BUSINESSEUROPE

POSITION PAPER

10 October 2017

Comments on SMIT, Single Digital Gateway and SOLVIT

The Commission "Compliance Package" proposals of 2 May 2017

DETAILED REMARKS ON:

THE SINGLE MARKET INFORMATION TOOL (SMIT) PROPOSAL
THE SINGLE DIGITAL GATEWAY (SDG) PROPOSAL
THE ACTION PLAN ON THE REINFORCEMENT OF SOLVIT

KEY MESSAGES

BusinessEurope fully supports the Commission's continued focus on making the single market work better. A fundamental aspect to achieve this is through ensuring high quality implementation, correct application and strong enforcement of agreed EU legislation.

1 BusinessEurope strongly opposes the introduction of the **Single Market Information Tool (SMIT)** procedure. We oppose additional obligations on companies to provide highly sensitive business information without a clear justification or explanation how and for which precise objectives the Commission intends to use this information, and under the threat of sanctions. Moreover, it is absolutely unacceptable that the Commission is solely deciding at all stages of the SMIT procedure on the next steps. No other party is empowered to even check, scrutinise or appeal a decision throughout the SMIT process (accept perhaps going through lengthy and costly court procedures). Also given the penalties, this kind of power on one side is unacceptable.

2 BusinessEurope welcomes the proposal for a **Single Digital Gateway** to establish a single online portal that offers accurate information, online procedures and problem-solving tools, which will make it easier for companies to operate across borders. It is however crucial that the SDG offers all the assistance and specific information companies need throughout the business life-cycle.

3 BusinessEurope welcomes a reinforcement of **SOLVIT** with a more clearly defined role for the Commission. To promote the use of this tool by companies, it is crucial that it is clear what companies can expect from SOLVIT in terms of substantive outcomes and recommendations when they suspect their single market rights have been breached.

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1. THE SINGLE MARKET INFORMATION TOOL (SMIT) PROPOSAL

1. BusinessEurope has serious concerns about the European Commission's proposal of 2 May 2017 to introduce the SMIT. While we fully share the Commission's objective of ensuring better implementation, correct application and stronger enforcement of EU legislation, we do not believe that this far-reaching instrument is an appropriate additional measure to achieve these goals.

2. We strongly oppose additional obligations on companies to provide highly sensitive business information without a clear justification or explanation how and for which precise objectives the Commission intends to use this information, and under the threat of sanctions. Additional obligations on companies without a clear purpose, under the broad scope of "serious difficulty" with the application of EU law, seem gravely unjustified. The Commission is yet to give a concrete example where it could see the launch of a SMIT procedure useful to address obstacles to *cross-border* trade flows or movement in the single market. It would be most helpful to see what kind of issues SMIT may address, which cannot be resolved on the basis of information collected through the many other information avenues readily available to the Commission.

3. Moreover, it is absolutely unacceptable that the Commission is solely deciding at all stages of the SMIT procedure on the next steps. No other party is empowered to even check, scrutinise or appeal a decision throughout the SMIT process. Also given the penalties, this kind of power on one side is unacceptable.

4. Member States are often responsible for fragmenting the single market or imposing additional barriers to free movement, either by late or low-quality implementation of agreed EU legislation, diverse interpretation, incorrect application of the existing rules or by imposing additional national rules and requirements. Therefore, the Commission needs to primarily focus on Member States when taking steps to improve the application of Union law. The fact that information about transposition and application of EU law by the Member States might not be available, does not justify mandatory information requests vis-á-vis companies.

5. BusinessEurope agrees that Member States should be more helpful and comprehensive in sharing national market information with the Commission, such as the information collected through TRIS or the Internal Market Information (IMI) system. This might be an additional source of information to help paint a detailed bigger picture. For example, Member States already have access to data of companies in a number of cases, like the ownership structure/beneficial ownership that is stored in a central register.

6. Moreover, competition law already provides the Commission with sufficient investigation and enforcement powers, and it should use existing information gathering and enforcement tools as well as existing channels of communication between the Commission and Member States, that are already in place in the EU and/or national legal frameworks to the fullest extent possible before seeking further and possibly overlapping powers as set out in this proposal.

Specific remarks

7. Extra inquiries on top of existing financial reporting obligations are a burden and therefore a cost on companies. Experience shows that the efforts made by companies for individual state information requests, for example in the framework of sectoral antitrust investigations in the area of e-commerce, can be extremely high and burdensome. Examples of other existing reporting obligations are corporate governance statement (soft law), but of course also annual reports, publication of annual figures, information to business registers, information to competition and state aid authorities and information to statistical offices. One can certainly question whether putting additional burdens on companies via this proposal is in line with the Commission's Better Regulation Policy.

