

Safeguarding the Single Market freedoms during times of crisis

Key recommendations for European Parliament, Council and Commission

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| <u>1</u> | The SMEI should ensure that Member States refrain from adopting unjustified and disproportionate measures during times of crisis . The tool should ensure that the Single Market continues to function in times of crisis. |
| <u>2</u> | The scope should be narrowed down . All additional burdens on economic operators should be removed from the proposal: information requests, stockpiling and priority rated orders. Economic operators should not be overburdened when they are already trying to navigate through a crisis. Information requests to economic operators should remain exclusively voluntary. |
| <u>3</u> | The proposal should provide predictability for economic operators subject to temporary national measures and restrictions . Single Points of Contact may not be sufficient as existing ones structurally underperform. The SMEI should ensure that all crisis-related measures are <i>timely, well-coordinated</i> and <i>communicated</i> at EU level to all relevant stakeholders. Additionally, administrative cooperation and transparency among Member States should be strengthened. |
| <u>4</u> | Business representatives should be part of the Advisory Group . In parallel, this group should have real powers in the SMEI governance (like in the activation of Single Market vigilance and emergency modes). The group should ensure compliance with competition law and respect business and trade secrets. |
| <u>5</u> | The proposal needs further clarification and predictability e.g., what is a ‘Single Market disruption’ or what is the definition of a ‘crisis’ . |
| <u>6</u> | Alternatively, the Commission should focus on the better use and improvement of existing tools to enforce EU law , before proposing new tools. |
| <u>7</u> | The Commission should have not only the power to scrutinise and question crisis-related measures, but also the power to remove them when these are disproportionate or unjustified. Therefore, Member states should notify all crisis-related measures. All temporary measures should have a clear expiration date. This could be linked to the removal of the Single Market Emergency mode. |
| <u>8</u> | It should be ensured that the SMEI does not fragment EU law . Certain provisions may give a legal basis for Member States to introduce crisis-related measures that may fragment the Single Market. Additionally, the same situation applies for the acceptance of conformity assessments based on national standards. |

Introduction

In our view, the SMEI should ensure:

- a coordinated and coherent approach during times of crisis, that focuses on safeguarding the free movement of goods, services, people and capital in the Single Market;
- crisis-related measures are transparent, proportionate, non-discriminatory and consistent with EU law;
- no new obligations are introduced on businesses when they are already struggling themselves to cope with a crisis;
- support to consumers and businesses.

Retail and wholesale have an essential role in our society. It ensures consumers and businesses have access to the products and services they need. In the last years, our sector has been very active on tackling four relevant crises: the Covid-19 pandemic, the Russian invasion of Ukraine, the inflationary pressures and the energy prices and supply crisis. During the COVID pandemic food retail was considered an essential service to consumers across the EU. However, European retailers and wholesalers have been struggling to cope with a highly fragmented approach by Member States and regions. For example, during Covid public measures varied significantly, changed frequently and often made it more difficult than necessary for our members to continue their operations. Also, it was often not clear what the rules were, how they should be applied and whether they were up to date.

The focus of the SMEI should be on safeguarding the four Single Market freedoms during times of crisis and avoiding any additional burden on companies when they are already navigating through a crisis. It should prevent Member States from restricting the four freedoms of movement, tackle restrictions when they're already in place, put a clear end to temporary crisis-related measures and promote coordination of Member States to safeguard the Single Market freedoms.

Need of clear definitions

The **definition of 'crisis' is broad and unclear**, as well as the crisis-related measures that Member States are allowed to enact. This gives leeway to Member States to circumvent their provisions or even find a legal basis to come up with protectionist or disproportionate measures.

There is no definition or clarification for "significant impact on the Single Market", under which may apply measures set down in the proposal as indicated in article 2 (1). There is also no definition of "significant incidents", which is used in, for example, Article 4, point 4(b) and Article 8, point 1. The term should be clearly defined.

Article 3(3) says that a **Single Market emergency** means *"a wide-ranging impact of a crisis on the Single Market that severely disrupts the free movement on the Single Market or the functioning of the supply chains that are indispensable in the maintenance of vital societal or economic activities in the Single Market."* It is unclear what wide-ranging impact means, what would be a severe disruption, it is unclear how many Member States should be affected before a situation would be defined as a Single Market emergency, etc. **Further clarification is needed** to avoid situations where a non-Single Market emergency is identified as such and leads to unnecessary measures.

