Verband der steuerberatenden und wirtschaftsprüfenden Berufe

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German Association of Tax Advisers

Mr Pascal ARIMONT
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Member of the Committee for the Internal Market and Consumer Protection (IMCO)
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Position of the German Association of Tax Advisers (DStV) on the Proposal for a Regulation of the European Parliament and of the Council setting out the conditions and procedure by which the Commission may request undertakings and associations of undertakings to provide information in relation to the internal market and related areas (COM(2017) 257 final)

Dear Mr ARIMONT, MEP,

the German Association of Tax Advisers (DStV) is the representative organisation of the members of the liberal profession of tax advisers in the Federal Republic of Germany. The DStV consists of 16 member associations, within which more than 36,500 tax advisers, auditors, certified accountants or professional companies are voluntarily organised.

The proposal for a Regulation setting out the conditions and procedure by which the Commission may request undertakings and associations of undertakings to provide information in relation to the internal market and related areas (COM(2017) 257 final) seeks to introduce a single market information tool (SMIT).

With the SMIT the EU Commission wishes to strengthen its smart enforcement strategy concerning European law. With smart enforcement of European law the EU Commission seeks to pursue a holistic approach, covering all stages of policy-making from policy design,

implementation, to information and enforcement. The SMIT is intended to contribute to a more consistent and efficient enforcement policy aimed at improving overall compliance with Single Market rules and EU law in general.

Presently, the EU Commission claims that she is regularly not in a position to receive and obtain reliable, complete and useful information to enforce European law. With the SMIT the EU Commission will be empowered to request reliable information directly from market participants or undertakings, such as tax advisers, law firms or professional organisations in order to ensure that the internal markets efficient functioning is maintained. This is presumed to be necessary where the EU Commission is of the opinion that a serious difficulty with the application of Union law risks undermining the attainment of an important Union policy objective

The DStV wishes to use this opportunity to offer his opinion and concerns regarding the Proposal for a Regulation, but also regarding the Draft Report issued within the IMCO-Committee.

General Remarks

Without doubt, German tax advisers and the German Association of Tax Advisers unconditionally support the European idea and the European Union. The internal market is a catalyst for growth and welfare for all Member States. Nevertheless, the DStV is concerned about the introduction of the SMIT, since it is the disadvantages that prevail with its introduction. Especially, the far reaching information rights of the EU Commission vis-à-vis market participants and the resulting increase in workload for private actors must be criticized.

The SMIT significantly invades the sphere of competence of the Member States, and in particular the competence to ensure that EU law is applies effectively within their national law. This results in the doubling of administrative efforts. The DStV wishes to clarify that it is **the Member States only** – with the exception of competition law – that must enforce and ensure the effectiveness of EU law within their legal system.

The DStV finds that the **European Commission does not provide sufficient grounds with her justification** for the proposal, why it is not sufficient to request from and oblige the Member States to provide the required information directly, without having recourse to private actors. It is unclear why existing public control and monitoring rights paired with a permanent Member State – EU Commission dialogue are not sufficient to ensure a smart enforcement policy.

In addition, the DStV warns that the proposal does not comply the principle of proportionality, since, for example, Article 4 of the proposed Regulation contains considerably vague and unclear terms that are not further defined throughout the legal instrument ('important Union policy objective' or a 'serious difficulty with the application of Union law'). With the introduction of the SMIT, moreover, the EU Commission secures itself a significant broad information right vis-à-vis undertakings and associations of undertakings, as a means to investigate into and prove alleged third party infringements against EU law. This includes Member States infringements that would normally be covered under the infringement proceedings (Article 258 and 260 TFEU).

Eventually, the proposal establishes an additional supervisory scheme next to the schemes existing already with the public authoities in the Member States creating a de facto supervisory authority with regard to the national regulatory bodies.

Should the European legislator, despite the substantial setbacks of the SMIT, nevertheless pursue this project on the basis of the current Proposal, substantial improvements are required as set out below.

1. Clear and restrictive scope for the application of the SMIT

Article 4 of the Proposal requires that a serious difficulty with the application of Union law risks undermining the attainment of an important Union policy objective is the only precondition for an information request issued by the Commission. The DStV considers this potential vague and unbridled scope of this power, that a considerable broad information right of the Commission vis-à-vis undertakings and associations of undertakings is introduced.

This reading is justified on the basis that Article 4 does not even require a clear distortion of the internal market. The mere – hypothetical - infringement of a Union policy objective or EU law seems to be sufficient to fulfill the requirements set out in Article 4 of the Proposal.

The DStV criticizes that the terms of 'an important Union policy objective' or a 'serious difficulty' are not defined by the Proposal. Moreover, the scope of the 'internal market', and in particular which areas of the internal market this covers, is unclear. This leads to uncertainty for market participants since no clear rules are set for the application of the SMIT. If the proposal is further

pursued, the DStV strongly advocates for further clarification of the scope of application of the SMIT to reduce the risk of an unbridled use by the EU Commission.