8. With this proposal, the Commission would gain extra powers to force companies to provide sensitive company information on for instance business strategy or pricing policy with the aim to address a "serious difficulty" with the application of Union law, as generally described in Article 4 of the proposed Regulation. However, while granting new powers, there is a lack of balance of these powers needed for good governance. There is no system of checks and balances between the executive, controlling and judiciary powers. The decision to target companies directly and ask for specific information is a burden, and therefore a cost. At the same time, it is unclear in which specific cases the Commission will use its power. It is solely up to the Commission to decide to trigger the SMIT procedure. It prepares a Commission decision, which the College of Commissioners approves, and the Commission remains in charge of the entire SMIT process, while collecting and keeping the results itself. This does not seem like an adequate balance of power.

9. As a matter of fact, if companies feel they suffer negative consequences due to a lack of enforcement or incorrect application of EU legislation, a large portion will already consider to pro-actively notify relevant national authorities or the European Commission. The incentive to do so is already there for those few cases where the provisions of SMIT would serve a worthy purpose.

10. Both large and smaller companies already have many reporting and transparency obligations, mostly at national level but also through implemented EU legislation. Examples are the existing reporting and transparency obligations under Regulation (EC) No 1049/2001 on public access to European Parliament, Council and Commission documents; Regulation (EC) No 1367/2006 on the application of the Aarhus Convention on Access to Information, Public Participation in decision-making and Access to Justice in Environmental Matters; and Directive 2014/95/EU on the disclosure of non-financial and diversity information by certain large undertakings and groups.

11. This additional SMIT procedure would create an extra layer of reporting obligations specifically and directly at the European level, rather than at national level. This adds to the complexity in overall reporting, also between different levels of government, i.e. at European, national, regional and local level.

12. In terms of information available to the Commission to address single market barriers, there are already vast existing information channels such as the Enterprise Europe Network, the ODR platform, TRIS, the IMI-system and the REFIT platform. These information channels could be explored better and more systematically to identify obstacles in the single market including non-compliance with EU-legislation. As indicated above (point 10) companies already provide a vast amount of information to national authorities, statistical offices and the public, either voluntarily or based on a legal obligation. Such information is also available to the Commission. In addition, comprehensive public consultations, targeted surveys, stakeholder events, commissioned studies and reports, EUROSTAT, direct contacts with market players and the many EU pilots and ongoing and past infringement procedures.

13. Finally, both the Single Digital Gateway and SOLVIT, which are also included in the Compliance Package, could further improve systematic collection of knowledge and data. The SDG proposal includes amongst others Points of Single Contact and Product Contact Points, and also provides for reporting on the functioning of the single market (Article 23). The Communication on SOLVIT foresees the upgrading of SOLVIT for EU law enforcement. Therefore, the other elements from the compliance package offer the Commission significant sources of information.

Explanatory memorandum

14. The explanatory memorandum of the Regulation states that "*enforcement supports and complements the delivery of policy priorities*" (p. 2). It underlines that the proposed instrument is more than a tool to support enforcement. Its intended use is also to help design and revise EU legislation. BusinessEurope strongly opposes that companies should be obliged to disclose information under the threat of sanctions in cases where the Commission requests information for policy development purposes alone. Policy development purposes could never justify sanctions and mandatory obligations and would per se be disproportionate.

15. The explanatory memorandum of the Regulation wrongly states that "*This proposal does not aim at creating new enforcement powers for the Commission such as the powers to pursue infringements of Union law in the internal market area against individual market participants*" (p. 2). In fact, it does do this. Moreover, on p. 3 it states that the proposal does not aim to create a new procedure for enforcing EU law. But it *does* create an extra procedure to support the enforcement of EU legislation.

16. As explained in the explanatory memorandum (p. 3) the legal basis of the proposed regulation is Article 337 TFEU (which foresees a simple Council majority) in conjunction with Article 114 TFEU (which foresees an ordinary legislative procedure). In our view, this legal basis is questionable. While the Commission argues that this double legal basis is justified and necessary, it is not clear on what grounds. The double legal basis is problematic because the different Articles foresee different legislative procedures and therefore in principle seem incompatible to us.[1] In the latest case to which the Commission itself refers, the double legal basis was actually

[1] Case C-300/89, para. 17-21; Case C-178/03 (opinion of the AG) para. 58.

rejected by the Court.[2] We therefore seriously doubt that the proposed double legal basis can be upheld in Court, while a choice for a single legal basis (either Article 114 TFEU or Article 337 TFEU) may not be sufficient to uphold the proposed regulation considering the broad powers it confers on the Commission.

17. It is positive that the explanatory memorandum states on p. 4 that the SMIT is "*a last resort measure*" when all other means to obtain information have failed. However, this is not mentioned in Article 5 regarding the conditions to launch a SMIT procedure, neither is it reflected in an appropriate procedure for independent verification of the Commission's own judgement in this respect.

