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Chairman
European Scrutiny Committee
House of Commons
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Dear Chair

8765/17: 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.

By way of providing an update on the above proposal, I have included in this letter the answers to questions asked by the House of Lords European Union Committee in the hope that you find this information useful. I have taken each of their questions in turn, and provided an update on Working Group discussions.

Please would you explain if further clarity has been gained from the Commission regarding:

1. The precise conditions that must be met before the SMIT could be used

The Commission's Impact Assessment contains a useful description of the conditions that must be met before the SMIT could be used:

"The 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:

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; and
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."

On the first condition, the Commission has explained in Working Group discussions that it would consider that a "serious problem" existed if there were "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" (extract from the Commission- *Communication on EU law: Better results through better application*[1], quoted in Working Groups).

On the second, there has been some debate as to whether the proposal as drafted has gone beyond the scope of the "internal market" set out in this condition. The Commission has explained that some matters *not* related to the internal market could be covered by the regulation, to the extent that the sector-specific legal basis allows. I expand on this point in answer to your specific question on the proposal's legal bases below.

On the third, the Commission has stated that its determination of whether the information could be obtained in a "timely" way would depend on the situation; the timescales for infringement cases would differ from other situations. The Commission did not provide any further clarification, but in the Working Group undertook to reflect upon the lack of clarity on timing.

In terms of whether the information could be obtained by "other means", the regulation states that the Commission shall only use the SMIT power if:

a) the information is not contained in a publicly available source; and
b) the information has not been provided by a Member State upon request by the Commission; and
c) the information has not been provided by a legal or a natural person.

It is our understanding from the Commission's explanations that the Member State would have the opportunity to provide the information upon receipt of the enabling Decision. Only if the Member State could still not provide the requested information would the Commission then use the enabling Decision as a basis to address a request directly to the undertaking or association of undertakings involved.

2. The practical application of safeguards included in the proposal

The Commission has confirmed that the main safeguards in the proposal are procedural. First, each enabling Decision stating the Commission's intention to use the SMIT must be adopted by the College of Commissioners. This Decision must include a description of how the conditions described above have been met.

Secondly, following the adoption of this Decision, the Commission could proceed with a "simple request" in order to obtain the information from the firms in question. This informal request would not create any legal obligations on the company. No sanctions would apply other than for deliberate deception. The Commission could also make a formal request i.e. a second Commission Decision, which could entail sanctions for late, incomplete, or misleading replies. The Commission has said that the simple and formal procedures are not necessarily sequential, but it considers that a formal request would be a rare occurrence.

Further safeguards include the targeting of respondents: each enabling Decision – under the scrutiny of the College - must also set out a summary description of the information to be requested and the criteria for selecting the addressees of the request for information.

[1] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0119(01)&from=EN

The Commission's Decision could be reviewed by the CJEU, and in issuing a request for information to an undertaking, the Commission would have to indicate that undertaking's right to take such action if there were grounds to challenge the Commission for not having met all the conditions set out in the Regulation. Equally, it is our understanding that a Member State could also take action against the Commission upon receipt of the initial Commission enabling Decision.

3. Measures to protect confidential information, and details of exemptions that would apply in this regard

The Commission has said that it considers the regulation to be in line with the Charter of Fundamental Rights of the European Union with regard to respecting business secrecy.

Undertakings would have the option of providing the Commission with two versions of the information: a confidential one for the Commission and a non-confidential one to be distributed to the Member State(s) concerned. The Commission has stated that, in practice, the full return would be redacted to produce a non-confidential version.

The Commission would review the confidential version submitted and make its own decision on whether the information should indeed be treated confidentially as requested. The Commission's interpretation of 'confidential', as explained in Working Groups, is "anything which undermines the commercial objectives of the company". The Commission has also stated that it will consider what is confidential in line with EU case law, which sets out the following criteria: i) the data is only known to a limited number of people, ii) disclosure is liable to cause serious harm, including loss of reputation, and iii) that the data is objectively worth protecting, such as business secrets.

