiding double counting in case of multinational enterprises, etc.) amounts to EUR12,000 and EUR43,000. The cost of data analysis ranges from EUR0.06m to EUR0.21m. The total annual cost of this option to all stakeholders would range between EUR0.78m and EUR1.37m.

Currently, the UK is the only Member State with an authority (CMA) to issue information requests in the single market domain. If all other Member States chose to establish such authorities, the aggregated fixed cost to national administrations would amount to EUR3.5m in both minimum and maximum scenarios. This fixed cost is assumed to cover all national expenses (checking if information is available, collection of the information, legal advice). Burden on firms and the Commission would remain the same. In this case, the total cost of Option 3 would range between

[303] In case the Commission requested data is readily available to the national authorities, their cost of collection of EUR0.11m and firm's cost or preparation and legal advice of EUR0.29m would not materialise. Therefor EUR0.4m would have to be deducted from the total of the maximum scenario. See also sensitivity analysis section.

EUR3.9m and EUR4.4m. This scenario seems unlikely given the low number of information requests to be processed under this proposal. However, it might materialise if Member States would decide to use the new investigative powers not only for the infrequent Commission requests, but also for their domestic purposes. In the latter case, the administrative burden on firms would raise significantly. However, for the purpose of comparability of the options, all are assessed based on the same scenario of 4 smaller and 1 larger information requests per year (as in Tab. A8.3).

Option 4. Introducing an EU-level Single Market Information Tool (SMIT)

Preparation of the requested information is expected to cost firms addressed by information requests between EUR0.08m and EUR0.31m. Legal advice would contribute additional EUR0.28m to the burden. Should a responding firm consider that its reply contains information that should remain confidential vis-à-vis that Member State, it may decide to share only a non-confidential version of its reply with national authorities. Based on the input from stakeholders through the public consultation and bilateral meetings, creation of such additional non-confidential version is considered quite burdensome and time consuming. For the purpose of calculating this administrative burden, we assume that all firms subject to small-scale requests (which are more likely to be used in the context of infringement proceedings against Member States where national authorities would have access to firms' replies) would decide to prepare a non-confidential version of their replies. We furthermore assume that this would add 25% to the cost of preparation of the reply. The resulting burden stands between EUR6,000 and EUR22,000. The total cost to firms is, therefore, between EUR0.37m and EUR0.61m.

There is no cost to national authorities The cost to the Commission of gathering and analysing data is estimated at EUR0.12m to EUR0.43m. There is no coordination cost for the Commission as it would ask firms for information directly. Therefore, the total cost of this option ranges between EUR0.49m and EUR1.04m.

Option 5. A 'hybrid' approach combining Options 2 and 4

In terms of administrative burden, this option is a combination of the costs of Options 2 and 4. The total EU annual burden on companies is expected to range between EUR0.37m and EUR0.6m, assuming that Member States do not already possess the required information, but that the information must be gathered either by national authorities or the Commission (50% each according to Option 2). The burden on national administrations (including finding information collected earlier, collecting information from firms and legal vetting before the information is sent to the Commission – as described in Option 2) would amount to between EUR6,000 and EUR0.27m. The burden on the Commission (including the coordination cost, the cost of collecting information (ranging from collecting 100% information in the minimum scenario to 50% in the maximum scenario), and the cost of data analysis) ranges between EUR0.13m and EUR0.36m. Hence, the total EU cost of this option would range between EUR0.51m and EUR1.2m.

Option 6. Enhancing the coverage of European statistics – discarded option

The option on enhancing Eurostat statistics would cost companies between EUR11m and EUR39m and national authorities between EUR8m and EUR30m. The EU total cost would range from EUR19m to EUR68m[304].

Option 7. Introduction of regular reporting obligation via Accounting Directive – discarded option

Enhancing the reporting obligations in the accounting directive would increase the burden on companies by between EUR0.5bn and EUR1.8bn annually. If audit was required, this would increase the burden further by EUR0.3bn to EUR0.9bn[305].

Impact on SMEs

SMIT is primarily concerning large enterprises, meaning no administrative burden on SMEs as a default. There may, however, be instances where SMEs (except micro entities, which are exempted) would be asked to participate (e.g. in case of smaller Member States or certain sectors of economy in which medium-sized companies may be the main market players). The individual costs of an SME to reply is estimated to range between EUR300 and EUR1,000 per information request with a cost of EUR1,000 for legal advice (roughly a quarter of cost of large firms, see Tab. A8.1). Moreover, in case only SMEs are covered by an information request, the global impact of all options amounts to roughly a quarter of the cost presented in Tab. A8.4[306].

It must be noted that in case of Options 1 and 3 Member States may decide to cover all companies (e.g. not excluding micro entities) and issue information request more often for domestic purposes. In that case the administrative burden on SMEs would increase substantially.