18. The explanatory memorandum states on p. 9 that "*It is estimated that the Commission could incur annual data collection and analysis costs of between 120,000 and 430,000 euro a year, assuming five information requests are made per year*". BusinessEurope wants more clarity how this figure was calculated and why five SMIT procedures a year is set as starting standard. We also submit that five procedures a year is a very high frequency for a "last resort" measure. Moreover, we stress that as indicated by the Commission any DG within the wide remit of the scope of the SMIT proposal can prepare such a Commission decision, e.g. DG GROW, DG EMPL, DG MARE, but also DG ENERGY, etc. Taking this into account, the number of actual SMIT procedures – once in place – could very well be much higher.

Recitals

19. Recital 18 – why does the Commission need to publish information provided by the addressees when the purpose of the procedure is to collect information to process internally for better policy making? To single out companies may create speculation that a company is being investigated and could dent its public image and capital value. Publishing of information that is considered confidential or commercially sensitive (even if Commission decides otherwise) will be harmful and shall at all times be avoided. There is already regulation that prescribes the handling of confidential information such as the protection of confidential information (trade secrets) under Directive (EU) 2016/943 and Regulation (EC) No 1049/2001-Transparency Regulation-, in particular those exceptions to disclosure as laid down in Article 4(2) first indent. In addition to this, Article 41 of the EU Charter on Fundamental Rights on the Right to good administration, includes: a) the right of every person to be heard, before any individual measure (as that SMIT implies with the information intended to be requested together with the threat to impose sanctions) that could affect him or her adversely; b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; and c) the obligation of the administration to give reasons for its decisions. As to the latter, since both the scope of application of the proposed legislation and the protection of confidential business information remain unclear, it is essential that the Commission provides more concrete clarifications. In sum, the information to be requested and namely the protection of this, if falling under the scope of the exceptions to disclosure enshrined in Article 4 of the Transparency Regulation, shall be more developed and reconsidered.

[2] Case C-490/10, para 64.

Articles

Article 2 – Scope

20. The scope as currently foreseen is not specifically defined and therefore very broad covering the free movement of goods, services, people and capital, and in addition also agriculture and fisheries (other than the conservation of marine biological resources), transport, environment and energy. Also, the proposed Regulation does not restrict the type of information or the categories that can be requested.

21. Moreover, the lack of clarity as to the scope of this proposal gives rise to a broad interpretation that could be problematic. Specifically, companies may risk a lack of protection of their confidential business information if this concerns information on emission into the environment. In case such information is requested, under the Aarhus Regulation and in particular as to its Article 6 (Aarhus Emissions Rule), EU authorities may not be able to refuse disclosure based on the need to protect commercial interests.

Article 3 - Definitions

22. The current list of definitions is incomplete and misses crucial definitions for a potentially far-reaching instrument such as SMIT, for instance, on “serious difficulty” (Article 4), or “important Union policy objective” or “association of undertakings”.

Article 4 - Power to request information from undertakings and associations of undertakings

23. Article 4 is phrased quite general and lacks detail. The crucial term “serious difficulty” with the application of Union law is too vague. While the Commission maintains that it will be a “last resort” tool, the legal conditions for the request (essentially, proof of a “serious difficulty with the application of Union law”) are subject to interpretation and will give the Commission a broad margin of discretion. Moreover, it is unclear why associations of undertakings are also targeted. This fundamental Article 4 needs more detail.

24. Also, the use of the information collected by the Commission lacks a clear purpose. Moreover, the Commission may use information that has already been made public for purposes other than those set out in Article 4 (see also Article 8).

Article 5 - Conditions

25. The proposed Regulation does not define what type of information can be requested. Article 5 merely states the conditions for an information request. This creates a lot of uncertainty. As the Regulation (Article 7) also covers confidential business information, it is assumed it may consist of market data, cost structure, pricing policies, product and service characteristics, geographical distribution of customers and suppliers and even business strategy.

26. As described in the explanatory memorandum, Article 5 requires the addition that the SMIT is “a last resort measure” when all other means to obtain information have failed. The safeguards of information being “not sufficient or adequate” are too light.

27. Article 5.1. does not take into account parallel empowerments, for instance to European Supervisory Agencies (ESAs) and other bodies, offices or agencies to cooperate with each other to minimise the number of requests that could follow from the SMIT procedure.

28. Article 5.2. on the content of the Commission decision necessary to launch a SMIT request is unclear. While this is meant as a safeguard, the terminology (i.e. the definitions) remain unclear. Although the provision makes clear that SMIT is applicable only to “serious difficulty of a cross-border dimension with the application of Union law…” this cross-border limitation is not clarified in its scope. More importantly, it is also unclear whether the SMIT is only utilised for serious difficulties in application of Union law by Member States (i.e. preceding or in support of infringement proceedings under Article 258 of the TFEU) or whether it could be invoked by the Commission where markets or market-players may be failing to properly apply Union law.

29. Article 5.3. is not phrased precise enough. It should be clear that the information requested must be “readily” available to the company, as such: The undertakings or association of undertakings concerned by the request as referred to in Article 4 are only obliged to provide information that is readily at their disposal”.

