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Single Market Emergency Instrument (SMEI)

KEY MESSAGES

- **A significantly narrower scope** limited to protection of the Single Market freedoms, the focus on **cooperation with industry** by giving it a more prominent role instead of new obligations, and the **simplification of decision-making** which could be possible under a narrower scope, are the prerequisites for SMEI adoption.
- Protection of the Single Market freedoms in times of crises and control over the crisis mitigation measures so that they meet the basic principles of necessity, proportionality and non-discrimination should be the underlying SMEI objectives; BusinessEurope could support respective articles in the proposal.
- SMEI goes far beyond the above-mentioned objectives, therefore we do not support such an extended scope. The supply chain challenges require much more tailor-made approaches, are the subject of industrial policy and do not fall under the proposal's legal base (Articles 21, 45 and 114 of the Treaty on the Functioning of the European Union), therefore respective provisions on the scope and under the vigilance and emergency modes should be deleted in their current form.
- Practical application of SMEI and its impact, enforceability and interplay with other EU legislation addressing crisis situations or industrial, IPR, competition and trade policy issues remain the questions requiring thorough additional explanation.
- BusinessEurope maintains that the change in balance of powers among the EU, Member States and industry as proposed in SMEI is disproportionate and public intervention is excessive; however, we support additional obligations on Member States to ensure administrative cooperation and transparency in times of crises.
- Emergency response measures under part IV title III should be largely refocused from a commanding model towards a model of cooperation between the Commission, Member States and industry.
- Effects of the vigilance and emergency measures on relations with trading partners as well as compatibility with the WTO rules should be considered and respective amendments made.
- Industry, as key player under SMEI, should be a permanent fully-fledged member of the Advisory Group that should have its decision-making role throughout the contingency, vigilance and emergency stages.



CONTEXT

The EU has been facing a series of different crises over the last few years, with great challenges for the cross-border business operations but also for administrative cooperation and transparency in the public sector when taking crisis-mitigation measures. Largely based on the Covid19 pandemic experience of unjustified restrictions on the Single Market freedoms and uncoordinated, in many instances unilateral, actions by Member States, the business community agreed there was a case for the EU-level framework that would prevent such disruptive practices in the future.

BusinessEurope called for an effective EU legal framework that protects the freedoms of the Single Market in any emergency situation and ensures real-time administrative cooperation and access to information for businesses and citizens. On 19 September 2022 the European Commission published its proposal for a Regulation establishing a Single Market emergency instrument and repealing Council Regulation No (EC) 2679/98 (SMEI). The proposal was supported by a package of relevant amendments to the sectoral product legislation (the “omnibus”), ensuring that SMEI works for the harmonised products and is consistent with respective legislation in place.

As a key societal stakeholder and European social partner, BusinessEurope outlines its reaction to the Commission’s proposal for SMEI and the “omnibus” below.

GENERAL COMMENTS

Objectives and scope of the proposal. BusinessEurope acknowledges the attempt of the proposal to improve the ability of the EU to respond to potential crises in the Single Market. Nevertheless, we have very significant concerns in terms of scope and disproportionately far-reaching interventionist measures envisaged in SMEI.

Protection of the Single Market freedoms in times of crises and the control over crisis mitigation measures so that they meet the basic principles of necessity, proportionality and non-discrimination should be the underlying objectives of an EU-level intervention. BusinessEurope can support SMEI provisions which would practically deliver on these objectives and acknowledges some positive articles in SMEI, such as on prohibited restrictions to freedoms of the Single Market in times of crises and on administrative cooperation among the Member States and the Commission. They may be an assisting tool preventing disproportionate or unnecessarily intrusive or discriminatory measures.

However, the published SMEI proposal goes beyond mere protection of the Single Market freedoms and addresses broader supply chain challenges and strategic dependencies, the matters of industrial and trade policy. Therefore, the business community cannot support many provisions under the vigilance and emergency modes in SMEI as they do not correspond to the underlying objectives as we see them.



We consider that the supply chain challenges require much more tailor-made approaches due to their diversity, and careful considerations in each case.¹ Moreover, we doubt that such an extended scope is in line with the legal basis of the proposal, namely Articles 21, 45 and 114 of the Treaty on the Functioning of the European Union.

