

## Single Market Emergency Instrument (SMEI)

**Eurochambres welcomes the European Commission's initiative to put in place an instrument that seeks to guarantee the integrity of the Single Market in times of crises and improve the bloc's preparedness against future vulnerabilities. However, the text requires more clarification and precision to guarantee proportionality and legal certainty. EU lawmakers must focus on eliminating unnecessary burdens for companies, especially SMEs.**

### 1. Executive summary

The Covid-19 pandemic and the Russian invasion of Ukraine constituted the most recent challenges to Europe's economy and continue to undermine the functioning of the Single Market and its recovery efforts. Several European-led initiatives have been put in place to mitigate the resulting social and economic impact of these crises and allowed businesses to adapt to long-lasting disruption.

Chambers of commerce and industry support the Commission's efforts to ensure the free movement of people, goods, and services in the last two years and remain committed to enhance the Single Market's resilience against future challenges.

It is important to strengthen the EU with a functional, efficient, effective, and time-limited instrument that allows for a swift response against a variety of

unpredictable shocks, stresses, and disruptions.

The current proposal risks creating legal uncertainty for businesses especially those that are on the front-line during emergency periods, while its added value for the well-functioning of the Single Market remains to be demonstrated. The Commission must not overburden market operators with complex reporting obligations, cumbersome approval procedures nor punitive sanctions.

The chamber network calls on EU lawmakers to be more ambitious and remove unjustified barriers affecting the functioning of the Single Market at all times, as the most appropriate preparation for crisis situations. Institutional leadership and constant engagement with market operators during emergencies are key to restoring trust in the Single Market.

### 2. Summary of Eurochambres' main messages/recommendations

The Covid-19 pandemic threatened the Single Market due to the abrupt closing of borders, slump in the manufacturing and domestic demand, sudden impediments to the free flow of goods and services, the disruption of global value chains and, for a short period, the lack of cohesiveness of European societies. Subsequent initiatives such as the Communication on the implementation of the Green Lanes and the Proposal for a Digital Green Certificate, or the investments made towards rolling out safe and effective vaccines allowed the EU to bounce back.

Chambers asked for a Single Market Emergency Instrument to avoid disproportional intervention in the economy. Thus, SMEI should establish legal provisions that support collaboration between national authorities, companies, and the European Commission to make the mechanism work but without excessive burden in the economy.

However, we see that:

- The crisis response and preparedness framework presented in the proposal for a Single Market Emergency Instrument (SMEI) is, at times, ambiguous and vaguely formulated which could lead to misunderstandings at the implementation stage. The provisions detailing the **information requests to market operators represent a heavy burden due to extensive reporting obligations**. The punitive nature of the sanctions' regime makes the SMEI unbearable for businesses.
- It is important to highlight that the **integrity of the Single Market depends on the correct and timely implementation of EU laws** in Member States. The Commission has tools at its disposal to act against countries that violate the four Single Market freedoms: infringement proceedings. The Commission also has a variety of reporting and notification tools at its disposal such as the TRIS in which urgent procedure could be used in times of crisis in order to support the rectification of disproportionate measures taken at the national level. Consequently, **it is necessary to ensure the coordination of the SMEI with existing EU mechanisms and other national initiatives**.
- Chambers do not agree that the crisis mechanisms should be activated solely through delegated or implementing acts as this may interfere with entrepreneurial freedom. **Crises should not be considered as excuses to bypass common legislative processes involving the Council and the European Parliament**.
- According to the proposal, competent national authorities should take due account of the administrative burden for SMEs and keep it to a minimum. However, this "minimum" is never defined rendering impossible the determination of the scope of obligations or the impact of certain provisions on SMEs. **As the text stands, there is no simplified regime for smaller economic operators, which are generally the first being impacted**.
- It is **vital that the SMEI is coordinated closely with the EU trade policy** to maintain existing supply chains and avoid additional costs for European businesses linked to e.g., tariffs or existing contracts. This aspect is absent from the proposal.
- The proposal also does not reference any European Green Deal initiatives nor the potential bottlenecks that may come together in times of crisis. **It is important to consider that, during emergency periods, long-term sustainability objectives will most likely not be given prioritisation**. Chambers ask for clarification on the interplay between the SMEI and the Carbon Border Adjustment Mechanism, the proposed Sustainable Products Initiative and Corporate Sustainability Due Diligence Directive as well as the planned legislation on raw materials.