Benchmark – cost of the baseline option

To compare the cost of the discussed alternative options, we must consider the cost of the data collection in the baseline scenario. Given the limitations of the current possibilities with regard to

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[304] Based on the IA on FRIBS: the total EU cost on data providers of European Business Statistics stands at EUR689m per annum for the whole EU and at EUR290m for National Statistical Authorities (NSA). Structural Business Statistics (SBS) collects similar data to at least some of those likely to be requested by SMIT. The share of cost of SBS for data providers and NSA is estimated in the FRIBS IA at 8.39% and 15.3% respectively of the total EU cost of the European Business Statistics. There are around 75 different variables collected per responding company (the actual number depends on company size and sector, some variables are not annual and data collection methods vary for different variables). Note that the total cost depends on many factors (e.g. the cost of collecting a variable may dramatically vary depending on whether information is readily available from other sources or not), and there is no linear relationship between number of variables and total cost. Nevertheless, given the above, the cost of adding one additional variable to SBS can be very roughly estimated at around EUR0.77m for companies in the EU, and EUR0.6m for NSAs of the EU. In the maximum scenario around 50 items are asked (as in notes to financial accounts) - resulting in a cost of around EUR38m for companies and EUR30m for NSAs. The minimum scenario was constructed as proportion of preparation cost for large companies reported in Tab. A8.1. As explained, these estimates are very rough, and should rather be viewed as giving a general idea of the involved costs only.

[305] Preparation and audit cost as reported in Tab A8.1 and A8.2, audit cost for SMEs: max scenario EUR1,700 (based on studies reported Tab A8.1.), min scenario EUR500 (calculated in proportion to cost of preparation for SMEs), no. of firms affected large – 0.043m preparation and audit; SMEs – 1.6m (preparation), 0.4m (audit).

[306] except for the new authorities scenario where cost stand at 85% of the total cost of Option 1 and 3 with dedicated new authorities presented in Tab A8.4.

collecting proprietary firm information (i.e. the lack of any investigation tools that could gather similar information in the internal market field outside of the competition law domain[307]), such comparison is far from one-to-one. The closest proxy is the Eurobarometer representative opinion poll. It caters for data reliability, representativeness and timeliness, but is not designed to collect e.g. detailed descriptions, it is uncertain that companies would be willing to provide confidential information (participation is voluntary), and given the random selection of participants firms of interest might not be questioned. An approximate cost of a single question for an EU wide representative poll for citizens is around EUR15,000, and can be higher in case of firm surveys (e.g. given difficulties in gathering representative sample of willing respondents). Thus, for instance, a survey corresponding to the scenarios considered in this impact assessment would cost the Commission between EUR210,000 and EUR750,000 (assuming citizens survey cost).[308] There is a corresponding cost to firms, but due to the lack of data on cost of replying to such surveys, it cannot be estimated. It should be noted, however, that a representative survey usually covers 1000 companies per Member State.

A8.2. Benefits

The benefits of using the tool could be three-fold: (1) direct benefits; (2) cost savings; (3) shifting the burden.

Direct benefits. Benefits of information requests can be estimated based on past cases, as reported in Section 2 of the impact assessment. For instance, the benefits of a small-scale information request (covering up to 5 firms) could range from around EUR25m (as evidenced by Fiat or Starbucks in the competition area) to EUR 3bn (as shown by the example of infrastructure concession). Assuming that half of small-scale information requests would typically be successful, benefits would range between EUR 50m and EUR 6bn. Benefits of larger information request, which would in majority of cases likely be used for informing legislative initiatives, are expected to be even greater. For instance, even small changes in the geo-blocking regulation with regard to copyright-protected content for the intellectual property intensive industries could bring benefits of up to EUR 9bn in terms of additional investments or savings to consumers.

Cost savings. More narrow calculation of benefits could be done by estimating costs saved on procuring external studies. Although, as discussed in Section 2 of the impact assessment, in majority of cases external contractors are not able to obtain the kind of information SMIT could provide, studies are used anyhow in the absence of any other source of information, particularly for informing legislative initiatives (results are, however, often far from perfect: attempts to get proprietary information from companies via interviews are rarely successful, and the results are often based on numerous assumptions and highly aggregated data). Based on the Commission experience, a study with detailed analysis of up to 5 firms can cost between 100 and 200 thousand euros (corresponding to small-scale information requests, particularly in the context of infringement

[307] Investigation powers in the competition law domain cannot be used for other purposes. For details see Annex 6.

[308] Corresponds to asking between 14 and 50 questions – a rough equivalent of minimum and maximum scenario.

proceedings), while a study covering up to 50 firms can cost between 200 and 800 thousand euro. Therefore, Member States and the Commission could benefit from savings on case studies ranging between EUR0.4m and EUR0.8m. The Commission could benefit from savings on larger studies ranging between EUR0.2m and EUR0.8m. Therefore, the replacement of 4 small and 1 big study would bring benefits in terms of cost savings to the administration of between EUR0.7m and EUR1.6m.