30. The principle of proportionality (Article 5.3., last paragraph) should in BusinessEurope’s view apply equally to large undertakings and small and medium sized undertakings. This appears not to be the case, according to the proposal.

Article 6 - Request for information made to undertakings and associations of undertakings

31. In Article 6.1. on the request for information, the Commission states that it shall aim at ensuring that such requests are only addressed to undertakings and associations of undertakings that are capable of providing relevant information. BusinessEurope questions whether it would be possible for the Commission to accurately judge which company would be able to provide which (kind of) information, also as companies differ a lot, even within the same sector.

32. It is positive that Article 6.1. states that in principle micro-undertakings do not fall within the scope of the Regulation, unless part of a bigger group of undertakings.

33. In Article 6.1. there must be a clearer distinction between “simple request” and “request by decision”. Currently, nothing is stated about when one or the other type of request is to be selected by the Commission and how this is done. This is important because the consequences from failing to adhere to a request differ: fines can be imposed in respect of either types of requests, whereas periodic penalties relate only to requests made by decision (Article 9.1. and 9.2.).

34. The legal text of Article 6.2. (simple request) and Article 6.3. (decision) should be identical regarding the content of the information request and the obligations on the Commission in this regard where this is the intention, i.e. the legal wording should be the same where the meaning is the same for the purpose of legal clarity.

35. Moreover, Article 6.2. should be made in line with Article 9.1 on simple requests, to ensure that fines apply only to supplying incorrect or misleading information where this is by intention or gross negligence.

36. Article 6.3. fails to lay down time limits for responding. It does not even provide an indication of an average length of the procedure nor does it indicate a minimum set time limit. This is very worrying. Companies need a reasonable minimum time to assess which information is confidential and which is not. Depending on the request, this could be complex and time-consuming. Therefore, more accuracy as to the time companies have to handle information requests is highly needed. However, as neither the type nor the use-purpose of the information to be requested under SMIT are clear, it is difficult to foresee which could be the ideal time period/ timeline for companies to cope with the obligation to provide information to the Commission.

37. Regarding the right of recourse, currently the only right of recourse for companies in the case of a Commission decision is through the Court of Justice of the European Union (Article 6.3.), which is lengthy, formal and costly and does not suspend the obligation. No other recourse exists for requests by decision and none exist for simple requests. Again, as solely the Commission itself decides to start a SMIT procedure and decides on the requests, targeted sectors and even which information is confidential and which is not, it puts companies in a very difficult situation in case they do not agree with the process / content of the procedure or request. There is no mechanism for countering a request made by the Commission, other than by paying a fine. This illustrates the clear lack of a balance of powers described above and is incompatible with the core values of public governance of the Union and its Member States. The fact that such countering mechanism does not exist emphasizes the lack of safeguards as to that information that could be commercially sensitive and that may be protected accordingly, as established under national and EU Law. Important considerations such as personal data and commercial information, including intellectual property rights should certainly be considered if the information is requested from companies.

38. In the above context, first and foremost, it should be possible for the company to first ask the Commission to review and withdraw its request or decision, for example where the company does not possess the requested information or where the company can establish that it is not the right company for the Commission to target with a request for information.

Article 7 - Answers to requests for information and protection of confidential information

39. The proposed Regulation does not protect confidential commercial information of companies and associations of undertakings in a sufficient manner. Lack of clarity as to the type of information potentially implies lack of safeguards. There is an important

need for clarity regarding the specific circumstances for refusal grounds to the disclosure of information. Likewise, regarding the ways and means for the companies to efficiently and effectively communicate the latter to the Commission, following a request for information. In sum, not only time frames but, first and foremost, procedures and steps on how to handle information requests are certainly missing within this proposal.

40. BusinessEurope is concerned that the Commission thinks too lightly of the exercise of assessing which company information is to be considered confidential and which is not in line with "the obligation of professional secrecy", laid down in in Article 7. This judgement often requires external expertise which is costly and time-consuming. In the explanatory memorandum, the Commission states that the estimated cost of replying for an individual SME ranges from €300 to €1,000 per request with an additional potential legal advice cost of €1,000, roughly 25 % of the estimated response cost for a large undertaking. In this calculation, BusinessEurope believes that the Commission takes unduly note of the request to assess which information is confidential and which is not. In fact, costs are likely to be much higher in most cases.

41. Additionality, it will lead to disproportionate administrative burdens both to require a clear indication of the information considered to be confidential and to require the targeted company to provide a separate non-confidential version of the submission. The first requirement should be enough. If the targeted company also wants to submit a non-confidential version, it can do so voluntarily. Another option might be to consider all information provided as confidential.

42. Moreover, to save costs, there is a risk that confidential information (or parts of it) end up being sent to the Commission, and could then also be sent to the concerned Member State, putting the company in a difficult position – see Article 7.3.