BusinessEurope considers that there is a fundamental question of SMEI objectives to be addressed, in order to get a workable framework. One should not forget that the Single Market articles of the Treaty are not meant to guarantee supplies of goods or services (regardless of whether they are categorised as strategic or not) but guarantee the freedoms of movement within the EU. The former is a matter for industrial and trade policy that should not be mixed into such a horizontal piece of the EU Single Market law as SMEI.

A narrower scope focused on the protection of the Single Market freedoms would allow for a simpler governance system and better enforceability. It is also crucial that SMEI, as an EEA-relevant proposal, ensures an efficient cooperation mechanism with the EEA partners that is warranted by the Single Market legal basis.

Single Market. BusinessEurope underlines that the provisions on protection of the Single Market should be clarified to provide legal certainty that SMEI is not creating an EU legislative body to justify ‘restrictions-by-default’ in times of crises. The prohibited restrictions in SMEI are not allowed by the Treaties as a matter of principle, and the co-legislators should not endorse any ambiguous provisions which could potentially open the doors for restrictions during a crisis. As example, the prohibited restrictions on free movement of persons are formulated vaguely and are not always binding on Member States (e.g., conditional upon “unless to do so is inherent to the nature of the crisis”).

Some of the provisions are phrased as if national measures restricting the freedom of movement are permitted unless they conflict with the conditions set out in SMEI (permissive formulation of Article 16). The rationale should be reversed so that national measures restricting the freedom of movement are prohibited as a matter of principle unless they meet the narrowly drafted exceptions in the Treaties and the additional conditions in SMEI (prohibitive formulation).

The permissive formulation in the proposal goes against the Single Market logic and rather opens up the room for discretionary interpretations of what is “inherent to the nature of crisis”, especially given a very generic definition of the crisis. There are also no

¹ The Explanatory Memorandum, in its part on stakeholder consultation (including Member State administrations), notes that stakeholders largely agree with the need to ensure free movement as well as greater transparency and coordination in times of crisis (administrative cooperation), also to coordinate public procurement, fast-track conformity assessment and improve market surveillance. It confirms that all stakeholders favoured a narrow scope of SMEI, so it is not clear why the Commission still opted for a broad one including the issue of strategic dependencies. The challenges stemming from such a wide scope were also confirmed by the opinions, one negative and the other positive with comments which were substantive, of the Regulatory Scrutiny Board (RSB) that checks the quality of impact assessments. The RSB pointed to lack of comparison of impacts of different policy options and potential problems in terms of subsidiarity and proportionality of the foreseen measures.



clear consequences for non-compliance by Member States, so businesses have numerous questions on practical application of the proposal and its enforceability.

Level of intervention and burden of proof. SMEI is a high public intervention measure that significantly shifts the powers among the EU, Member States and industry not only in the emergency situations but also in the so-called vigilance mode.

While BusinessEurope accepts that public intervention measures are necessary in emergency situations, many of them as drafted in SMEI do not meet the proportionality and necessity criteria. Some of them pose risks to the level-playing field, such as establishment of the lists of “the most relevant economic operators” before the emergency is even announced, for example. We are concerned about the signals to the market such lists might send and the overall impact on competition. It could be even counter-productive to crisis prevention.

Some of the crisis mitigation measures override the contract law, challenge protection of commercially sensitive information or deny the market economy entirely. **BusinessEurope cannot support the overall approach of putting additional obligations and burden of proof on companies in times of crises**, instead of helping them. If businesses cannot meet some of the demands under the SMEI “emergency” mode, the burden of proof still lies on companies which are already stressed with the crisis management tasks. The possibility of the “recommendations” to Member States “to ensure the efficient reorganisation of supply chains and production lines” adds to the uncertainty in times of crises.

We consider that such provisions confirm that the concerns in terms of proportionality, also raised by the RSB, remain valid. BusinessEurope maintains that **the shift of powers as proposed in SMEI is excessive.**

Consistency with other EU legal acts and international commitments. Consistency of SMEI with other legal acts is key, so that there is no confusion on how different regulations work during a crisis. The Explanatory Memorandum of the proposal refers to the whole body of existing rules to address crises and some of the supply chains bottlenecks. Even though the respective parts of the Memorandum bear the titles of SMEI “Interplay with...” different frameworks, they merely list those frameworks instead of explaining (with a few exceptions) how SMEI would work with them on the ground.

