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PostEurop position paper on the Single Market Information Tool

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PostEurop, representing 52 Universal Postal Service providers across Europe, welcomes the opportunity offered to provide its opinion on the initiative.

The Single Market Information Tool (SMIT) would be a horizontal measure affecting a multitude of sectors and European companies, including the postal sector and postal operators. The SMIT would provide the Commission with new competences to collect quantitative and qualitative information directly from selected market players. According to the Commission, the objective of the initiative is to improve the functioning of the Single Market based on targeted information that helps ensuring compliance with EU rules and identification of possible regulatory and market failures, by providing necessary information and evidence for the preparation of effective policy interventions.

PostEurop believes that, in light of the EU better regulation policy, the new SMIT misses an appropriate basis and appears disproportionate as instruments and mechanisms already exist to serve the objectives.

There is no legitimate basis for the SMIT.

When the Single Market Strategy was released, the enforcement issues addressed by the EU Institutions were related to the safety and quality of the products and to flaws in the relevant sectoral legislation[1], not to the existence of "artificial segmentation" in certain markets. The SMIT was specifically designed to solve product-related problems, but not for competition law-related issues. The tool required by the strategy was meant to complement market surveillance by the Commission in order to target those non-compliant products.

"The Single Market requires national authorities to *ensure* ***that products are safe*** *and comply with the rules. But there are still too many unsafe and non-compliant products sold in the EU market, which puts compliant businesses at a disadvantage and endangers consumers".*[2]

Furthermore, it should be considered that, based on existing legal provisions and information requirements numerous reports and data are already available. Pulling together already available data cannot be the task of a company.

The EC is already empowered to gather quantitative and qualitative information. Achieving the objectives pursued by the EC is already possible thanks to the existing Competition Law tools.

[1] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015DC0550

[2] The Single Market Strategy: Ensure a culture of compliance and smart enforcement to help deliver a true Single Market

Today, the EU Competition rules provide the EC with the power to require information directly from market players where there is *"an agreement between undertakings, decision by associations of undertakings or concerted practices* ***which may*** *affect trade between Member States and which* ***have as their object or effect*** *the prevention,* ***restriction or distortion of competition within the internal market.****"*[3]

The EC has already discretional powers in order to directly require some information from those operators whose market behavior may result in potential or actual market segmentation.[4]

Art. 18 of the Regulation 1/2003 provides the EC with the power to ask for the provision of all necessary information to carry on with its duties related to the enforcement of the EU Competition rules by simple request to undertakings or associations of undertakings. [5]

Therefore, such lack of information should not exist. Even if this occurs, the EC already owns the appropriate tools to address such a problem and avoid any obstacle to the running of the Single Market.

As it is set above, problems related to competitive distortions caused by "artificial segmentation" (the problem identified by the Commission as the reason why the SMIT would be needed) must be addressed on the grounds of the EU Competition law. The fundamental objective of such rules is to prevent distortion of competition. This is not, however, an end in itself. It is rather a condition for achieving a free and a dynamic Single Market. Therefore, the already existing competition approach drives the problem in a more specific, certain and sustainable way.

The measure would be disproportionate: when several measures are suitable for achieving the legitimate objectives, the less harmful or costly ones should be chosen.

The proposed regulation pursues the same objectives as the ones already achieved by the existing tools, in spite of some lacks in certain definitions and specifications (i.e. "*significant regulatory and market failures*", "*economically significant case*", etc.). Thus, the current mechanism should be considered as the less harmful, as the proposed Regulation would induce some legal uncertainty in the market.

In order to have reliable and easy-to-understand market information, the EC seeks to implement a tool to justify the request of factual market data (e.g. market size) or data on market player conducts (e.g. cost structure, profits and pricing principles) before any uncompetitive behavior has been proven or even suspected. The information the EC aims at collecting is highly sensitive and confidential and the regulation would allow the EC to request so, independently of the market share of the companies.

The EC and Member States provide legal framework up to "constitutional level" for certain information to be protected as trade secret for the sake of the good development of the internal market (fair competition and innovation). This has been recognized in a recently published Directive (DIRECTIVE (EU) 2016/943 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure). The creation of a legal basis like the SMIT that goes exactly in the other direction would undermine the objective of the mentioned Directive.

[3] Art 101 TFEU
[4] 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
[5] 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

There is no justification that legitimates the introduction of the SMIT. The proposal ignores the current EC powers to request information in case of potential infringement of the competition law. The existing options provided by competition law are effective and ensure legal certainty.

Disadvantages caused by the norm are disproportionate to the objectives pursued.

The data that the EC is aiming to obtain (ex. cost structure, profits, pricing policy, volumes, etc.) is very sensitive and companies should be only obliged to provide them in exceptional and limited cases. By allowing the EC to require such information without any sort of anticompetitive behavior evidence, the principles of no discrimination and presumption of innocence would vanish.

There is also an extreme risk that the internal sensitive or classified information will be leaked, which may jeopardize the fair competition in the internal market. This risk is also mentioned in Directive 2016/943 (above). Moreover, this will carry an extra administrative burden and a red tape to certain companies in a highly competitive and evolving market as the postal sector for instance. Both situations would lead to discrimination of undertakings that may have not behaved against the law.

From the postal operators' perspective, the SMIT may end up in yet another institutional control layer in a liberalized and highly competitive sector, with no added value whatsoever that lacks the essential legal justification and guarantees.

Conclusion

In order to solve existing or potential market failures, the tools provided by the current Competition Law are already in place and sufficient, since they resolve situations where there is a reasonable concern that market disruption occurred. Competition law defines situations, in which there is a legitimate justification for requesting sensitive information or for a detailed examination of the way the concerned undertakings behave in the market. Without this legitimate premise, there is no reason to examine and monitor business or pricing strategies of individual companies which are just making use of their freedom of establishment (as long as it is not in the conflict with the law). And even in cases with legitimate premise, special measures are provided to protect data.

The proposed tool would contravene the principles of legitimacy, proportionality, suitability and subsidiarity, and therewith conflicts with the EU better regulation policy.

This position paper is supported by the following Public Postal Operators:

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PostEurop is the association which represents the interest of 52 European public postal operators. Committed to supporting and developing a sustainable and competitive European postal communication market accessible to all customers and ensuring a modern and affordable universal service, PostEurop promotes cooperation and innovation bringing added value to the European postal industry. Its members represent 2.1 million employees across Europe and serve to 800 million customers daily through over 175,000 counters. PostEurop is also an officially recognised Restricted Union of the Universal Postal Union (UPU).