43. Referring to the point made under the general remarks above, Article 7.4. has no balance of power: it is the Commission solely deciding whether the confidentiality claim of the information transmitted by the respondent is well-founded and proportionate. If the Commission deems certain information not being rightly assessed as confidential, it has the right to disclose (with or even without the company's consent) after a certain period and a company (not an association of undertakings) has no right to appeal from the Commission decision. The information claimed to be confidential would then not be protected. This is unacceptable and puts sensitive company information, and therefore the business at risk.

44. Moreover, the real risk of unauthorised access by third parties regarding sensitive data, for example on business strategy, pricing policy, employment contracts and other details is unacceptable. Granting wide access to such sensitive information is inappropriate in light of the protection of business and trade secrets foreseen by Articles 15 and 16 of the European Union's Charter of Fundamental Rights, as well as constitutional provisions of the Member States.

45. More generally, Article 7 does not take into account a situation where a company does not possess or have ready access to the information requested by the

Commission. The article needs clarification regarding the targeted company's reply in this situation.

Article 8 - Use of the information collected by the Commission

46. Article 8 should provide a much wider protection of confidential information and not only cover documents but also other means of communication such as e-mails, oral communication, websites, etc. Moreover, it should provide for appropriate damage compensation in the event of unlawful disclosure of confidential information.

47. Article 8 (b) lacks a mechanism enabling companies to verify how the Commission will ensure that the information as presented will protect their identity.

48. Article 8.3. (c) on the disclosure of confidential information is not clear enough. It does not detail how a "decision is taken" on the disclosure, who precisely makes the decision and which available judicial remedies can be used. Moreover, nothing is stated concerning timelines here, which is a key element for the disclosure and resulting possible impact on the company.

49. Additionally, it must be noted that no guarantees can be given about the information remaining confidential or not. For instance, the current EU rules on Access to Documents remain applicable to the information collected. If a third party, for example a competing company, NGO or journalist would request access to the data, the Commission will have the obligation to disclose the data unless it can rely on at least one of the legal grounds provided in Article 4.2. of Regulation 1049/2001. The Commission may rely on the argument that disclosure would harm commercial interests but the test developed by the EU Courts makes it very difficult for the Commission to successfully rely on this ground (i.e. proof of a reasonably foreseeable risk of commercial harm, following an individual assessment of each document).

50. It is simply unacceptable that confidential information may be made public (Article 8.a), even if such information is in summary or aggregated form. This goes against the notion of professional secrecy.

51. Finally, the Commission has the right to disclose to third parties the information in aggregate or anonymised form, but there are no safeguards here whether this is done well and in an unharmful manner. Also, the Commission may decide to disclose information to a Member State if it deems it necessary to substantiate an infringement of EU law. This means that the Commission could disclose the information (e.g. commercial business information, trade secrets, copyright, or personal data) without the data supplier knowing it.

Article 9 - Fines and periodic penalty systems

52. BusinessEurope finds the proposal for the SMIT deeply concerning because of the drastic impact this tool could have for the targeted company. Not only at the sole request of the Commission a company would be required to disclose confidential information to the Commission, it could risk facing fines or penalty payments. The

fines laid down in Article 9 of up to 1% of total turnover of the preceding business year are of a significant size and disproportionally high, especially because the company is not under suspicion of violating any single market legislation.

53. Moreover, the wording in Article 9.5 suggests that the penalty payment may continue to be applied (with a reduced amount) after the undertaking has complied with its obligations. This is unacceptable. The Commission should waive the periodic penalty payment immediately when the undertaking has satisfied its obligation. The same can be said of article 10.

54. We also note that the Regulation does not at all prescribe time limits. Although requests and their complexity may differ, not a single indication of an average timeline is given. Businesses are worried that they might be very tight indeed. Moreover, there is no process for requesting a review of a decision to impose a fine or penalty payment other than seeking the Court of Justice of the European Union's review under Article 261 of the TFEU.

55. In terms of penalties, a periodic penalty can be up to 5% of the average daily turnover of the undertaking for the preceding business year. This is relatively high and without set time limits is very worrying.

56. It is positive that Article 9.4. and 9.5. state that the Commission shall take into account the nature, gravity and duration of the breach of Article 6.1., as well as the principle of proportionality in particular with regard to small and medium-sized undertakings when fixing the amount of the fine or periodic penalty payment. In Article 9.6. it is also specified that the Commission must seek the views of the affected undertakings and associations *before* imposing a fine or penalty. However, no provision for how the Commission is to treat such input is provided, e.g. there is no obligation on the Commission to give a reasoned response as to why the input has or does not have an impact on its decision to impose a fine or penalty or not. Moreover, it is solely the Commission deciding whether this is justified or not. Again, there is no real balance of powers in this regard.

57. It is also positive that where the addressed companies / associations have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may reduce or waive the amount of the periodic penalty payment. However, the text lacks criteria for such a decision, leaving it open to criticism of arbitrary outcomes.