Additional explanations and deep-diving into actual application of different provisions of SMEI and those other frameworks are necessary, to avoid overlaps or grey areas which in turn would prolong reaction times during the crisis. Non-personal data sharing provisions in emergencies can be an example covered by both SMEI and Data Act, or links to the TEN-T infrastructure use, all of them currently under negotiations. A list of mutually exclusive legislative acts or inter-linked provisions could be useful.

It is not clear how SMEI will interact with *non-legislative* crisis frameworks either, such as the Contingency Plan for Transport of 2022. Transport disruptions, not necessarily health-crisis related as during the Covid19 pandemic, have extremely great impact on businesses and the society at large, so much more clarity on synergies between the



crisis frameworks is needed. For example, similarly to SMEI, the Contingency Plan for Transport refers to the protocols of communication and administrative cooperation for information and data sharing among the Commission, Member States, EU agencies and industry, and it is not clear what procedure applies as SMEI (Article 6) also establishes a procedure for such protocols.

Selected parts of SMEI directly affect relations with our trading partners globally. The impact of SMEI on the trustworthiness of Europe's investment climate should be carefully assessed as well as its compatibility with the WTO rules. The proposal should be assessed in the light of international IP rules, as SMEI provisions on strategic stocks and priority orders may affect the existing industrial property rights and the management of related licenses.

Therefore, BusinessEurope maintains its significant concerns in terms of the scope and level of interventionist measures proposed in SMEI and stands ready to cooperate for improvements which are imperative. We present our more detailed comments to the proposal's six parts and the additional package of targeted amendments to sectoral legislation hereunder.

SPECIFIC COMMENTS

Part I – General Provisions (only partly acceptable to BusinessEurope).

1. Following BusinessEurope's general comments on the scope of SMEI and the proportionality of measures, Article 1 defining the subject matter should be amended to delete the reference to the "strategic importance" and focus on the "crisis-relevant goods and services in the Single Market".
2. We would also question the references to contingency and vigilance measures as separate categories under Article 1 (2 c-d), due to the fact that the scope should be focused on the administrative cooperation and the emergency mode.
3. Points 3-4 under Article 1 seem to be superfluous and should be deleted as they are covered by Article 1 (2b).
4. Following BusinessEurope's general comments on the scope of SMEI, the reference to supply chains under Article 2 (1) should be deleted.
5. The references to exemptions are not sufficiently clear. It remains uncertain how SMEI applies to raw materials or semi-finished products, for example. BusinessEurope supports a clear reference to adherence to obligations under the international law in Article 2(7), however mandatory provisions on priority orders under Article 27 seem to be in conflict with that reference. Notably, the provisions overriding the contractual obligations and exempting from liability thereof can be questioned. While BusinessEurope speaks for deletion of the priority rated orders



obligations in principle, SMEI consistency with WTO requirements in general should be checked.

6. Article 2 should additionally include a provision on protections of intellectual property. SMEI should state it is without prejudice to intellectual property rights and protects their economic value. To maintain trust in the investment climate in Europe, even during crisis situations the safeguards must be upheld.
7. For SMEI to be effective and targeted, so that the crisis mitigation measures are both proportionate and strictly defined in terms of their validity, a legally certain definition of 'crisis' is crucial. The proposal provides a broad definition in Article 3 (1) and leaves room for interpretation. It is unclear, for example, if the recent events such as sabotage of Nord Stream gas pipelines, outages in the German rail operation system affecting cross-border trains, or disruptions to the Starlink satellites qualify as 'crisis' and if they might trigger the vigilance or emergency modes.
8. The 'crisis' definition misses the crucial points related to the SMEI objectives, namely protection of the Single Market. The definition should include a reference to disruptions affecting the Single Market freedoms of movement of goods, services, capital and persons as well as data.
9. The definitions of 'strategically important areas' and 'goods and services of strategic importance' under Article 3 (4-5) are related to the extended scope of application which BusinessEurope questions in principle. Moreover, defining 'strategically important areas' through the notions of 'critical importance' and 'vital importance' does not seem legally clear.
10. SMEI should include a definition of 'economic operator' to ensure certainty of which players are covered by the proposal.
11. The Advisory Group, established under Article 4, is the central advisory body in decision-making under SMEI. The proposal as a whole should be re-focused to stronger cooperation among the Commission, Member States and industry, the latter bringing the market knowledge as fully-fledged member of the Advisory Group rather than randomly invited observer.
12. For efficient governance of the SMEI implementation, the Advisory Group with Member States and industry could potentially serve as scrutiny body for the decisions to use the crisis mitigation provisions of SMEI, however it bears no significant power (only that of advising and adopting 'opinions, recommendations or reports', Article 4(9)), neither the Commission is obliged to invite the European Parliament or social partners to the Group's meetings (Article 4 (3)). The Group should be equipped with a more significant decision-making role, always include stakeholders, have the EEA countries as members, and its activities be transparent.



