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## **Single Market Emergency Instrument (SMEI): input supporting BusinessEurope's response to a public consultation**

*With this non-paper BusinessEurope shares some general comments in support of its response to the public consultation questionnaire on the upcoming Single Market Emergency Instrument initiative, as well as the Covid19 crisis-based experiences and suggestions of its members which had been informally presented to the European Commission before.*

*BusinessEurope supports the European Commission's ambition to secure the Single Market freedoms in times of a crisis, in order to prevent disruptions of the kind witnessed during the Covid19 pandemic. The EU will meet new challenges and next crisis may well be of a different nature than the health-related one. Crisis mitigation measures should be readily available – within a limited scope and under strict criteria – and swiftly applied, which requires a clear legal framework at EU level. The public consultation questionnaire sheds some light on the discussions within the Commission held so far and triggers the following remarks.*

### **1. THE SCOPE**

The scope of SMEI should be narrow and ensure a targeted, effective and enforceable legal framework that *protects the freedoms of the Single Market in any emergency situation, controls national and European anti-crisis measures to meet the basic principles of necessity, proportionality and non-discrimination, and ensures real-time administrative cooperation and access to information for businesses and citizens.*

SMEI should not mix in the objectives or measures of the general industrial, Single Market or trade policies, neither it should be seen as means for further Single Market integration; the latter objective should be vigorously pursued by the Commission through other instruments.

With this in mind, *BusinessEurope does not support the extended scope to cover strategic dependencies of the EU economy.*

SMEI should provide a *crisis-response* framework, under strict and exhaustive list of criteria, for the measures limited in time, in order to prevent that they become permanent.



A transparent procedure of possible prolongation of measures and their ultimate termination should be spelled out. Keeping the “lifelines” open within the European economy can succeed if SMEI follows the underlying logic of business value chains being pan-European and international.

It is therefore crucial to have a *clearly defined harmonised definition of a crisis, which could not be subject to different interpretations.*

## **2. THE CRISIS PREPAREDNESS AND THE CRISIS MANAGEMENT PILLAR**

The structure of the public consultation questionnaire suggests the crisis preparedness and crisis management (response) parts as possible pillars of the future initiative. The questions under both “pillars” address the modalities of heavy public sector interventions, at the same time potentially putting lots of responsibilities on private operators which are under extreme conditions in times of a crisis already.

While we acknowledge that in order to address a crisis or emergency swiftly, one must be well equipped in legal, financial and administrative terms, an intrusive mandatory *ex-ante* market monitoring for “something that may or may not happen under certain conditions which may change beyond our control” fails to meet the proportionality and necessity principles. The same goes for some of the possible measures to mitigate a crisis.

Therefore, *BusinessEurope strongly rejects the ideas of mandatory obligations on businesses to disclose commercially sensitive information (to serve targeted monitoring of identified strategic supply chains) under the crisis preparedness pillar ex-ante, or the extreme “last resort” measures at EU level such as mandatory revamping of business models/production/services.* Moreover, the referenced information disclosures might also become accessible to competing parties from other parts of the world. Last but not least, such a monitoring would be too costly as it requires dedicated resources from the Commission and Member States on a permanent basis.

Assessment of risks by the public sector, however, could be useful on the basis of existing best national practices which are tailored to Member State specificities, and a voluntary dialogue with stakeholders could be foreseen. SMEI should primarily ensure administrative cooperation, strong coordination and exchange of information between the European Commission and Member States.

The questionnaire also addresses public procurement in crisis times. Some additional guidance and professional training regarding joint action in emergency cases in public



procurement as well as regarding the use of the exemptions of the directives on public procurement for emergency cases are necessary.

However, BusinessEurope underlines that the rules on public procurement already contain emergency provisions, allowing for a very far-reaching flexibility in cases of emergency. Accordingly, the aforementioned EU directives offer several options allowing for very rapid procurement in cases of emergency, e.g. by way of the so-called negotiated procedure without prior competition. As a consequence, *the rules of public procurement should not be modified.*

### **3. LESSONS OF COVID19 CRISIS – a reminder**

#### **I. Businesses most affected by the Covid19 crisis**

All industries have suffered in one way or another during the crisis and the impacts across the variety of sectors should not be underestimated. However, it can be noted that most often the transport and logistics, automotive sector, tourism and HORECA are quoted amongst those hit the hardest. Lack of supply of critical products and components, such as reagents or Single Use Systems as an example, had a strong impact on industry. Equipment and other rental, cleaning, advertising, recreational incl. sports and culture services are also referred to by our members. These references support and supplement BusinessEurope's reports of the Single Market disruptions which we shared in 2020.

