

Position paper on the EC's Single Market Information Tool

Our reference:	COB-17-142	Date:	September 2017
Referring to:	COM(2017) 257 final		
Contact person:	Malene Bye Rasmussen, Policy Advisor, Conduct of Business	E-mail:	Rasmussen@insuranceeurope.eu
Pages:	5	Transparency Register ID no.:	33213703459-54

Summary

Insurance Europe welcomes the European Commission's attentiveness to possible shortcomings in the application of EU law within the single market. Any effective and proportionate efforts to address actual failures in the application of EU law by member states that could be detrimental to consumers or otherwise compromise the level playing field within the single market are welcome.

The proposal for a Regulation on a Single Market Information Tool (**SMIT**), although packaged as an attempt to address such failures, could put undertakings and their associations in an extremely challenging position. The proposal envisages that undertakings and their associations provide data, including potentially commercially sensitive data, to the EC when requested. Such data may then be used by the EC in infringement proceedings against a member state and for policy development, without the proposal containing clear constraints. Failure to adhere to requests may lead to the imposition of significant penalties or fines on undertakings and their associations. These sanctions are extremely disproportionate to the objective sought, and are targeted at the wrong party.

Insurance Europe has grave concerns over the current scope and text of the SMIT proposal, which suffers from a lack of:

- proportionality in its scope,
- justification for and proportionality in its sanctions,
- safeguards for the data supplied and its confidentiality, and
- a satisfactory legal basis and disregards the division of competences between the EU and member states.

Insurance Europe urges the EC to withdraw the proposal, as the need for the SMIT has not been substantiated and its scope is disproportionate to the policy objectives it seeks to achieve.

Introduction

Insurance Europe welcomes the EC's attentiveness to improving the operation of the internal EU market. Insurers benefit from a functioning internal market, which enables them to offer insurance and related services on a cross-border basis where this is commercially feasible and attractive. Similarly, a functioning internal market ensures a level-playing field between competitors within that market. This ultimately benefits customers in terms of product choice, pricing and availability. It is important that commercial decisions on whether to enter (or not) new markets are left to undertakings. These decisions must be based on their commercial objectives, their risk appetite and regulatory feasibility.

The proposal for a SMIT seeks to introduce a *last resort* mechanism for the EC to access data from the industry as well as from trade associations that may assist it to support possible member state infringement proceedings, or assess the need for policy initiatives. Although the overall objective of improving the operation of the internal market is welcomed by Insurance Europe, the proposal is disproportionate to the policy objectives it seeks to achieve and suffers from several deficiencies.

Recommendation

Insurance Europe calls on the EC to withdraw the proposal, as the need for the SMIT has not been substantiated and its scope is disproportionate to the policy objectives it seeks to achieve.

Concerns over the scope

Summary

The SMIT proposal suffers from a lack of proportionality. Its scope is too wide and lacks legal certainty.

The proposal would enable the EC to require the provision of commercially sensitive and confidential data to address instances "where a serious difficulty with the application of Union law risks undermining the attainment of an important Union policy objective"¹ and where necessary data to determine such a risk is not available to the EC from other sources. Such risks may occur in relation to the four freedoms (free movement of goods, persons, services and capital), agriculture and fisheries, transport, environment and energy².

Insurance Europe's concerns include:

- **What is a "serious difficulty"?** This is unclear, as is whether all policy objectives should be treated as equally important by the EC when considering justifying a SMIT request.
- **What is meant by "last resort"?** While Recital 8 clearly states that the SMIT is only meant to be used as a "last resort", it remains unclear what this means. The proposal does not specify the necessary safeguards or the conditions that might trigger investigations. This concern has also been voiced by the Regulatory Scrutiny Board in its second opinion on the SMIT.
- **The lack of evidence to support proportionate use of the SMIT for policy design** The EC does not provide any evidence that substantiates the case for applying the SMIT to policy design. This is a concern that has also been raised by the Regulatory Scrutiny Board in both its opinions.
- **Existing reporting obligations** The proposal ignores the fact that the European insurance industry currently faces significant obligations to report to public bodies on various aspects of their business. Insurers are currently subject to significant reporting requirements under Solvency II and various other European rules. One of EIOPA's priorities in the coming years is, precisely, to ensure a proper functioning of the internal insurance and pension market and to have up-to-date regulation – objectives that underpin the SMIT proposal. In addition, further reporting requirements are imposed at national level. The EC can already obtain relevant information from the European supervisory authorities (eg EIOPA), national supervisory authorities, national ministries and publicly available financial accounts for policy design purposes. EIOPA, for instance, has access to data by virtue of its regular thematic reviews,

¹ Article 4 of the proposal for a SMIT (Ref: COM(2017) 257 final)

² Article 2 of the proposal for a SMIT (Ref: COM(2017) 257 final)

preparation of its annual Consumer Trends Report and so on. In view of this, there is unlikely to be an instance in which the data the EC needs is not already available.