Any decision to disclose additional information to others would be open to appeal by the company for at least one month before the information was revealed in any way. Member States have expressed concern about the appeals process, but the Commission has not expanded any further; we will continue to seek clarity on this point.

We have not yet received any further substantial clarification on the exemptions outlined in Article 8. This article states that the information can be transmitted to other parties or made public if: it is in a form where the undertaking cannot be identified (the Commission has given the example of an impact assessment), where the Commission has obtained the agreement of the respondent to publish the information, or where the disclosure of such information to a Member State is necessary to substantiate an infringement under the scope of SMIT and the respondent has had the opportunity to make their views known and use any judicial remedies available to them.

The Commission has confirmed that the Regulation regarding public access to Commission documents[2] would apply, but that any request to view confidential information obtained by the SMIT could be refused using the exemption in that Regulation. This exemption states that the institutions can refuse access to a document where disclosure would undermine the protection of commercial interests. The Commission has also said that the exemptions around using the information in infringement proceedings are modelled on similar powers the Commission has in the field of State Aid investigations.

[2] 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

4. The potential inclusion of third country undertakings operating in the Single Market.

We have not received any substantial clarification on this point in Working Groups, and we will seek further information in any future discussions.

Our initial view is that the proposed SMIT power is potentially broad enough to apply to any company operating in the Single Market regardless of whether it is established in an EU Member State. However, there remains a practical question about enforcement. In Working Group, the Commission has confirmed that it would have no powers to fine companies established outside the EEA for failing to provide information.

Your EM also mentions that there is a question of compatibility of the legal bases provided by the Commission for the proposal. Has the Government gained further clarity in this regard?

We have not received any further substantial clarity on this point. Questions concerning both the validity and compatibility of the legal bases for the proposal have been raised at Working Groups. The Council Legal Service (CLS) were asked to provide advice which they did on 3 October 2017. The CLS's opinion is that none of the legal bases cited in the proposal is valid. It has therefore seen no need to consider compatibility of legal bases at this stage.

The CLS opinion notes any proposed act "must do more than touch upon or have repercussions for" the Treaty policies which form legal bases. In view of the broad ambit of key provisions of the proposal, and the lack of evidence demonstrating the real need it is addressing, the CLS concludes it is not directly linked to or genuinely pursuing the aims of the Union policies established by the first six Treaty articles cited (43(2) (agricultural policy), 91 and 100 (transport), 114 (internal market), 192 (environment) and 194(2) (energy)) and for this reason they are not valid legal bases.

The remaining legal basis, article 337, allows the Commission to make provision to collect information required to perform its tasks. In contrast to the very wide information powers proposed by the Commission, the opinion cites Regulation 2186/93 as an example of the use of article 337; this regulation has a detailed annex identifying exactly how information collected would facilitate Commission tasks. And again, whilst it is arguable that the collection of information may assist with infringement proceedings, the CLS believes the Commission has not sufficiently demonstrated the need for a power as proposed. According to the CLS opinion, of 1654 infringement cases examined in the period 1997-2016, the number in which further information powers may have been useful was just 17. For these reasons the CLS concludes the proposal cannot validly be based on article 337.

There was wide support from Member States in the working group for the CLS opinion. The Commission has indicated that it will circulate its own written opinion in the next few weeks; the Government will consider this before finalising its own view. Should the proposal continue to be discussed in its current form, we will continue to seek assurance that the legal base or bases (and, potentially, their compatibility), are appropriate.

Would information held by the CMA be considered as already available to the Commission, and therefore out of scope of the SMIT?

Since the Explanatory Memorandum was submitted, we have concluded that we cannot assume instances where SMIT would be used to request information from businesses in the UK would be limited by virtue of the CMA's activities in collecting information (see paragraph

35 of the EM). We will undertake further analysis of the potential financial implications for UK business in the light of this, and update you in due course.