13. The tasks of the Advisory Group and involvement of stakeholders in terms of different “modes” (vigilance and emergency) should be more consistent. Notably, the task of establishing whether the criteria for activation or deactivation of the emergency mode have been fulfilled (Article 4(6b)) should be clearly mirrored for the vigilance mode under Article 4(5), which is not the case in the proposal. Similarly, as the Advisory Group would assist in consulting economic operators under the vigilance mode (Article 4 (5c)), such a function involving economic operators should be mirrored for the emergency mode under Article 4 (6), moreover that the emergency has even bigger impact on businesses. As noted under point 12 above, the Advisory Group should be granted a decision-making role to better reflect the cooperation principle in SMEI.
14. One of the key asks from the business community, based on the experiences of the Covid19 pandemic, was to ensure the administrative cooperation among the Member States and the Commission and provide access to the up-to-date (real-time whenever possible) information for stakeholders. Article 5 on central liaison offices should foresee a mandatory function of providing information to stakeholders, as minimum during the emergency mode.

Part II – Single Market Contingency Planning (only partly acceptable to BusinessEurope).

15. BusinessEurope supports the need for administrative cooperation provisions in SMEI, however we are not convinced if the contingency planning chapter rightly targets the measures.
16. Article 6 on crisis protocols is a crucial one to address the bottlenecks in communication, coordination and transparency of decisions by the public authorities in times of crises, however the proposal delegates these important provisions to the Commission. Under Article 6(1) the Commission only takes into consideration the opinion of the Advisory Group, next consults the Member States, and finally puts all the provisions on crisis cooperation, exchange of information, crisis communication and even the overall framework management in a delegated act. If companies are given a responsibility under these protocols, industry should be consulted (via the Advisory Group membership). Modalities of crisis protocols are key for effective and quick responses to the crisis, so SMEI should ensure a full consensus among the Commission, Member States and stakeholders.
17. BusinessEurope understands that there may be big challenges in agreeing administrative cooperation modalities with Member States in the basic act, however SMEI will only be effective if full backing by Member States for the administrative cooperation obligations is ensured.
18. We draw attention to the reference of ‘significant incidents’ as the subject of notifications by Member States under Article 8(1). ‘Significant incidents’ are not



defined in Article 3, therefore the introduction of this notion may be confusing to both the notifying authorities and the markets with economic operators potentially concerned. It may also bring uncertainty about how the confidentiality clause (Article 8(2)) is applied.

Part III – Single Market Vigilance (raising major overall concern to BusinessEurope)