Shifting the burden. In case information is shared between the Commission and national authorities, or vice versa, cost bore by one side constitutes a savings of the other. Administrative savings would emerge for the side that would receive the data without organising the collection. These savings would depend on the number of cases in which the data is shared. For example, in case of Option 4, the cost of data collection in the context of infringement proceedings bore by the Commission would be the maximum saving for national authorities who receive them.

Likelihood of benefits to materialise. In case of Option 1, which depends on setting up infrastructure (both legal and institutional) to conduct inquires in all but one Member State, the likelihood of savings materialising is considered low at least in the medium-run. This likelihood could increase with creation of national capacities in the Member States, but problems such as coordination and timeliness of information would remain.

For Option 2, given that the majority of Member States currently cannot collect a great deal of information and that no new collecting powers would be granted, a significant part of future Commission data needs will not be met (above assumed at least 50%). Therefore, the likelihood for benefits is also limited and assessed as medium.

For options 3 and 5, likelihood is considered high as all relevant information could be collected. There is a risk, however, that some national authorities may not share all of the requested information with each other or with the Commission (Option 3), or that the process could take longer due to coordination delays (Option 5 necessitates going through a sequence of steps: checking if Member States have the information or can obtain it; waiting for the Member States to organise collection and deliver the information; in case Member States do not deliver the information or cannot obtain it, organising a collection by the Commission).

The likelihood of benefits materialising in Option 4 is very high, as the Commission would have direct access to the necessary data without any coordination delays.

In the case of Options 6 and 7, the likelihood is considered low as necessary information is unlikely to be collected due to inflexibility of these two options as regards collection of relevant information in an ad-hoc manner.

A8.3. Comparison of costs and benefits

The table below summarises total EU wide annual costs and benefits of all the options.

Table A8.6. Comparison of total EU28 annual costs and benefits per option per stakeholder type.

		Costs		Benefits	
Option	**Stakeholder**	**Min. (EUR)**	**Max. (EUR)**	**Value (EUR)**	**Likelihood**
0	Commission	0.21m	0.75m	**0**	High

Table A8.6. Comparison of total EU28 annual costs and benefits per option per stakeholder type.

Option	Stakeholder	Costs		Benefits	
		Min. (EUR)	Max. (EUR)	Value (EUR)	Likelihood
	Total option 0 (Baseline)	**0.21m***	**0.75m***		
1	Firms	0	0.59m	Small-scale requests (in the context of infringement proceedings): **EUR 50m-EUR 6bn** Larger requests: **EUR 9bn and more** Additional savings on studies: **EUR 0.7m – EUR 1.6m**	Low
	Member States	0	0.47m		
	Commission	0	0.21m		
	Total option 1	**0**	**1.27m**		
2	Firms	0	0.29m		Medium
	Member States	0.006m	0.27m		
	Commission	0.01m	0.15m		
	Total option 2	**0.02m***	**0.72m***		
3	Firms	0.36m	0.59m		High
	Member States	0.35m	0.52m		
	Commission	0.07m	0.26m		
	Total option 3	**0.78m**	**1.37m**		
4	Firms	0.37m	0.61m		Very High
	Commission	0.12m	0.43m		
	Total option 4	**0.49m**	**1.04m**		
5	Firms	0.37m	0.6m		High
	Member States	0.006m	0.27		
	Commission	0.13m	0.36m		
	Total option 5	**0.51m**	**1.23m**		
6	Firms	10.5m	38.5m		Low
	Member States	8.1m	29.6m		
	Total option 6	**18.6m***	**68.1m***		
7	Firms	537m	1, 807m		Low
	Firms audit	274m	931m		
	Total option 7	**811m***	**2,738m***		

Note: Assumption of 4 small-scale requests (up to 5 firms) and 1 larger request (up to 50 firms) a year. All number are rounded, totals are recalculated. *Not comparable with options 1,3,4,5 – different amount of information covered (e.g. in case of Option 2 only 50% of information needs covered) or different number of firms (Options 0, 6 and 7).

A8.4. Sensitivity analysis

A sensitivity analysis is carried out in order to assess whether the ranking of options in terms of their cost efficiency changes with respect to: the amount of information needed that is already at disposal to national authorities (i.e. they do not have to collect it from firms); the number of firms covered by smaller and larger requests and the composition of administrative costs.

Sensitivity analysis of Option 2

Option 2 is based on two important assumptions on the future data needs of the Commission that are hard to quantify ex ante:

A) the percentage of the data that could be provided by the Member States (regardless of whether it is readily available to the Member States or they have the power to ask for it); and
B) Out of all the data that can be provided by the Member States (as defined in the point above), the percentage of data they would have to ask firms for.

The table below shows how the total cost of Option 2 changes with respect to different combination of the two variables discussed above.