Some estimated the 2020 revenue losses mostly at a range between 40-60%. Air passenger drop reached up to 90%. The German airports *alone* had around 3.2 bn EUR loss in 2020-2021.

Some comparisons of dynamics with the workers in short-term work schemes are available from Germany, on the basis of the latest consolidated data:

- in August 2021, more than half of the workers in short-term work schemes are based in three sectors: 236 000 in manufacturing industry, 107 000 in retail, 101 000 in HORECA. For comparison, in May 2020 there were 2 million short-term workers in manufacturing industry, 840 000 in retail, 635 000 in HORECA.

- the supply shortage has now shifted the focus to manufacturing industry, e.g. automotive industry and metal products (17 000 and 12 000 short-term workers in November 2021). With the increasing Covid19 incidence rates and related restrictions, HORECA continues to be affected (15 000 short-term workers in October 2021).

Some of our members point to the fact that the company survival rates in 2020 significantly depended on the government interventions (over 10% of the hardest-hit



companies). Apart from direct financial interventions, additional guarantee schemes or the expansion of existing ones helped businesses and most notably SMEs, however indebtedness levels of the latter have most often and significantly increased too. It poses new tensions in terms of capital attraction and challenges the digital and green transition further.

## **II. EU safeguards, applicable still before the crisis or urgently introduced as emergency measures, which worked well to protect business cross-border operations**

Companies report the following positive interventions at EU level, with an underlying message that the measures based on the existing Single Market law allowed for a rather swift application:

- The introduction on 23 March 2020 of the so-called “green lanes” alleviated many costly bottlenecks related to intra-EU flow of especially goods but also services (some shortcomings mentioned below).
- A relatively swift adoption of the common EU Digital COVID Certificate helped to restore the mobility within the Single Market for cross-border service providers and business travellers. The technical assistance provided by the EU has also helped to ensure a more uniform implementation. We recommend the Commission to evaluate the lessons learnt in order to avoid remaining deficiencies (see further below) and be able to use it as a blueprint in the future.
- Though problems of mobility persisted, the coordinated guidelines for travel restrictions adopted by the Council on 13 October 2020 was a positive step to increase transparency and predictability of travel restrictions within the Single Market.
- Having the subsidiarity aspect in mind, the EU guidelines and recommendations including the Council recommendations on the entry from third countries into the EU played an important role in establishing the necessary cooperation between Member States. They provided first examples for possible bilateral solutions and many helpful instruments were taken on a bilateral basis between Member States (e. g. exemptions to social security and tax rules of cross-border workers). However, given the legally non-binding nature of the EU guiding documents, those instruments were not always respected by the Member States across the board.
- Temporary relaxation of rules under the Community Airport Slots Regulation proved to be very helpful, though decisions could have been made sooner.



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- Derogations of certain rules in the medical devices sector and accelerated certification of critical medical products and devices allowed for continuity of supply that could meet a spike in demand. In addition, the European Medicines Agency's extension of Good Manufacturing Practices (GMP) and Good Distribution Practices (GDP) certificates was a helpful step.
- The EU Council's Integrated Political Crisis Response (IPCR) mechanism is also an effective tool to coordinate the political response to major cross sectoral and complex crises.
- The temporary framework for state aid has allowed Member States to support the economy in the context of the Covid 19 pandemic. This has been proven to be essential for many businesses in Europe though certain improvements could still be made.
- Activities of the EU (notably, the Commission) to ensure the access to vaccinations in support of the public health are important to prevent the return of restrictive measures on the economic activity. This may serve as a learning step to consider a strong EU action in addressing any critical supplies challenge in the future.