19. BusinessEurope takes note that the ‘vigilance mode’ is presented as the ‘yellow traffic light’, a warning of its kind with regard to threats which might evolve into an emergency. It seems to largely relate to strategic dependencies of supply chains, a scope element the inclusion of which in SMEI BusinessEurope opposes. We have a number of concerns in terms of proportionality of the proposed measures, and we underline that risk or threat assessment is possible and is done in numerous policy areas within the existing frameworks already. The vigilance mode is not necessary for the objective of protection of the Single Market freedoms in times of crises, therefore should be deleted in the current form, also taking into consideration further comments below.
20. The selection of goods and services of strategic importance (Article 9(1b)) and both activation (or extension) and de-activation of the vigilance mode under Articles 9-10 would have far-reaching effects on competition. If the vigilance mode is to stay, Article 9 should provide a clear set of criteria to be met for the vigilance mode to be used. There is no guaranteed and transparent possibility for stakeholders to weigh in with their opinion and evidence, because the implementing act procedure chosen in the article as well as the established Advisory Board do not foresee clear involvement of stakeholders.
21. Article 11 on monitoring raises very fundamental concerns. It obliges national competent authorities to monitor the selected supply chains of ‘strategic importance’, following the Commission’s standardised and secure means for the collection and processing of information, and ‘set up and maintain an inventory of the most relevant economic operators’. These are mandatory provisions under Article 11 (1-3). Even if the proposal further underlines that the requests for information disclosure will call for *voluntary* disclosure by companies (Article 11(4)), it is hard to imagine how national administrations will be able to meet their *mandatory* obligations based on voluntary provision of information. BusinessEurope considers that such SMEI provisions will directly lead to national administrations adopting further mandatory provisions at national level, as the only way to comply with the obligation of monitoring of supply chains. It would create risks of information leaks and alignment of commercial conduct by a few players which impedes competition. Moreover, it is necessary to introduce specific measures for adequate protection of trade secrets and compensation for damages in the event of accidental disclosure of the secret. Those measures must be based on the maximum protection of trade secrets considering that the European Directive on Trade Secret (Directive (EU) 2016/943) introduces a minimum harmonization framework.



22. In any event, the measure to single out the ‘most relevant economic operators’ and maintain their lists across the Member States under Article 11(3) would create pre-conditions of picking winners and side-lining some businesses, depending on the situation and scale of the economic activities concerned, which would send wrong signals to the market and seriously affect competition. It could potentially create reactions from the market players (e.g., further relocation from the EU) which could normally be avoided.
23. While BusinessEurope finds such monitoring measures disproportionate in principle and opposes these provisions, we also underline that potential findings from such monitoring would serve as basis for the Commission to take next procedural steps in initiating the emergency mode, according to the proposal. As the implications of such a monitoring are far reaching, the Commission should be *obliged* to discuss the findings which are relevant with the Advisory Group rather than having only an *option* to do so under Article 11 (6).
24. Concerning the information collection requirements related to strategic reserves under Article 12, BusinessEurope notes that they relate to the commercially sensitive information which would mainly come from companies (Article 12 (2a-d) on stocks, alternative supplies etc). Disclosure of such information is even more sensitive in turbulent markets which can still be managed to avoid a crisis (the vigilance mode refers to the threats which only have a potential to escalate to a Single Market emergency). In any instance and if the co-legislators decide to maintain the vigilance mode, SMEI must contain detailed provisions how the Commission and national authorities will guarantee the secrecy of sensitive information and compensation for damages due to accidental disclosure, as referred to in point 21 above.
25. Article 12 (6) grants extensive powers to the Commission, with participation of Member States via the implementing act procedure, to oblige the Member State in question to stockpile products. BusinessEurope underlines that this provision has no links with the objective to safeguard the freedoms of the Single Market or with the legal base used. It is also noted that the Advisory Group has no role in these decisions, even as an in-depth market analysis would be necessary before the decisions on strategic reserves are made – within SMEI or outside this proposal as the case may be. While the rationale behind strategic reserves merits further exploration, the provisions in the current proposal are not fit for purpose. An in-depth analysis should be conducted of the benefits and costs of alternative methods to establish strategic reserves in the EU before any proposal can be assessed meaningfully.
26. The financial compensation for stockpiling that might ultimately land on companies is not at all addressed in the proposal. In terms of products already covered by some national strategic reserve schemes, such as for certain food products, it is a common practice that the governments contract storage capacities from professional warehousing service providers. SMEI should provide legal (and financial) certainty in this regard. Intervention on strategic



reserves could have effects on the market deriving from the announcement and actual establishment of these reserves (e.g, changes in market perception or legal certainty between companies and Member State/s, acceleration of the scarcity of goods, inflationary pressures etc.), which requires additional assessment on a case-by-case basis.