58. More generally, it questionable why the Commission is so willing to target companies with sanctions for late, incomplete or inaccurate information when it allegedly wants to better enforce EU law by Member States, e.g. in the framework of infringement procedures. It is unacceptable that companies, who are not violating EU law and complying with the rules, could pay for the lack of compliance of EU law by Member States.

Article 14 - Extension of time-limits

59. Article 14 states that undertakings and associations may request an extension of time for complying with a request, however, no clarification of when the Commission will grant such a request are set out.

Article 16 - Professional secrecy

60. In addition to the Member States, their officials and other servants, the Commission, their officials, and other servants should also be included in Article 16 regarding professional secrecy.

Crucial issues not addressed by the current proposal:

61. **Use of data** - It is not clear what the collected information and data can be used for. The descriptions in Articles 4 and 8 are very wide.

62. **Data storage** - The proposal contains no limitation on how long the Commission may retain data collected through the SMIT (in particular confidential data). This seems unusual and disproportionate to the addressees who provide data.

63. **Association of undertakings** - In the current text, it is unclear whether European federations, such as BusinessEurope or its national member federations, would also fall under the scope of the Regulation. If this is the case, is should certainly be removed from the scope. If the Commission cannot obtain information from a Member State or a company, it is very unlikely that it will obtain it from an association. Moreover, what if the association of undertakings are non-profit organisations with limited capacity to satisfy the Commission's request partially and/or in full?

64. **The formal College Decision to request information** - It is completely unclear if the Commission Decision to start a SMIT procedure will be public or how the targeted companies will be informed. As part of this, it is essential that the Commission is obliged to inform the targeted company which other information channels the Commission has checked and why they were found insufficient

65. **Format of the information requested** - To minimize administrative burdens, it should be possible for the targeted company to provide the requested information in the format that is available to the company. The company should not be required to use a specific form when responding to a re-quest for information.

66. **Intellectual property rights (IPR)** - No mention is made in the proposal of information linked to IPR.

67. **Discretion on the protection of confidential information** - As far as protection of confidential information is concerned, those exceptions to disclosure set out under the Transparency Regulation are interpreted from a restrictive perspective when applying the Aarhus Regulation. The latter may apply if the requested information is

related to the environment. If so, it is noteworthy to stress that under such regulation the Commission may not refuse access to information for the protection of commercial interests, should the information be related to emissions into the environment (Glyphosate Case, C-676/13 P and Imidacloprid Case, C-442/14). Article 4 of Regulation (EC) No 1049/2001 states those exceptions under which institutions shall refuse access to information where disclosure would undermine the protection of personal data, public interest or commercial interests, unless there is an overriding public interest in the disclosure. However, under the Aarhus Emissions Rule, an overriding public interest is deemed to exist where the information is related to emissions into the environment, even if it is confidential business information.

In conclusion:

68. BusinessEurope strongly opposes the introduction of the SMIT. The instrument is too far-reaching without a clear purpose and will be a burden in the form of extra reporting obligations on companies under the threat of penalties. Moreover, it means that companies will report directly to the European level.

69. Also, looking at the legal wording of the proposal, there are many concerns and questions that we have.

70. BusinessEurope strongly opposes the introduction of the Single Market Information Tool (SMIT) procedure. If kept, it is clear, referring to the many points above, that the proposal needs to be drastically modified. To start, it should be made voluntary for companies and (confidential) information is only to be provided upon the company's consent. Moreover, Commission decisions (i.e. to start, but also throughout the SMIT procedure) should be open for appeal and independent vetting according to strict criteria, and pending such approval the provision of information is voluntary. In this case, non-provision of information cannot be penalised after.

2. THE SINGLE DIGITAL GATEWAY (SDG) PROPOSAL

1. With the proposal for a Regulation establishing a Single Digital Gateway (SDG), the Commission aims to streamline a number of online single market information tools, problem-solving tools and online procedures for citizens and companies. The proposal contains details on what information, remedies and procedures will have to be realised online and regulates the governance of the SDG.

2. BusinessEurope supports the establishment of the SDG, as it answers our call for a one-stop shop offering precise, up-to-date information and assistance to companies. Lack of knowledge about companies' possibilities and rights is an important obstacle for companies wanting to operate across borders. The SDG has the potential to make the single market more transparent, and in turn more certain and predictable. This will encourage more businesses to operate across borders. More cross-border activity will offer new business opportunities, more choice at better prices, and could ultimately create new jobs and growth. In addition, flaws in the single market can be detected in a more systematic manner through the establishment of the SDG than is currently the case.

3. However, it is crucial that the SDG offers all the information and assistance companies need in order to do business more easily across borders. This includes high quality and up-to-date market information; problem-solving and dispute resolution mechanisms; and electronic procedures for companies wishing to develop cross-border activities.