Table A8.7. Impact on the cost of Option 2 depending on the amount of future Commission's data needs in the possession of Member States and the proportion of that data that needs to be collected from firms (in EUR thousands).

(A) Share of data that could be provided by MS (%)	**(B)** Out of all the data that can be provided by MS *(A)*, the percentage of data they would have to ask firms for (%)						
	0	10	25	50	75	90	100
0	64	64	64	64	64	64	64
10	113	121	133	153	174	186	194
25	187	207	238	288	338	368	388
50	311	351	411	511	611	671	712
75	434	494	584	735	885	975	1,035
90	508	580	689	869	1,049	1,157	1,230
100	558	638	758	958	1,159	1,279	1,359

Note: ceteris paribus

How to read this table: For example, 50% of the future Commission's data needs could be provided by a Member State *(A)*. The Member State does not have any of that information available at hand but has to get all of it (i.e. 100%) directly from firms *(B)*. In this case, the cost of Option 2 is EUR 712,000 (see highlighted cell). This combination of assumptions was used as the central scenario for analysing cost of Option 2 and consequently as input to Options 3 and 5.

In case the national authorities could deliver all the information required by the Commission, the total cost of Option 2 would range between EUR0.56m (in case they have all the information readily available) to EUR1.36m (if all information would need to be gathered from firms). Only such figures could be directly compared to the cost of other options.

Impact of Option 2 on Options 3 and 5

As Option 2 feeds into Options 3 and 5, any alterations to the above assumptions will affect these two options as well. More precisely, the more of needed information is readily available to the national authorities, the less costly Options 3 and 5 become (as the following costs are reduced: the cost of firms to prepare information, the cost of legal advice, and the cost of authorities to organise data collection)[309].

[309] Option 3 with new authorities is always the most expensive, ceteris paribus

Table A8.8. Impact on the ranking of Options 3-5 depending on the amount of future Commission's data needs in possession of Member States and the proportion of that amount that needs to be collected from firms.

(A) % of data that could be provided by MS	Option 3 (reuse of authorities)					Option 4					Option 5				
	(B) Out of all the data that can be provided by MS *(A)*, percentage of data they would have to ask firms for (%)														
	0	25	50	75	100	0	25	50	75	100	0	25	50	75	100
0	3	3	3	3	3	1	1	1	1	1	2	2	2	2	2
25	3	3	3	3	3	2	2	1	1	1	1	1	2	2	2
50	2	3	3	3	3	3	2	2	1	1	1	1	1	2	2
75	2	2	3	3	3	3	3	2	1	1	1	1	1	2	2
100	1	1	1	2	2	3	3	3	1	1	1	1	1	2	2

Legend: 1 - the most cost efficient (least costly) option; 2 - the second most efficient option; 3 - the third most efficient option; Note: Options ranked based on the total cost of the maximum scenario; ceteris paribus

Option 4 is the least costly in case national authorities could satisfy below 25% of the future Commission's data needs (regardless of whether they have the information available or would have to collect it from firms) and in all cases when national authorities would need to collect from firms 75% or more of the data that they can provide. Option 5 is the least costly in the remaining cases. Option 3 (in case existing authorities are reused for issuing information requests) is the least costly in cases when national authorities can provide all the information the Commission needs and when half of that information is already readily available to them (Tab A8.8). Changes in the number of firms queried do not affect the above (table not presented).

Consequently, Option 4 is the least costly in 56% of cases, followed by Option 5 – 44% of cases and Option 3 – 12% (assuming that all combinations of variables presented in table A8.8 are equally possible).

The below table shows how Options 3 and 5 compare in terms of total cost to the preferred Option 4, depending on different combinations of Option 2 assumptions.

Table A8.9. Cost of options 3 and 5 in relation to the cost of the preferred option 4 depending on different assumptions for Option 2 (in % of Option 4 cost).

(A) % of data that could be provided by MS	Option 3 (reuse of authorities)					Option 5				
	(B) Out of all the data that can be provided by MS *(A)*, the percentage of data they would have to ask firms for (in %)									
	0	25	50	75	100	0	25	50	75	100
0	31	31	31	31	31	6	6	6	6	6
25	12	17	21	26	31	-7	-2	3	8	12
50	-8	2	12	21	31	-20	-10	-1	9	19
75	-27	-12	2	17	31	-33	-19	-4	10	25
100	-46	-27	-8	12	31	-46	-27	-8	12	31

Note: Options compared based on the total cost of the maximum scenario; ceteris paribus

How to read this table: For example, 50% of the future Commission's data needs could be provided by a Member State *(A)*. The Member State does not have any of that information available at hand but has to get all of it (i.e. 100%) directly from firms *(B)*. In this case, compared to Option 4, Option 3 is 31% more expensive and Option 5 is 19% more expensive.