Part IV – Single Market Emergency (in principle acceptable to BusinessEurope with modifications which are imperative)

27. BusinessEurope welcomes the proposal's objectives to re-establish and facilitate free movement in Title II of this part.
28. However, Article 16 does not serve a purpose to dissuade Member States from introducing restrictions to the Single Market freedoms. On the opposite, it risks to open the door for discretionary measures by Member States, therefore BusinessEurope calls for significant clarification or complete deletion of it. Article 16(1) deviates from strict definition of the "emergency mode" as per implementing decisions and adds a reference to "the underlying crisis", which expands the grounds for adoption of national measures. Coupled with a broad definition of "crisis", it may even become an article for inspiration on restrictions. As minimum, the "emergency mode" notion should be used as it is the case in Article 17(1).
29. Article 16 also uses vague concepts like "as soon as the situation allows" or "undue or unnecessary administrative burden" (NB: in the subsequent transparency provisions, Member States are not even asked to explain their measures based on these concepts).
30. Article 17 on prohibited restrictions is an attempt to define the blacklist of restrictions and so reassure Europe on unquestionable Single Market freedoms during the crisis. However, the blacklist of restrictions to free movement of goods, services and persons fails to do so, as discriminatory decisions are allowed under a vague condition if they are "inherent to the nature of the crisis/Single Market emergency", the judgement left to the Member State discretion. Such conditionalities and exceptions should be eliminated in the blacklist with prohibited restrictions. They may also trigger additional interpretations on Single Market restrictions potentially introduced outside the scope of the emergency/SMEI in general.
31. Supportive measures in Article 18 exclusively cover only free movement of persons as per Article 17(6). It is not clear why the scope is limited, leaving other free movement restriction scenarios out.
32. Articles 19-22 on transparency and administrative assistance are extremely important and BusinessEurope supports them but they should be strengthened. The burden of proof in the notification procedure that is crucial to ensure transparency as well as proportionality, necessity and non-discrimination of



national crisis-mitigation measures lies solely on the Commission. Member State obligations are extremely limited to sending and re-sending their drafted or adopted measures without any justifications or even formal responses to comments made by the Commission or other Member States. While BusinessEurope is aware of the sensitivities as well as time pressures on Member States during a crisis, SMEI should require at least a minimum justification from the notifying party.

33. BusinessEurope regrets that there are no provisions on better uniform enforcement of Articles 16-21, neither the implications of non-compliance by Member States are clear. Once coordinated and uniform crisis response measures have been taken at Union level, Member States should automatically discontinue the application of any national measures adopted to the same purpose, notified or not. Non-notified measures should be null and void in principle.
34. Access to information provisions under Articles 21-22 should be reinforced. The language regime should be identified, as is the case with similar contact points under the Union law, so that cross-border relevance for information seekers is ensured. The notion of “up to date” information should be defined in stricter terms, as the emergency dictates the dynamics and frequency of crisis-relevant events. Some inspiration could be taken from EU rules on cyber security.
35. Single Market emergency response measures under Title III (*except for Article 26 thereof*) heavily rely on additional obligations for economic operators and fines for non-compliance, including the “name and shame” provisions under Article 27(4). BusinessEurope considers that the emergency response measures do not address the free movement objectives, are disproportionate and fundamentally deviate from the principle of cooperation that is crucial in times of crises. The Commission should not be granted the powers to impose additional obligations on economic operators as established under Article 23(1), unless the decision-making powers of the Advisory Group under Article 14 are established as safeguard. Therefore, the majority of Title III Chapter I provisions (*except for Article 26*) should be deleted in their current form to achieve truly cooperative spirit.
36. The triggering of the Single Market emergency response measures should be clearly limited to the crisis-relevant goods and services established under Article 14(5). A cross-reference to this article is therefore necessary in Article 23(2) to ensure legal certainty and scope limitations of such measures.
37. There are a number of fundamental reasons to delete a part of mandatory information disclosure provisions in Article 24. The requested information disclosures would cover commercially sensitive information: production capacities, stocks within the EU and in third countries including in the facilities a company “operates, contracts or purchases supply from”, as well as “a schedule of the expected production output...” (Article 24(1, 3)). While we accept that certain information is necessary to adequately respond to a crisis, a full



'deconstruction' of the supply chains and contractual schedules as mandatory information under Article 24 (2) are disproportionate requirements which fail to fully respect trade and business secrets, regardless of such disclosure being the last resort measure. Article 25 on confidentiality is not a sufficient safeguard.