General remarks

4. BusinessEurope supports the Commission's initiative to create a one-stop shop to support businesses that wish to operate across borders. We agree that doing this in the form of a Regulation is the right approach. The establishment of the SDG would streamline existing information portals and problem-solving tools and add a number of new obligations as well. While we are overall supportive of the proposal, we also have a number of concerns.

5. The possibility to complete administrative procedures entirely online is a great benefit of the SDG. We would therefore strongly encourage the Commission to be more ambitious and include additional procedures in the SDG. In particular we would encourage the inclusion of procedures to establish a company abroad and to declare business tax. The absence of these elements seriously weakens the benefits that the SDG would offer to businesses and put its use and overall take-up in danger.

6. Regarding the assistance and problem-solving services, we would encourage the Commission to be more ambitious and include more remedies in the SDG. We would recommend to make the proposal as comprehensive as possible, and propose in particular to include SOLVIT in Annex III (list of assistance and problem-solving services). In our view, a voluntary opt-in to the Regulation may not be sufficient to ensure a proper functioning of the SOLVIT tool, especially if it were to be used in the context of the free movement of goods in the near future.

7. Regarding the information available online, we welcome the broad area of information covered by the proposal, including information on VAT. We would like to emphasise the importance of relevant and up-to-date information. It is key that structures are in place to ensure that (links to) information will continue to be updated, so that companies have digital access to the latest information. We worry that the proposed structures may not be sufficient, and believe that Option 3 from the impact assessment could have yielded more effective results as it would have put the Commission in more control as to ensuring all information is made available, and potentially in all EU languages.

8. Also, more in general, we are concerned that the governance foreseen in the proposal may not be sufficient to ensure the portal's successful implementation. While the proposal aims to streamline the current patchwork of existing single market tools across Member States and bring these up to standard, it is not sure if this can be maintained in practice. We have seen this in other examples such as SOLVIT and the Points of Single Contact where there is a mixed level of quality between Member State service.

9. Finally, it is important that the SDG is designed in such a way that it is easy to use and interactive. We recommended in earlier positions that an online portal may, for example, include a comprehensive search engine, the possibility to use e-signatures and FAQs in difference languages, e-assistance through a live chat and a user discussion forum. While the proposal includes e-signatures (in Article 11), features such as a search engine and FAQs are not included in the current proposal. It is essential to get the details of the user interface right, and we would recommend that the Commission takes the views of stakeholders into account when developing this interface.

Specific remarks

Articles

Article 6 – Access to assistance and problem-solving services

10. Under Article 6(3)(b) regarding the costs of access to assistance and problem-solving services, we suggest that in addition to microenterprises and citizens, these services should be free (or affordable) for SMEs as well.

Article 14 – Quality monitoring

11. The Article foresees the disconnection of the service from the SDG as the main sanction for non-compliance. We would suggest in addition the possibility of penalties for non-compliant Member States. This is important especially considering the lack of enforcement on Member States in comparable situations, for example for not delivering an acceptable standard of their Points of Single Contact as required by the 2006 Services Directive.

Article 16 – Repository of links

12. It should be made clear how broken links will be dealt with in practice, in particular whether Member States would be obliged to review links submitted to the SDG on a regular basis and/or whether an alert system would be put in place to warn national coordinators that an update is necessary.

Article 20 – Promotion

13. It is not sufficiently clear from the Article how the SDG will be promoted and/or what investment is considered acceptable. While Article 28(1)(b) stipulates that the promotion costs will be covered by the general EU budget, it remains unclear what level of promotion and what costs are acceptable.

Article 22 – User feedback on the services of the gateway

14. Regarding the collection of feedback on users' experience, it is unclear if the provision of feedback on the SDG is an optional tool or not. We would therefore suggest that the word 'voluntary' is included in the Article. We would also recommend that the feedback form contains an open text space to provide comments.

Article 23 – Reporting on the functioning of the internal market

15. When using the SDG as a tool for monitoring the functioning of the internal market, it is crucial that the user interface allows for a meaningful way to report obstacles that companies encounter. In practice, this would include at least an open text box to describe the obstacle encountered, rather than a drop-down menu where a choice has to be made between a pre-identified list of obstacles.

Article 27 – Annual work programme

16. We welcome that in the implementation plan, a network of stakeholders is foreseen to discuss practical issues related to the SDG. We recommend that stakeholders are also involved in the prioritization of different elements from the SDG.

Annexes

Annex II - Procedures

17. We would recommend to extend the online available procedures regarding companies from Annex II. In particular lacking are procedures on the establishment of a company in another Member State and declaring business taxes. The proposal mentions that procedures relating to the establishment of companies will be based on the company law initiative and linked to the SDG in a later stage (p. 7). We understand that work is still in progress on this piece of legislation, but stress that we would like to see these procedures included in the SDG as soon as possible.