### **III. Regulatory areas/laws/administrative rules where the EU level intervention could have helped, but there was no action in that regard**

- Overall, access to timely (real-time), comprehensive and clearly structured information has been a huge problem. The Commission could establish some kind of a matrix combining i) relevant crisis criteria, ii) indispensable information/data sets for differentiated users, and iii) standardized interface for information access throughout the EU, some of which could be adapted depending on the type of a crisis.
- Free movement of workers in general and free movement of service providers in particular were heavily impacted by the crisis and missing solutions. Varying degrees of difficulties across Member States were related to the social security contribution for service providers who were "stuck" in another Member State. Some Member States waved their regular rules that required companies to pay social security contributions to the host Member State, however there was no EU coordination or common approach, leading to uncertainty regarding potential extra social security expenses for many companies who were already in financial difficulties. While many restrictions have been lifted, there continue to be COVID-related barriers to free movement. These relate to inconsistencies between Member States' approaches, such as concerns the length of validity of recovery certificates, which can discourage mobility.



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- Severe travel restrictions across the world led to seafarers being stranded on board, some for more than 18 months. This situation is much related to the issues beyond the EU however directly affecting the Single Market and should therefore be a part of SMEI.
- The earlier application of the Regulation on Electronic Freight Transport Information (eFTI Regulation 2020/1056) would have helped (NB: application foreseen as of 2024).
- During the second and third Covid19 wave, when the vaccination was not yet accessible, the ECDC common European map was very helpful in identifying high-risk countries within the EU. However, in the later stages the map was no longer updated to the necessary detail and therefore lost its relevance.
- The website <https://reopen.europa.eu/en> provided useful information on the applicable procedures, i.e. information related to filing in the Passenger Locator Form and the relevant requirements, i.e. presenting EU Covid Pass or negative test result. But the fact that Member States have introduced different requirements/forms to the same objective - tracing down travels – has been very confusing.

#### **IV. Regulatory areas/laws/administrative rules where the Commission intervened but they failed to produce a desired result (mitigation of the crisis impact was insignificant or not felt at all)**

- While we acknowledge the effort to coordinate Member States' restrictions, the Commission guidelines have not produced desired effects with regard to quarantine application, especially harming the provision of services in critical occupations. A more robust framework would be a benefit of the upcoming SMEI.
- While in general the European Commission was quick to arrange for some short-term flexibility regarding the EU state aid rules in relation to government compensation schemes for the hardest-hit companies and sectors, in practice there were issues with the authorization of certain emergency state aid. As example, the Commission's demand for the schemes be authorized as "temporary framework" for state aid led to limitations by a support ceiling per company in the period covered by the scheme.
- At the pandemic outbreak start, the Commission's efforts to resolve the lack of face masks and some Member States' restrictions on export of face masks were in vain. Additional peer pressure was necessary but it cost precious time.
- In some cases a number of Member States, including Germany, only 11 days after the adoption of the first revision of the Council recommendation on free movement



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introduced strict border control measures and (partial) travel bans on 12 February 2021.

- The exemptions allowing for free movement were defined more strictly than in the Council recommendation thus deviating from it significantly, especially with regard to border regions and cross-border workers. For example, only workers exercising critical functions or working in the essential infrastructure were allowed to cross the border for work reasons and even in that case were subject to regular testing requirements.
- Green lanes were not fully and uniformly implemented. Workers in the transport sector had to undergo a mandatory COVID test and queue at the border for long periods, even if the Council recommendation stated that Member States should lift or repeal any systematic testing requirements immediately if transport or supply chain disruptions occur.
- Disagreements on which products were deemed to be “critical” for transportation across borders added to this patchy implementation. As example, the labelling of certain machinery as “critical” went together with the contradicting interpretation of its spare parts and components as being *not* critical. This rendered both manufacturing and maintenance hardly possible.
- The European Digital Covid-Certificate was followed by additional diverse requirements at Member State level. Tools like this are only effective if it is clear what exhaustive list of conditions is imposed when using it, therefore more harmonization of rules is necessary.

### **V. Examples where both the information access (be it on the restrictions or easing of rules) and the timing of anti-crisis measures were well organized, at EU or national level**

- So far, our members find only the EU digital COVID-certificate as *both the right initiative and that coming more or less at the right time*, paving the way for its national use and accelerating deconfinement measures.