38. BusinessEurope underlines that such mandatory information requests could also concern information about capacities or supplies in view of purchases from third parties/third countries, where non-disclosure agreements apply (and the contract-overriding clause of SMEI does not).
39. Finally, mandatory information requests would be unimplementable for representative business organisations, as these organisations do not have any legitimacy to request specific business information from their members. SMEI provisions should be limited to voluntary information sharing by such organisations on the basis of a cooperative spirit, as such approach has succeeded during the Covid19 pandemic.
40. BusinessEurope opposes Article 27 on priority orders in principle and demands its deletion. It is not for the Commission to issue instructions on the production prioritisation that may also entail production line and supply chain adjustments, moreover that such instructions may become mandatory and be part of the SMEI scheme of fines and "naming and shaming" publication. BusinessEurope underlines that the priority orders may also have a negative effect in terms of competition, provoking anti-competitive behaviour and distortions.
41. Businesses do adapt to societal needs in times of crises as the Covid19 pandemic demonstrated already, supplying the crisis-relevant goods and services as much as possible, largely maintaining the business operations and protecting the jobs. It is therefore unacceptable that SMEI includes the contract-overriding provisions under Article 27 (3, 7) which would entail reputational and trustworthiness damage for the EU companies, let alone potential litigations. Compliance with WTO rules when it comes to trading partners is also under question.
42. Article 27(4) seems to have been written assuming that many businesses, independently of their situation, size and many other factors (to be disclosed in their replies to the Commission), should accept the priority orders once they are decided upon by the Commission. Such provisions undermine the cooperation principle.
43. Therefore, direct mandatory EU interventions under Article 27 could even derail companies' efforts to address the societal needs instead of mitigating the crisis effects. BusinessEurope suggests that SMEI is refocused from a commanding model towards a model of cooperation between the Commission, Member States and industry.
44. BusinessEurope calls on to delete Articles 28-31 and re-focus SMEI towards a cooperation framework as addressed in point 35 above.



45. BusinessEurope considers that Article 33 should be deleted even if it refers to a softer measure, recommendations to Member States. It neglects the realities that industry reacts to crises and, in case of the crisis-relevant goods and services, to peaks in demand much quicker and more efficiently than the public sector, if efficient dialogue (through the Advisory Group) is ensured.

Part V – Procurement (acceptable to BusinessEurope with additional clarifications)

46. BusinessEurope agrees that SMEI should address coordination of procurement and foresee a joint procurement option in order to both secure the Single Market principles and ensure supply of what is necessary for the society in times of crises through efficient public spending.
47. Use of Article 34 of the proposal should be clearly restricted. Article 34.2 requires the Commission to ‘asses the usefulness, necessity and adequacy of the application’ yet it is not clear how this assessment would be carried out. The wording here must therefore add additional criteria for consideration such as prices or delivery time as mandatory elements to consider.
48. Articles 34-35 should address procurement of the crisis-relevant goods and services only. The references to “goods and services of strategic importance” should be deleted to reflect the more focused scope (see point 1 of this position paper).
49. An additional provision for joint procurement should be added that considers the structural principles of public purchasing in the relevant sectors. A safeguard should be created ensuring that joint procurement procedures do not substantially harm SMEs, research and development, and innovative undertakings while maintaining the competitive structure in the respective sectors.
50. BusinessEurope considers that the provisions of Article 35 (3), allowing for the Commission’s on-site visits to production facilities, are disproportionate and should be deleted. The European Commission does not (and should not) possess the powers of market surveillance or public order institutions. It is not clear why such a provision is included in the proposal’s article on the ‘negotiating mandate of the Commission’, when the Commission will be mandated to conclude contracts with economic operators anyway.
51. Greater communication between all contracting authorities and contractors at the outset of and during the crisis period should be encouraged. Contracting authorities already have the option to fully utilise the flexibilities within the existing EU procurement rules to increase the value of products and services supplied by 50% under existing contracts (Article 72, Directive 2014/24/EU). Use of certain modification provisions would have to be carefully managed to remain compliant with EU procurement rules. There must be consistency between Article 36



(modalities of procurement) of the proposal and the contract provisions set out in Directive 2014/24/EU.