On the one hand, Option 3 and 5 can be up to 30% more expensive than Option 4 in cases when national authorities would need to contact firms directly to collect all relevant information. On the other hand, when all information is readily available to the national authorities, Options 3 and 5 can be up to 46% less expensive than the preferred option. On average Option 3 is 12% more expensive

and Option 5 is 1% less expensive than the preferred option (assuming that all combinations of variables presented in table A8.9 are equally possible – from the analysis of options it is clear however, that instances where information is not available at national level are more common, additionally the effectiveness of Option 5 is reduced by a lengthy process which is not monetized).

Impact of the number of firms queried on the ranking of options (assuming reusing existing authorities under Option 3)

This analysis is done only for the options with the highest probability of delivering the benefits, which are Options 3 to 5.

The number of firms queried does not influence the order of options. Option 4 is in all cases the least costly, followed by Options 5 and 3 (assuming reusing existing authorities for issuing information requests; data not presented).

Impact of Option 3 on the ranking of options, assuming creation of new national authorities

In the scenario when new dedicated authorities would be created for conducting information requests at the Member State level, the number of firms queried would influence the ranking of the options.

Table A8.10. Impact of the number of firms covered on the most cost efficient option.

No. of firms per larger request	Option 3 (new authorities)							Option 4							Option 5						
	No. of firms per small-scale request																				
	1	5	10	20	30	40	50	1	5	10	20	30	40	50	1	5	10	20	30	40	50
50	3	3	3	3	3	3	3	1	1	1	1	1	1	1	2	2	2	2	2	2	2
75	3	3	3	3	3	3	3	1	1	1	1	1	1	1	2	2	2	2	2	2	2
100	3	3	3	3	3	3	3	1	1	1	1	1	1	1	2	2	2	2	2	2	2
350	3	3	3	3	3	3	3	1	1	1	1	1	1	1	2	2	2	2	2	2	2
500	3	3	3	3	3	3	3	1	1	1	1	1	1	1	2	2	2	2	2	2	2
600	3	2	2	2	2	2	2	1	1	1	1	1	1	1	2	3	3	3	3	3	3
1000	2	2	2	2	1	1	1	1	1	1	1	2	2	2	3	3	3	3	3	3	3

Legend: 1 - the most cost efficient (least costly) option; 2 - the second most efficient option; 3 - the third most efficient option; Note: Options ranked based on the total cost of the maximum scenario; ceteris paribus

Option 4 is the least costly in cases when up to 20 firms would be covered by a small-scale information request and up to 1000 in a larger request. Above that level, Option 4 becomes second best and Option 3 becomes the least costly. Option 5 is the second most cost-efficient (and Option 3 the third) in cases involving up to 1 firm in small-scale request and 600 in larger requests. Above that level, Option 5 becomes the third best (Tab. A8.10).

On the one hand, this situation is a direct result of using only a fixed cost to calculate Option 3 administrative expenses for the newly created authorities (cost is a constant independent of the number of firms covered). On the other hand, Options 4 and 5 are based on a variable cost (cost increases with the number of firms). In reality, an authority with a fixed number of staff could only

process a certain number of requests per year, and would need to hire more staff to cover additional requests. More realistic cost structure of Option 3 (assuming creation of new authorities) should take that into account – the administrative costs should be composed of a fixed cost up to a certain level and a variable element above it. In such cases, there would be no impact on ranking of options. Given, however, that SMIT is intended for an exceptional use on a small number of cases, such additional complication would not change the result and is not introduced for the sake of simplicity.

Impact of change in proportion of authorities cost for data collection and analysis

The calculations of all options are based on the assumption that the cost for authorities is equally split between data collection and data analysis (see Tab. A8.2). The table below shows how changing this proportion affects the ranking of Options 3 to 5 in terms of their cost efficiency, as well as how the cost of Options 3 and 5 compares to the cost of the preferred option 4.

Table A8.11. Impact of the share of data collection cost on the most cost-efficient option and cost difference from the preferred option.

Share of data collection cost (%)	Ranking			Cost difference from Opt 4 (%)	
	Option3*	Option 4	Option 5	Option3*	Option 5
0	3	2	1	29	-25
10	3	2	1	29	-16
20	3	2	1	30	-7
30	3	1	2	30	1
40	3	1	2	31	10
50	3	1	2	31	19
60	3	1	2	31	27
70	2	1	3	32	36
80	2	1	3	32	45
90	2	1	3	33	53
100	2	1	3	33	62

Note: Options ranked based on the total cost of the maximum scenario; ceteris paribus;
* Option 3 with reuse of existing authorities;

When the share of data collection cost in the total cost of data collection and analysis is 30% or above (and consequently the share of data analysis cost is 70% or below), Option 4 is the least costly option in terms of the total cost (that is in majority of cases). Below 30%, Option 5 becomes the least costly. Option 3 (assuming creation of new national authorities) is in all cases the most expensive option (data not presented, ceteris paribus).