- **Remarks on information sharing are also strikingly absent from the proposal.** In 2020, companies were confronted with a lack of timely and reliable information about measures affecting the free movement or public health across the EU. Hence the need for an online tool or a single point of contact that informs in real time about the measures taken across the EU. **The Re-open platform should be considered as the blueprint for future crises** while ensuring that the information available in such platforms is standardised and available in all EU official languages. Companies should also be allowed to subscribe to relevant alert mechanisms allowing information to be targeted to the specific needs of businesses. Such platform should be made available not only on a computer basis but also adapted to mobile phones.
- More specific measures are needed to **ensure the free movement of persons** namely:
  - Facilitating the mobility of cross-border workers during crisis periods, through the use of fast-track passes e.g., the EU Digital COVID Certificate.
  - Harmonising certificates needed for cross-border passing.
  - Extending the mutual recognition principle to crisis-related services in order to ease transport and workers' mobility.

Finally, **certain rules such as certification, harmonisation and even state aid rules need to be relaxed to allow for swifter deployment of supportive measures** by Member States so that companies can be supported e.g., in terms of production conversion. Simplified, flexible and speedier state aid procedures for both 1) a temporary state aid framework which is regularly updated and 2) approval of a national aid scheme under such a framework are highly welcomed as long as the integrity of the single market and the level playing field are guaranteed.

### **3. Additional recommendation on specific aspects in order to make the proposal more streamlined and fit for purpose.**

#### **3.1 Definitions (Article 3)**

One of the biggest challenges of the proposal is that the definitions provided in the text are too vague:

- It is essential to include the definitions of economic operators and institutions that are to be covered by the scope of this Regulation.
- Chambers believe that “crisis” is too vaguely defined and may create legal uncertainty for national authorities and businesses.
  - We may consider serious crises not to be completely unexpected e.g., European energy crisis following the application of EU sanctions due to the Russian aggression against Ukraine. The definition should also encompass likely certain and important events with a chain reaction potential.
  - Furthermore, it is important to highlight the impact such crisis may have (or not) in the Single Market. An upheaval outside of the Union with minimal or no disturbance for Member States should not be considered as a crisis in the context of the SMEI.
- Article 3(3) defines a “single market emergency” as a wide-ranging impact of a crisis based on either 1) the disruption of the free movement on the Single Market or 2) the functioning of indispensable supply chains. Questions arise on whether

these two elements should be cumulative or potentially extended by others. Finally, the term “wide-ranging” is not very precise and risks being interpreted differently by those affected, which will result in more legal uncertainty.

- Articles 3(5) and 3(6) only describe respectively the terms “goods and services” and “crisis-relevant goods and services” in very general terms. As the SMEI should not be applied in areas for which crisis-relevant regulations are already in place, the definition of article 3(6) should be clarified by also anticipating the effect on upcoming legislation e.g., the EU Critical Raw Materials Act. Based upon the criteria that emerge, the industry can evaluate which value chains are affected.

### 3.2 Advisory group (Article 4)

Eurochambres believes that the Commission must consider existing crisis-management capacities to cope with complex, unpredictable events that characterise modern crises. Involving market operators in the decision-making process is fundamental to ensure an effective emergency response.

Important stakeholders such as European business representatives should be given a greater say. As such, they should be considered as full members of the advisory group given the far-reaching impact that the instrument will have on the economy and the opinions, recommendations and reports produced in this context should be seen as indispensable. The Regulation should allow for the identification of European business representatives at the EU level and for national business representatives at the Member State level.

