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SWEDISH ENTERPRISE

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## Response to the Consultation on the Single Market Information Tool

The Confederation of Swedish Enterprise is Sweden's largest business federation representing 50 sector organisations and 60 000 member companies with over 1.6 million employees.

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The Confederation of Swedish Enterprise (henceforth Swedish Enterprise) finds that the questionnaire provided for the consultation on the Single Market Information Tool (SMIT) does not give the opportunity to comment on the context in which this proposal sits. Swedish Enterprise has, therefore, chosen to respond to the consultation with this paper instead.


**Summary of points on SMIT**

On the basis of the information about SMIT presented thus far, Swedish Enterprise does not think that the Commission has presented a case to justify the introduction of the tool. As things currently stand, we see fundamental problems related to subsidiarity, proportionality and the freedom of trade. There is also a lack of information about and analysis of the legal basis of the proposed tool. Swedish Enterprise is of the opinion that existing mechanisms and instruments to enforce EU legislation and collect information about the functioning of the Single Market are sufficient if used effectively and systematically. We would, therefore, like to see more emphasis on other initiatives presented in the Single Market Strategy such as better assistance and guidance to Member States in the implementation and enforcement of EU legislation.


Swedish Enterprise supports the European Commission's efforts to revive and modernise the Single Market and to enhance its function. Swedish Enterprise represents many businesses that already engage in, or could engage in, cross-border trade within the EU, and for these, it is especially important that remaining barriers to trade and free movement in the Single Market are removed.

We welcomed the Single Market Strategy's (COM (2015) 550 final) emphasis on improving implementation and enforcement of existing regulation as we are of the opinion that this must be a priority both for the EU institutions and Member States in order to eliminate barriers to free movement.

### Doing business in the Single Market must never be an obligation

Swedish Enterprise strongly believes that the Single Market offers great opportunities for companies that wish to expand their activities across borders in the EU. The emphasis


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needs to remain on "opportunity" however. Engaging in cross-border trade must not become what is expected from business, or even worse an obligation on companies.

Swedish Enterprise is, therefore, worried by the current trend in reasoning from the Commission that fragmentation of the Single Market is to be blamed on companies and that they should be made responsible for solving remaining problems on the market. A recent example of this is the proposal for a regulation on addressing geo-blocking 2016/0152 (COD) with its de facto obligation on traders to sell. Safe-guarding the principles of freedom of trade and freedom of contract are fundamental to a functioning market economy.

Decision-makers involved in determining how to improve the functioning of the Single Market should have their starting-point in the understanding that companies' 'raison d'être' is to sell their goods or services, and to sell at a profit. Companies, therefore, adapt their business strategies to applicable laws and regulations for this purpose. With many barriers to trade and national rules in Member States still fragmenting the market, some companies choose to refrain from cross-border trade. The top priority for the Commission, and Member States at national level, should be to make cross-border trade an attractive option for companies in order to convince them that expanding on the Single Market is worth considering as part of their business strategies.

Instead, companies now stand accused of undermining the Single Market by artificially segmenting it. And in response, the Commission wishes to create a new instrument that it can use to collect extensive information from "selected market players". This is at the core of what we find problematic about the plans to create SMIT.

**Business should not be blamed for an incomplete Single Market**

According to the principles for better law-making, as outlined, for example, in the 2016 Inter-Institutional Agreement, the Commission should, when considering a new legislative initiative, provide information about what problem it wants to address and explain why this is a problem. It should furthermore, explain why actions needs to be taken at EU level and what is to be achieved. The answers to these questions should be based on accurate, objective and complete information and any proposed actions should be proportional.

The Commission claims that businesses rather than Member States are often responsible for artificial segmentation of the Single Market. Swedish Enterprise thinks that the Commission has not provided sufficient information that would support such a sharp accusation directed at the European business community.

In the areas of geo-blocking, cross-border parcel delivery, cross-border insurance, copyright licensing and financial markets, Commission officials need to start considering the complex regulatory realities that companies face when wanting to trade cross-border on the Single Market. This reality is too often so overwhelming, and costly to deal with, that it makes more business sense to refrain from such trade. The European Institutions and Member States rather than businesses are responsible for this situation and are thus also in the best position to remove barriers to trade and ensure a better functioning of the market.

The Commission is the 'guardian of the treaties' and responsible for ensuring that all Member States properly apply EU law. Member States are responsible for implementation and enforcement of EU legislation. They are equally responsible for national regulation being compliant with EU legislation and for refraining from imposing national regulation that cause

market fragmentation. It is well known that Member States do not always live up to this responsibility. There are also differences in how Member States interpret and enforce EU legislation. As long as this continues to be the case, the Single Market will not be complete.

**Insufficient problem definition**

The information available about the Commission's intentions with SMIT in the Single Market Strategy and its accompanying Staff Working Document SWD(2015) 202 final, in the Inception Impact Assessment (IIA) published on 1 August 2016 and in the consultation documents does not explain adequately what the tool will be used for.