ANNEX 9: WHY SHOULD THE EU ACT?

According to Article 5(1) TEU, the limits of Union competence are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. According to Article 5(2) TEU, the Union shall act within the competences conferred upon it by Member States in the Treaties to attain the objectives set out therein. The achievement of a functioning single market is an objective to be reached by the Union in cooperation with the Member States (shared competence, cf. Article 4(2)(a) TFEU).

A9.1. The legal basis

Article 114 TFEU allows for the adoption of measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States, provided that such measures have as their object the establishment or functioning of the single market[310]. The need to establish a coherent and systematic mechanism for the collection of reliable and accurate firm-level information for the purpose of enforcing single market law at a cross-border scale is the core of the policy intervention. Existing national rules provide for an uneven and insufficient level of information collecting, making enforcement of the single market rules more difficult or even impossible. As a result, obstacles to the proper functioning of the single market could be created. The use of Article 114 TFEU would therefore aim at preventing the emergence of obstacles to the functioning of the single market and should be enough legal basis for an EU action entrusting Member States authorities with powers to collect information (option 3)[311].

However, should the policy intervention require entrusting the Commission with specific powers to collect information from firms (option 4), Article 114 TFEU would need to be supplemented by Article 337 TFEU. The latter entitles the Commission, within the limits and under the conditions laid down by the Council, to collect any information required for the performance of the tasks entrusted to it. The combination of Articles 114 and 337 TFEU has already been used in other legislative acts entrusting the Commission with information collection powers, notably Directive (EU) 2015/1535[312]. Moreover, the use of Article 114 TFEU for entrusting EU institutions or bodies with powers for the implementation of harmonised rules has already been accepted by the CJEU, including the possibility

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[310] According to Article 26 TFEU, '*the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.*'

[311] Cf. Judgments of the CJEU in cases C-380/03, Germany vs. European Parliament and Council, paragraphs 38 to 42 and 80; C-434/02, Arnold André GmbH & Co. KG vs Landrat des Kreises Herford, paragraphs 31-34;and C-376/98, Germany vs. European Parliament and Council, paragraph 86.

[312] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification), OJ L 241, 17.9.2015, p.1.
Note that the original Commission proposal was based on the then Article 213 of the Treaty (now 337 TFEU) only. However, the legal basis was enlarged to encompass Article 100 of the Treaty (now 114 TFEU) cf. Proposal for a Council Decision laying down a procedure for the provision of information in the field of technical standards and regulations, COM(80)400, 19 August 1980.

to adopt measures that are legally binding on individuals[313]. Both the CJEU[314] and the Union co-legislators[315] have also accepted that the reference in Article 114 TFEU to 'measures for the approximation' may encompass the use of Article 114 TFEU as legal basis for the adoption of a directly applicable Regulation.

Article 114 TFEU acts as a default legal basis within the single market area. However, there are three specific economic sectors within the internal market for which the Treaty has foreseen common policies within the internal market: agriculture and fisheries[316], transport[317] and energy[318]. In addition, there are areas closely connected to the single market such as the policy on the environment. Therefore, the use of additional Articles of the TFEU as additional specific legal basis may be needed to ensure full coverage of the single market in relation to economic sectors of the single market that benefit from specific legal basis within the TFEU for legislative action: e.g. Article 43 TFEU (as regards agricultural goods), Articles 91 and 100 TFEU (transport), Article 192 TFEU

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[313] Cf. Judgement of the CJEU in case C-270/12, United Kingdom vs. European Parliament and Council, paragraphs 97 and seq.

[314] *Ibid*.

[315] See for instance Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority); Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority); Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority); or Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC.

[316] Article 38 TFEU:

'*1. The Union shall define and implement a common agriculture and fisheries policy.*

The internal market shall extend to agriculture, fisheries and trade in agricultural products. 'Agricultural products' means the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products. References to the common agricultural policy or to agriculture, and the use of the term 'agricultural', shall be understood as also referring to fisheries, having regard to the specific characteristics of this sector.

2. Save as otherwise provided in Articles 39 to 44, the rules laid down for the establishment and functioning of the internal market shall apply to agricultural products.

3. The products subject to the provisions of Articles 39 to 44 are listed in Annex I.

4. The operation and development of the internal market for agricultural products must be accompanied by the establishment of a common agricultural policy.'

[317] Article 90 TFEU: '*The objectives of the Treaties shall, in matters governed by this Title [Transport], be pursued within the framework of a common transport policy*.'

[318] Article 194 TFEU:

'*1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:*

(a) ensure the functioning of the energy market;

(b) ensure security of energy supply in the Union;

(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and

(d) promote the interconnection of energy networks.

2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions. […]'

(environment) or Article 194 TFEU (energy). This does not entail an undue extension of the scope of this initiative outside the single market area and has been done in other pieces of legislation[319].