Annex III - Assistance and problem-solving services

18. While SOLVIT is not established by a binding Union act, this service is expected to play an enhanced role in the area of the free movement of goods in the near future (see the Roadmap on p. 12 of the Action Plan on the reinforcement of SOLVIT). In our view, a voluntary opt-in to the Regulation (see recital 22) may not be sufficient to ensure a proper functioning of the SOLVIT tool, especially if it were to be used in the context of the free movement of goods. Whether TRIS should also be included in the Annex with problem-solving services should be further reflected on.[3]

[3] While TRIS is essentially a notification system between the Commission and Member States regarding new technical national regulation, companies can also comment on (the titles of) these notifications.

3. THE ACTION PLAN ON THE REINFORCEMENT OF SOLVIT

1. SOLVIT is a problem-solving service that companies and citizens can use when they face obstacles in having their EU rights recognised in another Member State. It deals with cross-border problems by a public authority relating to the alleged breach of EU law, that are not subject to legal proceedings. SOLVIT cases are handled by national SOLVIT centres, which are coordinated by the Commission. In each case there are two SOLVIT centres involved: The Home centre (in the country where the person or company resides) and the Lead centre (in the country where the problem occurs). Together these centres aim to provide a solution for the issue at hand.

2. An important advantage of SOLVIT is that it provides an easily accessible and free procedure, which potentially enables companies to resolve single market barriers in a pragmatic and rapid manner. BusinessEurope therefore generally welcomes a reinforcement of SOLVIT. As the Action Plan on the reinforcement of SOLVIT and Staff Working Document also rightly point out, there are a number of areas in which SOLVIT should be strengthened in order to improve its performance.

General remarks

3. At present, SOLVIT is mainly used by citizens, particularly in the context of social security issues;[4] a very small percentage of cases involves business complaints.[5] What is more, only 6% of all cases dealt with under SOLVIT since 2002 relate to the free movement of goods and services.[6] Especially if SOLVIT is to be used by companies in the context of the free movement of goods and services, it is important that the tool is reinforced.

4. Cases regarding the free movement of goods and services are likely to involve 'structural problems', i.e. problems that involve a national rule that is in breach of EU law, but may also involve cases where the national law is not correctly applied. From the perspective of companies, it is currently not clear what they can expect from SOLVIT in terms of substantive outcomes and recommendations when they suspect that their rights regarding the single market are breached. The analysis by the Commission shows that cases involving a structural problem are often not resolved by the SOLVIT centres when they emerge (resolution rate of 20%).[7] SOLVIT should work efficiently and effectively for all problems that companies face, and irrespective of whether these are created by either the existence or the application of national rules.

5. The Action Plan proposes a more active role for the Commission in SOLVIT, in particular in offering more guidance and support to the national SOLVIT centres. It also proposes an increase in awareness-raising by the Commission and an upgrade of the role of SOLVIT in EU law enforcement. This shows a willingness from the side of the Commission to further promote a culture of compliance. We welcome these

[4] 62% of the cases in 2016 (SOLVIT scoreboard).
[5] 4,4% of the cases in 2016 (SOLVIT scoreboard).
[6] Action Plan on the reinforcement of SOLVIT, p. 5.
[7] Action Plan on the reinforcement of SOLVIT, p. 9; Staff working document, p. 25-29.

initiatives and believe they can contribute to make SOLVIT more effective for single market issues. Capacity building at Member State level is likely to improve the working of SOLVIT in practice. However, we would like to underline a number of specific concerns in this context.

Specific remarks

6. In cases involving the free movement of goods and services it is key that opinions of SOLVIT offer motivated explanations, so that it can be assessed to what extent (the application of) a national measure impeding free movement in the single market is justified. Opinions should ideally include an evaluation of the compatibility of the national measure with EU legislation. The Commission should provide guidance on the question of whether a national measure is in accordance with EU law.

7. It is also crucial that the Commission offers authoritative guidance in cases of disagreement between SOLVIT centres or within national administrations. The Commission's analysis shows that 50% of the cases in which the Commission gave informal legal advice remain unresolved.[8] A better follow-up by the Commission engaging in infringement procedures and/or policy development where the problem is not solved by SOLVIT would enhance the impact of its legal advice. While the Action Plan expresses the intention to engage in upgrading the role of SOLVIT in enforcement, the plan does not include clear objectives for the Commission.

8. In cases that involve Mutual Recognition, adding an appeal procedure in SOLVIT (as mentioned in the SOLVIT Action Plan Roadmap on p. 12) could improve the implementation of this principle in practice. It is understandable that the Commission would prefer to build on existing tools, such as SOLVIT, rather than creating a new tool. It is however crucial that a potential appeal procedure can be triggered directly by companies. In addition, it is important that there is a clearly defined role for the Commission or a mechanism of Member State peer review in place in such an appeal procedure.

9. Finally, in the context of awareness-raising, business organisations should ideally be able to anonymously file complaints. This could help to promote the use of SOLVIT in the context of the free movement of goods and services.

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[8] Staff working document, p. 30-31.