Need of transparency in times of crisis

EuroCommerce supports Arts 21 and 22 establishing Single Points of Contact at Member State and Union level for assistance to citizens, consumers, economic operators, workers and their representatives. This in conjunction with Art 16, paragraphs 4 and 5 that obliges Member States to inform citizens, consumers, businesses, workers and their representatives about measures that affect their free movement rights.

EuroCommerce supports the idea of establishing a Single Point of Contact for businesses. However, they should be able to function effectively and efficiently and perform their tasks. According to the European Parliament study on ['The role of Points of Single Contact and other information services in the Single Market'](#) from October 2020, as well as the Single Digital Gateway impact assessment, Single Points of Contact are underperforming. Especially, due to the lack of online information; poor quality of information and assistance services; lack of availability of online procedures (especially for non-

national users); poor awareness of their existence and accessibility for foreign users; and a lack of overview of their general performance. The SMEI Single Point of Contact should take into account the conclusions and recommendations from this study.

The SMEI Single Point of Contact should ensure that all measures during a crisis are **timely, well-coordinated** and **communicated** at EU level to all relevant stakeholders. The role of this body should not be passive. It should actively communicate all economic operators of any new measure introduced that may have an impact on them. This would help companies to navigate through a rapidly changing and fragmented regulatory landscape. The body should also inform about regional and local measures.

For example, during Covid there were many restrictions on shops opening hours, the number of customers allowed into a shop, movement of workers and citizens and closing of borders. These undermined operations of retail stores that were deemed essential. Employees could not get to the store or distribution centre and products could not be distributed to stores. More transparency, clearer rules and timely information would have helped.

Notification of crisis measures

EuroCommerce supports Article 19 on notifications. We believe that **the Commission should have the opportunity to assess whether temporary crisis measures are proportionate, non-discriminatory and consistent with EU law**. However, the Commission should ensure that Member States notify temporary measures via this tool.

Sometimes Member States introduced temporary measures that were infringing EU law and favouring certain business models e.g. obligations to offer local products and measures only applying to big or small stores. It's important that these **temporary measures are all notified** and that the Commission has the power to take a decision requiring the Member State to abolish a measure under the SMEI, to refrain from adoption and to ensure EU law is respected and the Single Market freedoms are safeguarded. If a Member State fails to notify a measure or draft measure, the Commission should also be entitled to alert the notifying Member State and ultimately abolish such measure. This power is now not foreseen under the procedure in Directive (EU) 2015/1535, but it would be an essential requirement considering the temporary nature of the measures. Alternatively, the Commission could only open an infringement procedure which could take years, and this would not make sense under the SMEI. The Commission needs to be able to act immediately when necessary.

All crisis-related measures should be temporary, and their **time of application clearly defined** (e.g., 6 months). We propose that when the SMEI emergency mode is removed, all related temporary measures taken by Member States at national and regional level should be removed as well. This will provide legal certainty to businesses and consumers. Or a concrete end date should be included in the temporary crisis-related measure. In certain countries there are 'temporary' measures that have been prolonged unnecessarily and which restricted the Single Market freedoms and were a burden for businesses. We have seen in several cases that businesses operating cross-border were targeted by these measures, which gave the impression these were actually protectionist measures.

No new obligations on businesses during times of crisis

EuroCommerce is concerned about Art. 24 on **'information requests to economic operators'**. We fully **support voluntary exchange of information with public bodies**, Member States and the Commission. This is also what EuroCommerce and its members have done during different crises. However, we do not support any mandatory data sharing requirements on businesses that are already struggling themselves to cope with a crisis. Mandatory information requests may infringe trade secrets and other sensitive business information. While a 'comply or explain' principle applies with regard to information requests, the Commission has the power to reject a company's objection. In this light, it should be emphasised that 75% of the stakeholders consulted by the Commission in the public consultation are in favour of sharing information only on a voluntary basis.