The policy intervention is limited to the single market and does not extend to policy areas that do not fall within the single market[320].

A9.2. Subsidiarity

According to the principle of subsidiarity laid down in Article 5(3) TEU, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The problem addressed in this impact assessment essentially relates to the enforcement of single market law, both the Treaties and secondary legislation, by the Commission and the Member State. The Member States must respect Union law and have particular obligations in respect of the implementation and transposition of Union law as well as in ensuring its correct application at national level. At the same time, the responsibility of the Commission under Article 17(1) TEU is to ensure that the Treaties and Union measures adopted pursuant to them are correctly applied and, it is empowered, as the 'guardian of the Treaties', to oversee the application of Union law (under the control of the CJEU). Thus, the Commission is responsible for monitoring the application of the single market law in Member States. In order to correctly perform this function, Commission's access to relevant, reliable, accurate and timely information is essential – including, where necessary, access to firm-level information. The CJEU has indeed progressively been stricter with the Commission in relation to the sufficient factual evidence that it must submit in order to prove '*to the requisite legal standard*' the elements of the allegations made in infringement proceedings[321].The options proposed this impact assessment aim at improving access to such type of information and therefore

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[319] For instance, Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 (laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services) is based on Articles 43, 114 and 337 TFEU.

[320] Area of freedom, security and justice (Arts. 67-89 TFEU); economic and monetary policy (Arts. 119 -144 TFEU); research, technological development and space (Arts. 179-190 TFEU), employment (Arts. 145-150 TFEU); social policy (Arts. 151-161 TFEU); the European Social Fund (Arts. 162-164 TFEU); Trans-European Networks (Arts. 170-172 TFEU); economic, social and territorial cohesion (Arts. 174-178 TFEU); environment (Arts. 191-193 TFEU), areas of Union exclusive competence as referred to in Art. 3(1) TFEU [N.B. (a) customs union, (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy]; areas where the Union has competence to carry out actions to support, coordinate or supplement the actions of the Member States as referred to in Art. 6 TFEU [N.B. (a) protection and improvement of human health (Art. 168 TFEU); (b) industry (Art. 173 TFEU); (c) culture (Art. 167 TFEU); (d) tourism (Art. 195 TFEU); (e) education, vocational training, youth and sport (Arts. 165-166 TFEU); (f) civil protection (Art. 196 TFEU); (g) administrative cooperation (Art. 197 TFEU)].

[321] See e.g. Luca PETRE and Ben SMULDERS, 'The Coming of Age of Infringement Proceedings', Common Market Law Review 47, 2010, po. 9. These authors (p. 38) refer to several judgments of the CJEU supporting this trend. Cf. cases C-532/03, Commission vs. Ireland, paragraphs 36-37; C-507/03, Commission vs Ireland, paragraphs 32-35; C-293/07 Commission vs. Greece, paragraphs 32-34; C-156/04 Commission vs. Greece, paragraphs 35 and 51; C-237/05 Commission vs. Greece, paragraph 39.

allowing the Commission to better perform its role as guardian of the Treaties. Full and correct implementation and application of single market rules are essential for the successful completion of the single market and have always been a priority for the Commission. Accordingly, the Commission has been systematically taking all necessary measures in order to assist the Member States in fulfilling their obligations and to address cases where national legislations or practices have fallen short of the single market requirements (in accordance with the Article 258 TFEU). At the same time, this initiative does not deprive Member States of their important role, alongside the Commission, in the enforcement in single market rules. Member States continue to have their own investigation powers and remain free to extend them (except in the case of option 3 where they will be required to do so).

Union action is needed to ensure that the Commission will have access to firm-level information necessary to improve the Commission's ability to monitor and enforce Union single market rules through infringement proceedings. The objectives of this initiative (see Section 4) cannot be sufficiently achieved by Member States alone, as shown in previous sections of this Impact Assessment in relation to existing legal barriers to sharing firm-level information with the Commission and continuing uncoordinated national approaches in this area. This is shown by the continuing uncoordinated national approaches in this field: Member States lacking sufficient powers in most cases (except when national competent authorities are specifically mandated by Union law to do so); absence of mechanisms for sharing of information among Member States or between Member States and the Commission (except when foreseen by Union law), methodological problems that arise for instance from using different definitions of, for example, cost and combining the information with a risk of, for example, double counting. In addition, national responses are necessarily limited in their geographical scope and cannot be compared with or substitute for a co-ordinated or systematic response at Union level. This incapacity of Member States to act is particularly detrimental to the responsibility of the Commission. Commission's access to reliable and accurate firm-level information is necessary in specific cases of cross-border dimension to exercise its monitoring and enforcement powers. Yet, we have seen that, in certain situations, the Commission may lack essential information to enforce EU law and control the national application of Union law. Member States are not in a position to fill-in this gap. As a result, the current inconsistencies hinder the functioning of the single market.In addition, possible national responses would necessarily be limited in their geographical scope and cannot be compared with or substitute for a co-ordinated or systematic response at the Union level providing for the establishment of information-collection powers to assist the Commission in its role of guardian of the Treaty. Therefore, the objectives envisaged can be better achieved, by reason of its scale and effect, at Union level. Indeed, the Union is best placed to address the question of the coordination and/or collection of targeted firm-level information requests in the single market domain where there are suspicions of serious obstacles to the functioning of the single market, in particular due to the often cross-border nature of such obstacles[322] and the related data requirements. Such Union action

