

# European Commission Proposes New Powers to Request Confidential Information From Companies and Trade Associations

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Regulatory

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On May 2, 2017, the European Commission published a [legislative proposal](#) for a Regulation on a Single Market Information Tool. If adopted, the proposed Regulation would empower the Commission to request information from companies and trade associations, from a wide variety of industrial, technological and services sectors, if the Commission finds that serious difficulties in applying European Union (“EU”) law may undermine an important Union policy objective. Companies and trade associations failing to provide the requested information would be subject to significant fines.

If adopted, the proposed Regulation would increase the transparency requirements to which companies active on the EU market are already subject. These include the disclosure rules of [Regulation 1049/2001](#) on public access to EU documents, [proactive publication of testing data by EU Agencies](#), and the Court of Justice’s (“CJEU”) [broad interpretation](#) of the concept of information on emissions into the environment that must always be disclosed.

This alert summarizes the key elements and concerns with the Commission’s legislative proposal.

## What information could the European Commission request?

The proposed Regulation would apply in the following areas: the internal market, agriculture, fisheries, transport, environment, and energy. Thus, the Commission’s power to request information may affect a wide range of sectors, such as pharmaceuticals, medical devices, cosmetics, food, chemicals, agriculture, software, online platforms, motor vehicles, electrical engineering, aviation, and energy.

The proposed Regulation does not define what type of information can be requested. Instead, the proposal states that the Commission may request information if: (i) the information already available is not sufficient or adequate to address a “serious difficulty with the application of Union law [that] risks undermining [...] an important Union policy objective;” and (ii) the information requested cannot be obtained in a timely manner because it is not publicly available and a Member State or company has already failed to provide it.

The requested information may also include confidential business information. By way of example, it may consist of factual market data, cost structure, pricing policies, products or

services characteristics (e.g. emissions or energy consumption), or geographical distribution of customers and suppliers (e.g. geo-blocking practices).

Before requesting information from particular companies or trade associations, the Commission would be required to adopt a decision addressed to the Member States concerned that must explain how the information requested is necessary to address a serious difficulty in the application of Union law and why such difficulty risks undermining an important EU policy objective.

### **For what purpose can the Commission request information?**

The proposed Regulation states that the Commission may only use the information collected to address a serious difficulty with the application of Union law that risks undermining an important Union policy objective. This may include using the collected information in infringement procedures against Member States, to assist Member States in their enforcement procedures against companies or trade associations, or as a basis for amendments to, and interpretative guidance of, EU legislation.

The proposed Regulation would apply without prejudice to other enforcement powers of the Commission or EU agencies to gather or request information. Thus, there is the risk that information collected through the proposed Regulation may be used in specific follow-up investigations, such as sector inquiries or dawn raids under EU competition law, or investigations by the European medicines Agency under (EC) No 658/2007 on the infringement of certain obligations in connection with marketing authorizations of medicinal products.

The proposed Regulation establishes the general rule that the information must only be used for the specific purpose for which it was collected. However, the proposal also states that if the information collected has already been made public, the Commission may use it for other purposes. Moreover, the case-law of the CJEU has consistently favored the effective enforcement powers of the Commission and Member States. Thus, there is the risk that the CJEU will only block information from being used for purposes other than for which it was collected if this would irremediably infringe a party's right of defense. This could, of course, be narrowed down through precise wording in the new Regulation.

### **Protection of confidential information?**

The proposed Regulation does not protect confidential commercial information of companies and trade associations in a sufficient manner. While companies and associations would be allowed to indicate what information submitted they consider to be "covered by the obligation of professional secrecy," the Commission would retain the power to refuse keeping certain information confidential.

Moreover, even if the Commission agrees to keep certain information confidential, it may disclose it to third parties or make it public in three cases: (i) in aggregate or anonymized form; (ii) with prior consent; (iii) or where disclosure to a Member State is necessary to substantiate an infringement of EU law. In the latter case, the Regulation does not clarify whether this relates to an infringement by the Member State, or by natural or legal persons.

The proposed Regulation is also unclear on whether the Commission would be required to grant third parties access to the collected information on the basis of [Regulation 1049/2001](#). This may

be particularly relevant with respect to confidential information on emissions into the environment, which the [Aarhus Regulation](#) in most cases requires the Commission to disclose.

### **Enforcement?**

The proposed Regulation states that the Commission may issue a request for information by means of “simple requests” or “decisions.” The main difference between the two types of requests seems to lie in enforcement. The Commission may impose fines of up to one percent of the company’s or trade association’s turnover in the preceding year if they intentionally or through gross negligence supply “incorrect or misleading” information in response to a simple request; or provide “incomplete” information or miss the deadline in response to a request in the form of a Commission decision.

Moreover, the Commission may also impose periodic penalty payments of up to five percent of the average daily turnover of the company or association if the undertaking fails to supply complete, accurate and not misleading information within the deadline prescribed by the Commission’s decision.

The legislative proposal does not clarify how the turnover should be calculated, e.g. global or European turnover.

### **Next Steps**

The European Parliament and Council must now consider the legislative proposal for its adoption through the so-called EU ordinary legislative procedure. This procedure is likely to take at least 18 months and will provide companies and the public with opportunities to influence the text of the Regulation that is finally adopted.

If adopted, the Regulation could apply as of the end of 2018.

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