Confidential information held by the CMA is not generally available to the European Commission. The CMA's use of information that relates to businesses is governed by part 9 of the Enterprise Act 2002. Based on these provisions, the CMA would have a gateway to share confidential information on a business which it had obtained in the course of its functions with the European Commission in the following circumstances:

- if it received the relevant consent of that business
- for the purposes of an EU obligation e.g. in connection with EU consumer or competition law (but under EU competition law that information would not then be available to the Commission for the purposes of the Single Market rules); and,
- for the purposes of facilitating the CMA's statutory functions.

The CMA can also share information with an overseas authority in specified circumstances in connection with that authority's enforcement of competition and consumer protection law. However, the CMA cannot share information on this basis if it was obtained by it in connection with a merger or market investigation.

Even where the CMA has a gateway to share information, it must carry out a balancing exercise having regard to whether disclosure would be contrary to the public interest, whether the disclosure of commercial information might significantly harm a business' legitimate commercial interests, and the proportionality of disclosure.

Each case would need to be determined on its merits, but the Government's view is that a transfer of information held by the CMA to the Commission (other than with consent or in connection with obligations under EU competition and consumer law) would only in very limited circumstances be likely to fulfil the relevant criteria for information to be shared under the Enterprise Act.

Has the Commission provided examples, outside of public procurement exemptions, where being able to obtain firm-level data would have improved compliance with or enforcement of Single Market rules?

The Commission has provided the following examples in Working Group discussions.

1. Roaming: the Commission had initially looked at roaming charges from the perspective of competition but had found there was no abuse of dominant position. However, the Commission considered there was still a clear internal market problem, which it decided to solve through roaming legislation. In hindsight, the Impact Assessment for this first proposal would have had insufficient evidence to meet current Regulatory Scrutiny requirements.

2. The Commission has said that it considers 1 in 20 single market cases at the CJEU are lost because of a lack of sufficient company-level evidence. According to the Commission, the SMIT could have enabled the Commission to obtain the necessary information from private parties in order to win these cases. The Commission has argued that losing such cases leads to non-tariff barriers to trade. The Council Legal Service disputes this figure, arguing that, of 1654 infringement cases examined in the period 1997-2016, the number in which further information powers may have been useful was just 17 (i.e. around 1 in 100).

3. The Commission has also cited the example of where a Member State has extended a contract with a concessionaire without a tender, which could have impacts in the billions of euros.

4. Finally, the Commission has spoken of the calibration of the Capital Requirements Directive and argued that it is difficult to gauge accurately the amount of capital banks should be required to hold.

Please would you also confirm if the SMIT would only apply to Single Market breaches involving more than one Member State?

Article 5 of the proposed Regulation outlines the conditions the Commission must satisfy in order to make an information request. This includes a requirement for the Commission to provide a summary description of the alleged serious difficulty of a "cross-border dimension".

In this regard, the Commission has again referred back to its *Communication on EU law: Better results through better application*, which describes the breaches it wishes to target as those "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."

Our understanding is therefore that whilst an information request could be issued to address a potential breach within one Member State, the breach would need to be shown to have a cross-border dimension or *impact* more than one Member State.

The Commission has said in Working Groups that the cross-border dimension could be more clearly stated in future iterations of the text.

Update on discussions in Working Group

Discussions in Working Groups to date have made it clear that a large number of Member States are highly sceptical of the proposal. Concerns have been raised about burden on business, adequate safeguards and the scope. No Member State seems strongly supportive of the proposed new powers for the Commission.

The most detailed discussion has been on doubts about the seven proposed legal bases. As explained above, the Council Legal Service's Opinion of 3 October concluded that none of the bases could support the proposed powers. The Commission has indicated that it will circulate its own written opinion in the next few weeks.

At the working group on 17 October, there was wide support for the Council Legal Service's opinion, and 12 Member States presented a non-paper supporting the Council Legal Service analysis and expressing doubts about the proposal's added value. As such, it is currently unclear how and whether progress can be made in Council on the proposal unless the Commission makes substantial changes to it. The Working Group will probably be invited to review the Commission Legal Service's opinion in due course.

I am copying this letter to the Chairman of the Lords European Union Committee, Les Saunders (DEXEU) and Briony Thompson (BEIS).

Yours faithfully

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