- **Better Regulation principles** The EC's Better Regulation framework ("cutting red tape") aims for legal certainty and to avoid the imposition of disproportionate burdens by EU law. The SMIT proposal fails to meet these objectives because of its significant deficiencies and because it does not make clear that the insurance sector should be exempt from the additional burden of data requests.
- **Subsidiarity and proportionality** The proposed right of enforcement by the EC — circumventing national authorities — is problematic and incompatible with the principles of subsidiarity and proportionality. The EC is currently empowered to require data from member states, national supervisory authorities and European supervisory authorities. These powers should be sufficient. The principle of subsidiarity aims to ensure that action at EU level is justified, taking into account the possibilities available at national, regional or local level. Therefore, the EU should not take action unless this is more effective than action taken at national, regional or local level. This has not been shown to be the case for the SMIT.

Similarly, the principle of proportionality requires that any action by the EU should not go beyond what is necessary to achieve the objectives of the Treaties. The SMIT would go far beyond what is necessary.

- **Cost and effort** Insurers are concerned about the potential effort needed to fulfil a SMIT request from the EC, given their significant, existing reporting obligations and daily business operations. This includes the staff time needed to: identify the data requested, make it accessible and make it suitably presentable. A request will inevitably also require legal scrutiny (possibly with external lawyers) to take a decision as to what is or is not confidential (and the reasons therefore) before a response can be provided to the EC. The disproportionality of this is particularly true in respect of a request made for policy development reasons.
- **What are the limitations to a request?** There is uncertainty about the *limitation* to a request. In its Impact Assessment and various presentations of the SMIT proposal, the EC confirms that information can only be used for the reasons requested³. Any limitation on the purpose of a request is, however, not explicitly reflected in the current text of the proposal in Article 5.2, despite its inclusion in Article 8. There is thus unease about the possible use of data provided to the EC. It is also unclear whether the EC could use both justifications in one SMIT request. And there are no limitations on how long the EC can hold the data.
- **Explanatory examples of data are too wide** The type of data that can be requested is extremely wide and therefore disproportionate to the objectives sought. Recital 11 foresees factual market data such as: cost structures, pricing policy, product or service characteristics or geographical distribution of customers and suppliers. The recital goes on to include "fact-based analysis" of the functioning of the internal market, such as perceived regulatory and entry barriers or costs of cross-border operations. SMIT requests could therefore require undertakings or their associations to hand over valuable, and in some instances, extremely expensive and private research analysis, under the threat of severe sanctions for failure to do so. This is all data that may be commercially sensitive and could compromise an insurer's business and competitive advantage if made public. Furthermore, significant data is already available through alternative means, such as publicly available financial accounts, EIOPA thematic reviews and EIOPA's annual Consumer Trends Report.

³ Section 2.4.4 of the EC Impact Assessment

Concerns over sanctions

Summary

The proposal suffers from a mismatch between the *purpose* of a SMIT request and *who* is sanctioned. Moreover, the level of sanctions is disproportionate to the objectives sought.

The primary objective of a SMIT request is to ensure a better functioning single market through more effective application of single market rules⁴. Its purpose therefore is to fill the information gap which the EC asserts it suffers from, and thereby assist it to gather evidence of a member state's failure to properly apply EU law. In addition, the SMIT may also help the EC to propose improvements where evaluation shows that enforcement deficits are due to shortcomings in the relevant sectoral legislation⁵; ie data requested may be used to explore the need for (new) policy development.

Insurance Europe's concerns include:

- **Inappropriateness of imposing sanctions where request is for infringement proceedings against a member state** Imposing sanctions on undertakings and their associations for a failure to supply data is inappropriate, since the target of an EC request is, at its base, member states. Here, the proportionate approach would be for the EC to make a properly reasoned and justified request to an undertaking or association which the addressee may, on a voluntary basis, choose to respond to where possible.
- **Inappropriateness of imposing sanctions where request is for policy development** It is unclear why sanctions should be imposed for a failure to adhere to a request for information that is based on a policy-development motivation. It is wholly disproportionate when there would be no underlying breach of law by the undertaking sanctioned.
- **Sanctions are excessive** The level of sanctions that can be imposed by the EC (fines of up to 1% of total turnover and penalties of up to 5% of the average daily turnover, based on the preceding year) are excessively high, in particular where a request by the EC is justified for policy development.