### 3.3 Training and simulation (Article 7)

Training should also be available to economic operators and European/national business representatives on a voluntary basis. However, companies should not be obliged to hand over real information during eventual simulation exercises undertaken by the central liaison offices. Sensitive information should not be disclosed under no circumstances.

### 3.4 Ad hoc alerts for early warning (Article 8)

The Central Liaison Office of a Member States must consider the alerts brought by economic operators or stakeholder organisations to avoid potential disruption of the functioning of the single market.

### 3.5 Activation criteria of the different mechanisms (Articles 9 – 11, 13 – 15)

Existing and emerging crises call for new and innovative crisis management responses with concrete mechanisms and timeframe. SMEI activation must be considered as an outstanding process, but the vagueness of the definitions allows the Commission to resort to it whenever a challenge looms. This creates considerable legal uncertainty for the business sector.

There is a lack of clear formulations on the criteria for triggering and deactivating individual mechanisms. The SMEI should act as a last resort in crisis resolution in order to avoid the Commission assuming overwhelming powers and interfering with the free functioning of the market.

The extension of the vigilance mode highlighted in Article 10 should not be a unilateral decision of the European Commission. The extension should have the agreement at least between the Commission and the Advisory Group. The impact assessment of the potential impact of a crisis should integrate a framework of indicators. This performance framework should identify the following elements:

- State of play (reference point)
- Estimation of developments if no action is taken (potential scenario without measures)
- Reference value below which the alert disappears.

Article 11(3) and the obligation for Member States to “set up and maintain an inventory of the most relevant economic operators” in the vigilance mode will cause unnecessary turmoil in the business ecosystem besides threatening the viability of individual companies considered to be less relevant to the market, which often end up being SMEs. This provision also raises competition questions in regard to state aid eventually provided to these actors thus Eurochambres recommends the deletion from the Regulation.

Article 15 (1) wording is also inadequate because it seems to suggest the extension of the emergency mode potentially *ad aeternum*. EU lawmakers must focus their efforts on mitigating impacts during the crisis and limiting the emergency period to its shortest timespan.

Article 15 (2) provides for the deactivation of the emergency mode based on an opinion issued by the advisory group and a decision of the Commission to propose to the Council to deactivate the emergency mode. This provision is susceptible to create blocking situations (e.g., in the absence of opinion from the advisory group or in the case of disagreements of the Commission with the advisory group’s opinion, among others), risking that emergency mode extends beyond the maximum period of 6 months. The emergency mode must not in any case last longer than necessary to respond to the crisis. Therefore, Eurochambres suggests establishing an automatic deactivation of the emergency mode at the expiry of the 6-month period, unless an extension or an early deactivation is decided as per the procedure set by Article 15 (1) and (2).

### **3.6 Strategic reserves and its coordinated distribution (Articles 12 and 32)**

Article 12 defines how the European Commission wants Member States to build up “strategic reserves” of certain critical goods and services. In such case, it is necessary to stipulate that Member States have this obligation and should envisage the creation of reserves ahead of time, especially when it comes to energy, water supply or global public goods e.g., vaccines. This measure must not translate into heavy public sector interventions in the private sector. Hence, this responsibility must not be transferred to the private sector nor companies’ stocks or production capacity should be used by Member States when the emergency regime is activated during a crisis. Companies should not be obliged to prioritise the production of certain goods and services over others. However, the EU should not preclude companies from stockpiling reserves of any goods considered to be critical for their business.

Companies have shown the capacity to self-organise and reorient their production to meet the needs of essential products in high demand therefore recommendations to companies to ramp up production are sufficient.

Furthermore, companies can be encouraged by Member States to make the necessary investments or to reorganise their productive capacity. Member States could also introduce favourable frameworks by changing certain elements that affect production and stockpiling (e.g., derogation from the rules on working hours, overtime free of tax and social charges, etc.).