During the pandemic, the retail and wholesale sector and others, showed that businesses are willing to step up and share information. This needs to be on a voluntary basis, otherwise, it will be too burdensome for companies during a crisis. It is important that information request are clearly defined to avoid confusion.

Similar concerns apply to stockpiling obligations and prioritization of orders for economic operators in Art. 25 and 27. Businesses are also affected by a crisis and it is in their interest to help public authorities to tackle a crisis. For example, it is unclear who finances the strategic reserves and how stocks are distributed in the event of a crisis. Moreover, mandatory stockpiling may lead to higher prices and market disruptions, consequently hampering the availability of strategic goods. On the other hand, it is not unthinkable that an extraordinary crisis may require extraordinary measures. While the rationale behind strategic reserves merits further exploration, the provisions in the current proposal are not fit for purpose.

It is undesirable that companies can be forced to prioritise certain orders. Only 31.25% of the stakeholders consulted believe that mandatory priority orders are an efficient means of tackling shortages of strategic goods. This does not provide sufficient grounds to restrict the right to property, as enshrined in Article 17 of the EU Charter of Fundamental Rights, to such an extent. In addition, the proposal sends the wrong signal to trading partners by affecting the reliability of European operators. Companies may also face high damage claims in third countries if they fail to honour their contractual commitments with customers outside the EU. It would be difficult for companies to plan out and prepare for the needed production or delivery capacity which may exist but it takes time to put into operation.

We are also sceptical about mandatory data sharing for Member States, since this can lead to cascading obligations when Member States introduce the same requirements on economic operators, but at national level.

An inclusive advisory group with real responsibilities

EuroCommerce believes that it would be beneficial for the functioning of the Advisory Group to add all relevant stakeholders to mitigate the impact of a crisis. This could serve as a platform for exchange and discussion of expertise and best practices. Representatives of civil society and businesses play an important role in mitigating the impact of crises. Their expertise, network and insights are of great added value. In parallel, the Advisory Group with businesses representation should have more powers in the governance of the Single Market Emergency Instrument. Especially in the activation of Single Market Vigilance and Emergency modes.

Obviously, where necessary, appropriate measures should be taken to respect trade secrets and competition law.

Use existing Single Market governance tools

The EU should avoid creating new Single Market governance instruments and bodies, but focus on improving existing instruments instead. For example, Article 19 refers to an existing procedure in Directive (EU) 2015/1535. We support this procedure but we know, as the Commission confirmed in its [latest report](#), that the system is underused. From our experience, we see that more and more Member States knowingly do not notify measures to avoid scrutiny. There is also a notification procedure in the Services Directive (Art. 15(7)) which does not function well, and where the Commission made a proposal for improvement in 2016 which was withdrawn.

In case of infringements, we see that cases are delayed or are subject to political bickering. The Commission could and should act faster where possible and make the internal process more automatic and transparent. Or perhaps introduce under certain conditions suspension injunction powers in case of clear breaches of internal market rules.

Scope and time limitation

EuroCommerce supports Art. 17 on 'Prohibited restrictions of free movement rights during a Single Market emergency'. This is key to safeguarding the Single Market freedoms during crises. However, paragraphs 2 and 3 may give legal basis for Member States to actually introduce those restrictions. These paragraphs allow Member States to introduce restrictions when these are related to the 'nature of the crisis/Single Market emergency'. In combination with, the in our view, already too vague definition of a Single Market emergency, this could potentially lead to abuse of the SMEI. We suggest removing this.

Ensure proportionality of product law amendments during a Single Market emergency and avoid fragmentation

The acceptance of conformity assessment based on national standards when the product is not harmonized will lead to fragmentation of the Single Market. In this regard, this should be removed from the legal text.

Within Article 15 'Extension and deactivation' paragraph 3, which is activated in an emergency referring to Article 24-33, the Commission is entitled to amend sectoral product legislation. This is critical because companies rely on clear sectoral legislation and they invest a lot of time and resources in compliance, which may include when necessary long transition periods to implement the new rules. Therefore it is important to assess the impact of possible crisis-related amendments to ensure these are feasible and proportionate for businesses, including mandatory information requirements, forced production and any necessary investments to comply with the amended legislation.

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