In line with the foregoing, the DStV demands that the information request under the SMIT may only be used vis-a-vis undertakings or associations of undertakings in exceptional cases (ultima ratio). This can only be the case, where the EU Commission has reason to believe that there is an identifiable problem in the internal market, the recognition and verification of which can only be determined through a request for information towards private actors in the internal market. The DStV requires that in such cases the EU Commission is obliged to explain to what extent the information requested is necessary to verify and remedy the distortion of the internal market.

Furthermore, the Regulation must clearly define what kind of information the EU Commission can request from private actors. The examples referred to in recital 11 cannot be considered as providing a conclusive list of types of information the Commission can request. It is also not sufficient for the Commission to lay down the type of information in a decision in accordance with Article 5(2) of the Proposal prior to the request being made. In this case, the Commission remains free to determine – within the decision adopted – any kind of information she seeks relevant for its purposes. This clearly hampers legal certainty.

The use of the SMIT should further be limited to cases where the EU Commission cannot obtain it the information required from public sources, or not in due time or not sufficiently elaborated. The temporal and substantive requirements for requests under the SMIT cannot be within the Commissions discretion.

The DStV recalls that the SMIT can only have a supplementary function. The primary exchange of information must take place between the official authorities of the Member States and the EU. By no means can the introduction of the SMIT cause a general information right vested in the EU Commission vis-a-vis undertakings and associations of undertakings through which the Commission can detect, investigate or verify potential violations and infringements of EU law.

2. Proportionality of the request for information

The DStV is of the opinion that the Proposal does not ensure that a request for information complies with the principle of proportionality appropriately.

Although micro enterprises as defined by Directive 2013/34/EU are excluded from the scope of application of the Proposal, the EU Commission may nevertheless, if it considers it necessary, direct requests for information to small and medium sized undertaking. Although it is stated that the Commission, when issuing to SMEs must obey the principle of proportionality, this is not further specified are bound by legal terms. This categorization is particularly difficult for small and medium sized practices offering legal or tax consultancy. The requirements set out in Directive 2013/34/EU are easily met by independent practices, as a consequence of which they cannot avail the personal scope of the SMIT.

In the case the Commission seeks to pursue the Proposal as initiated, the DStV firmly demands that the application of the principle of proportionality in cases referred to above is clearly defined in the text of the Regulation. This may include an extensive balancing of interests between the internal market objectives on the one hand and the potential burdens a request has on undertakings and associations of undertakings on the other. The balancing must give due account to the workload resulting from a request for information as well as the eventual, and properly calculated costs for the addressees. It is mandatory that this balancing is carried out on a case-by-case basis.

Moreover, the precision, completeness and clarity of the information to be submitted to the Commission pursuant to Article 7(1) of the Proposal must duly reflect the circumstances, nature and capacities of the undertaking or association of undertakings requested.

Beyond, it must be ensured that the Commission does not file similar or double requests for information to undertakings or associations of undertakings to those that are already subject to information obligations under EU law. Liberal professions are for example bound to notify certain professional regulations to the Commission (COM (2016) 821 final), and further regulations are in forthcoming. It must be guaranteed that the Commission does not submit request for information to members of the liberal professions, which are already covered by the notification procedure referred to before.

3. Protection of professional regulations and requirements – specificity of liberal professions

Liberal professions come, by definition within the scope of the free movement of servies as being service providers. They are as such treated as undertakings or associations of undertakings within internal market law.

However, liberal professions *qua* service providers by their very constitution and legal basis must be separated and treated differently from commercial undertakings. The provision of services by members of the liberal professions, in particular legal professions, is strictly personal, direct and subject to a special relationship of trust. The principle of confidentiality and professional secrecy are adamant for the fulfillment of tasks in the best interest of their clients and thereby in the interest of the general public.

The Proposal provides that that members of the liberal professions must provide information to the Commission despite it being subject to the confidentiality requirements. Although this information can be marked das confidential, the information must be supplied to the Commission (Article 7(1) and (2) of the Proposal). For ethical and professional reasons this cannot be accepted and is firmly rejected by the DStV.

The DStV, furthermore, rejects the proposal, that it should be on the Commissions motion alone to declare that marked confidential information does not qualify as such and to determine from which date the information can be disclosed. This would require the members of the liberal profession to have recourse to judicial proceedings against the EU Commission to ensure that they comply with their professional confidentiality and secrecy obligations under national law. This violates professional and constitutional principles within the EU (i.e. Directive 2016/943/EU and Regulation (EU) 2016/679) and must therefore be deleted in its entirety from the text of the Regulation.

The text of the Regulation must be amended in accordance with the remarks above and it must be ensured that the provision of information tot he Commission by private actors is limited by eventual national professional regulations. Since this is a specificty of liberal professions, this remains exceptional. Request made by the Commission under the SMIT cannot, by any means undermine national professional regulations.

Likewise, it is unclear from the point of view of the DStV, if the forwarding of even non-confidential information to the EU or the Member States, is compatible with existing European data protection requirements where the information concerned contains personal data. According to the DStV, it is highy questionable how Article 7(4) of the Proposal is in compliance with the data protection requirements under EU law.

If you should have any further question regarding our views and positions, please, feel free to contact us.

Best regards,

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