According to the IIA, the Commission's policy objective is to a) ensure compliance with EU law related to the Single Market and b) to identify significant regulatory and market failures feeding in the necessary information and evidence for the preparation of proposals for policy interventions.

Swedish Enterprise would like further explanations as to whose compliance with Single Markets laws the Commission is aiming to ensure. **Will the Commission use SMIT to address how companies behave in the Single Market?** Or **will the tool be used to address how the Single Market functions and how well Member States live up to their obligation to implement and enforce single market legislation?** Swedish Enterprise thinks that it is of utmost importance for the Commission to answer these questions and clarify this.

**Legal basis, subsidiarity and proportionality of the proposal**

If the Commission intends to provide itself with a tool to exercise supervisory authority of individual companies' compliance with EU law, beyond the remit of EU competition law, it is of utmost importance that it explains on **what legal basis** this tool can be based since such supervisory authority is exercised at national level. Furthermore, when exercised at national level, such authority is never unconditional or without various legal safeguards.

This also raises concerns about **subsidiarity**. Swedish Enterprise does not think that the subsidiarity check in the IIA provides enough information and analysis of why EU action is needed. It is worrying that arguments that Member States may not be capable of collecting market information and that they "may legally not be able to share the information with the Commission or other Member States for the purpose of addressing flaws in EU legislation" are used to justify intervention at EU level. Highly sensitive information collected from companies for one purpose must be treated with strict confidentiality and cannot be used for any other purpose than that for which it was collected. Also, it should be noted that the "limitations" the Commission refers to in this context are there both for legal and commercial reasons.

Of course, improper business practices do sometimes exist. However, EU competition law already prohibits actions by companies that prevent, restrict or distort competition within the Single Market. If companies create market fragmentation in violation of these EU rules it should, of course, not be tolerated. However, the tools already exist to address such breaches of the rules. And, Swedish Enterprise would strongly oppose the statement by the Commission that the remit of EU competition law is "narrow".

If companies act contrary to EU compliant national rules, the authorities of the Member State in question also already have authority to collect the information necessary to investigate

company behaviour. It is, however, a precondition that there is strong reason to suspect unlawful behaviour for such information to be collected.

Swedish Enterprise thus questions that there is a need for any more tools to collect information from companies at EU or national levels.

If the Commission intends to use SMIT to address how the Single Market functions and how well Member States live up to their obligation to implement and enforce Single Market legislation, it appears entirely **disproportionate** to coerce companies under duty to provide sensitive business information. Options 1 to 4 in the IIA all presuppose that companies would be fined for failure to provide information of for providing complete and accurate information. No evidence is provided, however, that supports why this is considered necessary. Swedish Enterprise strongly questions this flaw in the evidence base for the proposal.

**More efficient use of existing sources of information**
Furthermore, Swedish Enterprise finds it difficult to believe that the numerous sources of information already available to the Commission would be insufficient for identifying remaining barriers to free movement in the Single Market and failure by Member States to implement and enforce Single Market legislation.

***Sector inquiries***
Most importantly, under EU competition law (article 17 of Regulation EC No 1/2003) the Commission has powers to conduct sector inquiries where it believes that competition might not be working as well as it should, even if there is no suspicion of wrong-doing by individual firms.

The focus of sector inquiries tends to be on industry-wide practices that appear to be harming competition, rather than the behaviour of a specific companies. However, the Commission can use sector inquiries to identify whether there are grounds for opening separate investigations under Article 101 and/or 102 TFEU into the conduct of individual market participants. The Commission is also able to consider if, for example, regulatory regimes in the Member States are restricting competition and/or single market integration. Based on the results of the inquiries the Commission can then propose new, or changes to existing, legislation to deal with the identified issues.

With the information currently available regarding SMIT, Swedish Enterprise fails to see how SMIT would not be a duplication of these powers already available to the Commission.

***Other additional sources of information***
In addition, under the heading "baseline scenario" in the IIA, the Commission lists a range of information sources already available for identifying regulatory failures and barriers to trade in the Single Market. These include public consultations, targeted surveys, reports by stakeholders, commissioned studies, voluntary requests for information, ad hoc submissions and complaints and Enterprise Europe Network. We would like to add Eurostat, TRIS, the IMI-system, SOLVIT, the REFIT Programme and the simplification proposals now considered by the Refit Platform and the Lighten-the-load portal to the list. If used efficiently and systematically, surely these sources provide the Commission with enough information to frame future Single Market policy.

The Commission rightly concludes that stakeholders cannot be compelled to participate in Commission-led consultation activities. This is, however, not a valid justification for SMIT or for adding extra reporting obligations on top of those that already exist.

Rather, Swedish Enterprise would encourage the Commission to consider why stakeholders refrain from participating in, for example, public consultations.