Concerns over data supplied and its confidentiality

Summary

There are insufficient safeguards to protect the interests of addressees who supply data to the EC.

Insurance Europe is sensitive to the genuine concerns of the EC to ensure that infringement proceedings against member states are properly evidenced, and that the information gap the EC perceives it suffers from is addressed. However, Insurance Europe is not persuaded that requiring undertakings and their associations to provide commercially sensitive information, which may also be confidential under the law of the home state of the addressee, is the most effective or proportionate approach.

Insurance Europe's concerns include:

- **Unclear how an addressee is selected** The EC's decision to select an addressee is unclear. Recital 12 notes that requests should be made where undertakings or associations are "...capable of providing sufficiently relevant information, notably larger undertakings" (see also Article 6). This potentially places larger undertakings and associations as the main targets of a request because of their size, as opposed to their relevance. Moreover, the absence of an appeals procedure against selection as an addressee is regrettable.
- **Unclear what criteria EC uses to confirm confidentiality** How the EC agrees with an addressee's contention of confidentiality (or rejects it) is unclear and unsatisfactory. There is a significant vulnerability in the process for determining if confidential data is indeed confidential, since it is left to the EC's discretion to determine whether such a claim is "well-founded and proportionate" (Article 7.4).

⁴ Section 4.1 of the EC Impact Assessment (Ref: SWD(2017) 216 final)

⁵ Section 4.1 of the EC Impact Assessment (Ref: SWD(2017) 216 final)

Further, it is disappointing that there is no appeals process if the EC were to conclude differently from an undertaking or association.

- **EC's publication of confidential data is unsatisfactory** The EC's ability to publish confidential information in summary or aggregate form is unsatisfactory (under Article 8), as it undermines the commercial sensitivity of data supplied.
- **Absence of appeal against EC decisions** The absence of proper appeals procedures against the EC makes the SMIT proposal inherently biased against the addressees, especially when SMIT requests are introduced alongside significant sanctions for non-adherence to a request. Giving undertakings recourse to the Court of Justice of the EU (CJEU) under Article 6.3 only where a request by the EC follows a formal decision is unsatisfactory. Therefore, the simple request option should be removed from the proposal. Limiting recourse to requests following a formal decision is also counter-intuitive where a request is justified to obtain data in a *timely manner* (under Article 5.2), as the time it takes for a CJEU decision would defeat the justification for the request. The cost, public attention, difficulties of showing legal standing, and time involved in obtaining a judgment means this recourse is unlikely to be taken by SMIT addressees, if at all.
- **Incomprehensibility of Article 7.2** The premise of the obligation to provide copies of any confidential data showing and hiding the confidential sections is poor. Data either is or is not confidential and, in the former case, should not be required to be divulged for the purpose of policy development or to support infringement proceedings against a member state.

Incompatibility of legal bases

Summary

Insurance Europe is concerned that the proposal will cause a change to the balance of competences shared by the EU and member states and that the legal bases for the proposal are incompatible.

The introduction of an instrument like the SMIT would change the competences of the EU and its member states, as set out in the treaties (see Art. 4 TFEU). Despite the EC's reasoning (p.3 of its explanatory memorandum), if the proposal is implemented, it will create new enforcement powers for the EC. We regard the desired extension to the EC's powers — namely the right of access to business data and circumventing the national authorities — as very serious.

Insurance Europe is not persuaded that the legal bases for the SMIT proposal are compatible. The SMIT is based, amongst other things, on Articles 114 and 337 of the TFEU. The former requires the SMIT proposal to be adopted by ordinary legislative procedure, permitting the Parliament the right to participate fully in the exercise of the legislative function and the Council to adopt the proposal by qualified majority. In contrast, Article 337 requires only the approval of the Council by simple majority. Due to the different procedures for adoption, it is our understanding that it is incompatible to base the SMIT proposal on both Articles 114 and 337 of the TFEU⁶.

Insurance Europe is the European insurance and reinsurance federation. Through its 35 member bodies — the national insurance associations — Insurance Europe represents all types of insurance and reinsurance undertakings, eg pan-European companies, monoliners, mutuals and SMEs. Insurance Europe, which is based in Brussels, represents undertakings that account for around 95% of total European premium income. Insurance makes a major contribution to Europe's economic growth and development. European insurers generate premium income of €1 200bn, directly employ 985 000 people and invest nearly €9 900bn in the economy.

⁶ Case [C-300/89](#), paragraphs 17 to 21, and Case [C-178/03](#), paragraph 57