[322] In general, the Treaties require the existence of certain cross-border dimension for their single market rules to be applied. At the same time, the existence of purely internal situations resulting in an infringement of Union law (e.g. secondary harmonising legislation) cannot be excluded.
The justification for the Commission's action with regard to those situations is in principle weaker, as the Member State would be better placed to address such purely internal situations. However, this does not

would fulfil the necessity test in this regard and would enhance the ability of the Commission to ensure the respect of Union law, in particular with regard to infringement proceedings, without undermining the role of the Member States in applying Union law and enforcing it vis-à-vis individual companies.

The necessity test would also be met regarding the collection of firm-level information for informing legislative initiatives – in particular where evaluation shows that enforcement deficits are due to flaws in the relevant single market legislation. As a matter of principle (cf. Article 17(2) TEU), Union legislative acts may only be adopted on the basis of a Commission proposal (except where the Treaties provide otherwise). The level of evidence generally required from the Commission for informing legislative proposals has progressively increased over time and there will indeed be circumstances, in technical areas (see examples in previous sections), where the Commission will need to use collected firm-level information to calibrate the regulatory solution proposed. Union action is also needed for this purpose, for the same reasons (e.g. Member States action would not be sufficient) expressed in the previous paragraph. It must be noted in this regard that there is no such thing as a sharp distinction between infringements proceedings and the use of legislative acts to address serious obstacles to the internal market. When the Commission is at the stage of collecting information to assess whether there are obstacles to the functioning of the internal market, the Commission will collect the information concerned without necessarily knowing what the future action to address those obstacles will be: either launching infringement proceedings (which is a faculty, not an obligation of the Commission[323]) or proposing a legislative change (if the Commission believes that the latter choice is better justified)[324].

In terms of added-value, Union action would ensure that the Commission has access to relevant, reliable, accurate and timely firm-level information in those instances where access to such information is necessary and cannot be obtained otherwise (e.g. in situations where national authorities cannot have access to the relevant data; where they do not wish to cooperate with the Commission or where firms do not voluntary agree to share data with the Commission). Therefore,

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exclude that the Commission may need to address those situations (e.g. in the event of lack of action by the Member State concerned) and that, in doing so, it may need to have access (where appropriate and justified) to specific firm-level information. It is important to note that the CJEU applies a relatively low threshold to show the existence of a cross-border dimension: it has already ruled that, even when a purely internal situation is concerned, national rules may have the capacity of producing effects outside the Member State concerned (see, for example, joined Cases C-159/12 and C-161/12, Venturini, paragraphs 25–26); it has also considered, in particular in cases related to public procurement procedures that appeared *a priori* as purely internal situations, that a hypothetical discrimination against potential competitors located in another Member States would be enough to in that respect (see, for example, case C-231/03, Coname v. Comune di Cingia de'Botti, paragraphs 17–21 and case C-458/03, ParkingBrixen GmbH v. Gemeinde Brixe, paragraph 55).

[323] '*In exercising this role* [N.B. as guardian of the Treaties]*, the Commission enjoys discretionary power in deciding whether or not, and when, to start an infringement procedure or to refer a case to the Court of Justice*. […] *It* [N.B. the Commission] *will distinguish between cases according to the added value which can be achieved by an infringement procedure and will close cases when it considers this to be appropriate from a policy point of view*". Communication from the Commission, 'EU law: Better results through better application', OJ C18, 19.1.2017, ps.14 and 15.

[324] '*The Commission will exercise such discretion in particular […] in those [cases] where pursing the infringement would be in contradiction with the line taken by the College of Commissioners in a legislative proposal*'. *Ibid*. p. 15.

this Union action would provide that residual powers are available to reach the last "extra mile" towards the necessary data. This can only result, in the exceptional circumstances in which such residual powers will need to be used, in better informed enforcement actions or policy initiatives by the Commission in reaction to serious obstacles to the functioning of the internal market. Union action would also ensure that, where as a result of an infringement proceeding in which the Commission had access to such type of data, any concerned Member State (irrespective of their existing national powers) could also have also access to the necessary data for better applying Union law at domestic level. The added-value effects achieved by Union action cannot be delivered by uncoordinated national action, which would not be able to ensure that the Commission (or all concerned Member States) would have access to relevant, reliable, accurate and timely firm-level information in those instances where access to such information is necessary for the purposes explained above