### **3.7 Measures restricting free movement (Article 16)**

Article 16 provides for Member States the possibility to adopt national measures restricting free movement in response to a Single Market emergency and that “any restriction should take into account the situation of border regions”. In this respect, Eurochambres considers that this provision does not protect the rights of citizens and businesses located in border regions and opens the door to restricting the free movement of persons, goods, and services in critical times.

Furthermore, Member States are allowed to introduce restrictions subject to the conditions that the restrictions be limited in time and be removed as soon as the situation allows it. Not only these conditions are vague, but they may also lead to unpracticable situations at the grassroots level. For instance, a given Member State may find itself in a situation where it will have to manage different measures depending on the decisions and the policy of the neighbouring Member States (e.g., an employer established in a border state might be led to manage different statuses of cross-border employees depending on the country they reside, and the measures taken in their country). This is not only a source of legal uncertainty, but also created organisational, administrative, and logistic burden that may be detrimental to the continuity of the activity in times of crisis.

Therefore, restrictions in border regions should not be allowed, especially in times of emergency.

### **3.8 Information requests to economic operators (Article 24)**

Chambers believe that the design of a mandatory, multi-level information system for both Member States and economic operators which entails serious reporting burdens, administrative bottlenecks and red tape ultimately results in further financial complications during a crisis period.

In view of the preservation of entrepreneurial freedom as well as the protection of trade secrets, the information requested must be reasonable, subjected to the most stringent data protection requirements, and provided exclusively under a voluntary basis across all Member States. This will eliminate fragmentation in the Single Market.

### **3.9 Priority rated orders (Article 27)**

While the proportionality of this measure remains to be justified further in case the Commission requires companies to accept priority rated orders of crisis-relevant goods, it is essential to have clear criteria that justify such an overriding interference with economic freedom. Other important considerations:

- The prioritisation of orders should also be based on information collected by and discussed with the advisory group.
- The 10-day notification given to companies for explaining why they declined to prioritise the orders is extremely short especially for SMEs. The notification

deadline should be increased to at least 30 days.

- The so-called “fair price” is mentioned in the proposal but in the case of priority rated orders, it is necessary to calculate a price that covers any outstanding costs. It is advisable to lay down thresholds for the quantification of the “fair price”, both minimum and maximum. The “fair price” should also at least consider direct, indirect costs and market price.
- The compensation of companies should always be envisaged especially when facing dramatic changes in the production lines, the cancellation of existing contractual obligations or framework contracts which may result in damages or penalties for non-compliance, and the potential loss of business partners.

### **3.10 Fines to operators (Article 28)**

Eurochambres fundamentally disagree with any punishment of companies in the form of sanctions especially during a crisis. Businesses are critical elements in crisis-solving situations so Member States should engage cooperatively and allow them to do the necessary changes in their supply chains and production lines.

### **3.11 Measures to ensure the availability and supply of crisis-relevant goods and services (Article 33)**

Article 33(1) gives the possibility to the Commission to recommend Member States to swiftly implement measures that affect the reorganisation of supply chains and production lines and to redirect existing stocks to increase the availability of crisis-related goods and services.

Chambers consider that such recommendations should only apply in the cases of state-owned companies and never in the case of private companies. The potential costs in the change in production and contractual damages to the original product purchasers or the original production input suppliers should be considered as additional reasons for avoiding economic interventionism.

### **3.12 Procurement and related provisions (Articles 34 – 39)**

Businesses believe that a recommendation on bundled or joint purchasing at EU level can increase the Commission’s negotiating power of important products. Clarity and legal certainty are needed during a crisis as to how public procurement law is to be interpreted in times of crisis.



Eurochambres, the Association of European Chambers of Commerce and Industry represents over 20 million businesses in Europe through 45 members (43 national associations of chambers of commerce and industry and two transnational chamber organisations) and a European network of 1700 regional and local chambers. More than 93% of these businesses are small and medium sized enterprises (SMEs).

More info and previous positions on: <https://bit.ly/ECHPositions>

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