### **VI. Suggestions for the “menu” of the crisis-mitigation measures which would be helpful to businesses in turbulent times**



- The exchange of and access to timely **information, the coordination** of crisis-mitigation actions between Member States and the Commission should be reinforced. Improving the provision of information in times of crisis is one of the core tasks of SMEI. A common dedicated online information interface (such as the webpage of DG MOVE during the first wave, later the ReOpenEU application) should be immediately operational when a crisis strikes, updated regularly, and include easily understandable and reliable information. A fully operational Single Digital Gateway could serve as the basis, some of the measures including:
  - ✓ Reliable and timely (minimum 48 hours in advance), widely accessible information for companies about changes in crisis-related travel or other restrictions/conditions;
  - ✓ Extensive and regularly updated overviews of measures in various Member States accessible to internationally operating businesses;
  - ✓ Hotline for companies and citizens for the 24/7 identification of Single Market disruptions in times of crisis, so that a quick exchange could be made between various parties (business federations/member states/EC) to solve the problems. SOLVIT network could serve as inspiration.
- To ensure free movement for specific groups such as seasonal workers, cross-border workers or workers exercising critical functions, the EU should create a **harmonised – or fully mutually recognised – electronic laissez-passer system** for the crisis. This could apply in case of sudden border closures in all types of future crises.
- If it were the EU Digital COVID-19 certificate, it should be updated regularly in the same way in each country, i.e. and for example to reflect the latest scientific evidence, vaccination status after booster shots etc. **Documentation for travel should be the same across the EU in general.**
- A **robust and flexible framework for “emergency state aid”** with clearly specified criteria should be readily available. Only when a specific crisis leads to acute and deep financial difficulties for certain sectors, Member States should have a flexible and predictable EU state aid framework to work within, so that emergency compensation schemes can be implemented as quickly as possible.
- **Fast track procedures for development and publishing of harmonised standards** that would allow for presumption of conformity of products, including new innovative products needed during the crisis (for instance, personal protective equipment and medical devices).
- The pandemic also showcased the need for efficient market surveillance in times of extreme need of certain products. During the pandemic the EU quickly intensified the production of personal protective equipment such as face masks. Many companies bought and imported PPE goods from third countries in order to comply with health restrictions and requirements and in order to minimize the loss of production time. However, non-compliance with EU standards became an issue and a new risk in the



crisis mitigation efforts. It could be beneficial for SMEI to establish how “**emergency market surveillance focus**” could be triggered. This could be done **within the current market surveillance structure** and include defining the priority areas and means of market surveillance, additional short-term procedures which better equip market surveillance authorities of Member States. The process of setting up these necessary mechanisms and administration for focused market surveillance must be accompanied by consultations with manufacturers, user industries, and business associations.

- The “**Green Lanes**” **concept** should be a part of SMEI toolbox. Additional discussions on the attempts to define which products or services are labelled as “critical” and thus prioritized for the “Green Lanes” passage are necessary, as complex value chains may not always allow precise delineation (e.g., final product/service vs. its components, critical vs. non-critical). A flexible-enough or quite different approach may be needed. Prioritisation of specific industries in Europe is a very far-reaching intrusion to the market. Industry must always be strongly involved in such processes if they are the only last solution remaining. There are also huge risks and uncertainty around the distinction “critical vs. non-critical” for the globally organised supply chains and innovation partnerships.
- **Stronger coordination of non-binding instruments** such as recommendations should be envisaged, so that they are applied prior to adopting national measures.
- **Specific conditions and harmonized steps for exits from the crisis mode** should be clearly established in SMEI; in the COVID-19 example for travel and tourism re-establishment these should cover:
  - ✓ A recognition of the endemic nature of COVID-19 and termination of complex traffic light systems;
  - ✓ Common criteria on when to discontinue the use of passenger locator forms (PLFs) as well as basic hygiene standards at a later stage (face masks, social distancing, etc);
  - ✓ A recognition of the WHO-approved vaccines for international travel. The EU Digital Covid Certificate could be the basis for a more harmonised approach, and the certification accepted at borders could pave a way to other uses at national level where required;
  - ✓ Decisions on the EU Digital Covid Certificate adequacy and recognition with the trading partners to facilitate the recovery of international travel;
  - ✓ Digitalisation of verification procedures: manual certificate and PLF checks continue to cause complexity and long queues (especially at airports and seaports). An “Okay to travel” message as integral part of the online check-in process could provide a simple and efficient solution in the Covid-19 crisis exit but also any future crisis situations. Improved Member States coordination is also necessary to ensure that the verification roles of public authorities (e.g. police) and of service providers / companies are well-balanced and clear to all actors.