Apart from not always being aware that they could participate, doubting that the information provided matters to the policy outcome is a strong reason. And this consultation on SMIT is a case in point. The deadline to submit responses is 7 November 2016. But already when the Work Programme for 2017 was published, it was clear that there will be a legislative proposal on SMIT published in the first quarter of 2017. This, we assume, means that only options 3 and 4 in the IIA are relevant because the important "do nothing" option has already been discarded. Less clear is if the Commission is also still considering doing something related to option 1 and 2. Judging also from the consultation questionnaire it seems that options 3 and 4 are those being considered and why stakeholders are not asked to comment on the merits of going forward with the proposal. In this context we want to point out that option 3 is less bad than options 1 and 2 and especially than option 4. However, this practice does not inspire trust in the consultation process.

Swedish Enterprise is of the opinion that rather than forcing companies to provide information under the threat of sanctions, the Commission should focus on making it worthwhile for companies to share information about market failures on a voluntary basis. But key to this is to show that it makes a difference to put the time and effort into commenting on various proposals and sharing information.

**The cost to business of providing information to government**

Providing information to government, whether at EU or national level, is both costly and time-consuming for companies. Reducing requirements on business to submit information to government is among the top priorities for simplification of regulation and reduction in administrative costs seen from a business perspective. The Commission has received many simplification proposals in this area from the Swedish and European business community. Any additional requirements imposed on companies to provide information should, therefore, be absolutely essential and have a convincing evidence-base. This is especially important if the requirements to provide information are to be obligatory and companies would face sanctions if they fail to submit information according to the Commission's specifications.

In the preliminary assessment of expected impacts it is concluded that "companies targeted by the information requests might face *certain* compliance costs from the obligation to reply to information requests". Swedish Enterprise has strong reason to believe that the costs to targeted companies would be much higher than this. These are resources that could instead be allocated to developing and growing the companies.

For example, the recent e-sector inquiry has been both burdensome and costly for companies who were compelled to respond to it. Members of Swedish Enterprise report that providing the information for the inquiry took several weeks of work, involving numerous staff. Figures from the Swedish Agency for Economic and Regional Growth show that the administrative costs to companies in Sweden of complying with government regulation is around 90 million euro per year (not including financial and investment costs due to regulation).

To consider adding additional administrative costs on business by introducing SMIT must be contrary to the Commission's efforts to keep the burden on business of complying with regulation to a minimum.

In summary, based on information presented so far, Swedish Enterprise does not think that the Commission has presented a case to justify the introduction of SMIT. We would rather see more emphasis on other initiatives presented in the Single Market Strategy such as better assistance and guidance to Member States in the implementation and enforcement of EU legislation.

**Key assurances needed if SMIT is introduced**
If, however, and as we must assume from the information in the Work Programme, the Commission does present a proposal for new legislation in this area, the following are points that must be taken into consideration:

In option 3 in the IIA, the Commission lists four parameters of the market information tool that would be considered and analysed in depth. A fifth and sixth parameter should be added to this list: how the Commission will guarantee the confidentiality of the information collected and how they will guarantee legal certainty for companies.

The Commission proposes to collect a range of detailed and, in some cases, confidential information about targeted companies (market size, geographical distribution of consumers and suppliers, cost structure, profits, pricing policy, volumes, new products, ownership structure or supply contracts, geographic location of headquarters, warehouses and distributors, employment contracts and overall market functioning data, for example, regulatory and entry barriers, costs of cross-border operations, growth rate of the market or overcapacity).

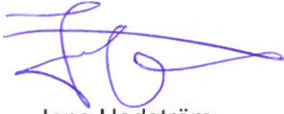
In the IIA, the Commission discusses in a rather worrying way how rules would be created for co-ordination of information requests and for sharing the collected information between Member States. The Commission states that clear rules would be required. We share this view but have strong doubts about how this can be achieved.

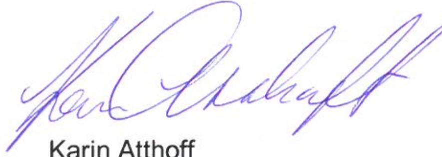
Ensuring confidentiality of sensitive business information is an absolute necessity. The Commission must provide details about how the authority collecting the information will ensure the information is not leaked, stolen or misused in any way.

The Commission must also be able to guarantee that information cannot not be used for any other purpose than that for which it has been collected. Only if the company concerned has given prior consent may the information be used for other purposes. There must be guarantees of predictability for how and when the information will be used.

The Commission states that SMIT can be used on a case-by-case basis and there is no analysis provided of which cases these might be. It is also not clear on which grounds areas that need further investigation will be identified and that will trigger SMIT. This means a lack of legal certainty, predictability and transparency for companies about if and when they may be required to provide information. It is crucial that SMIT should only ever be used as a last resort when it has been concluded that all other information sources are insufficient or inefficient.

Swedish Enterprise is of the opinion that before any decision is made on whether to introduce SMIT, all aspects of its practical functioning and estimated effects on business must be carefully and thoroughly investigated and analysed. Swedish Enterprise will be pleased to contribute in any way we can to this work.





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