52. The non-competing tenders' clause under Article 39 is an unprecedented intervention. It reinforces the need for very strict criteria of procurement on behalf of Member States and transparent supervision of the process, to maintain the trust in the public market.

Part VI – Final Provisions (acceptable in principle)

53. For efficient and timely administrative cooperation and access to information, the provisions on digital tools and infrastructures under Article 41 should be supported. However, it remains unclear whether the Commission already has certain model in mind based on existing tools, and most notably whether any of such tools or infrastructures will be meant to serve the stakeholder demand for information in times of crises.

Package of targeted amendments to sectoral legislation, supporting SMEI (acceptable to BusinessEurope if substantive corrections are made)

54. BusinessEurope broadly supports the 'omnibus' of amendments to the sectoral product legislation that aims at accelerating market access for and free circulation of products in times of crises.
55. It is positive that the scope of dedicated emergency provisions in sectoral legislation is clearly defined via references to 'crisis-relevant goods' as defined in SMEI, and that exceptional provisions will apply only under the emergency mode as established within the SMEI procedures.
56. Derogations for conformity assessment of products should be possible during a crisis. Alternative methods such as international or national standards should be a preferred option if published European harmonised standards do not exist or cannot be used.
57. BusinessEurope supports the provisions explicitly banning any extra fees or surcharges on manufacturers when they apply for prioritised conformity assessment procedure. SMEI should not allow artificial distortions using the crisis situation in this regard.
58. We call for a stronger usage of mutual recognition under SMEI. Products should be covered by the principle of mutual recognition in cases of derogations from the conformity assessment procedures, taking into consideration temporary nature of such an arrangement and the overall objectives of SMEI to ensure free movement of products. National authorities should be then required to document the rationale for derogation and be subject to the same requirements as manufacturers are regarding risk assessments.



59. BusinessEurope agrees that products placed on the market under crisis regimes should not be CE-marked. The product should instead note it was manufactured based on the authorization for derogation, and this could be considered as part of the product's 'intended use.' However, this must be defined in the legal text and not subject to a Member State decision.
60. SMEI must consider that products placed on the market during a crisis can remain on the market after the emergency phase is over. High value or long life-cycle products will be especially impacted by this. If a product needs to be withdrawn from the market, it must be ensured that companies do not bear all the cost themselves, otherwise the incentive to contribute during a crisis will be negated.
61. BusinessEurope strongly opposes the obligation of a manufacturer to deploy all reasonable measures to ensure a product does not leave the territory of a Member State, and there is a two-fold problem. First, it is not possible for a manufacturer to meet this obligation in practice, let alone the fact that it is a public function of market surveillance authorities. Second, the reference to a *Member State* territory is against the Treaty provisions on the Single Market and should be replaced by a reference to *the Union market*. The proposal's wording is neither proportionate nor in line with the Treaty provisions or SMEI objectives, even in case of the derogations in question.
62. We reiterate that Member States should only be able to influence standardisation via the Committee on Standards as outlined in Regulation 1025/2012 or via sectoral advisory groups. Additionally common specifications must be used only as a last resort. If companies are mandated to apply common specifications, then a grace period for application must be given as it is technically impossible to switch overnight to another standard or specification for production. In any case common specifications should not be mandatory, and SMEI should give preference to international, unpublished harmonised European or national standards before recourse to common specifications at all times.
63. The Covid-19 pandemic exemplified that notified bodies facilitated market access when needed and there is no reason to believe this cannot happen again. There is little need to regulate the notified bodies' capacity expansion, therefore the provisions in this regard should remain the "best effort" rather than mandatory ones.
64. BusinessEurope strongly supports the provisions obliging Member States to prioritise their market surveillance function for the crisis-relevant goods. We consider that re-focusing of market surveillance actions when respective markets are under tension could ensure the level-playing field and fairer competition, if applied proportionately. The provisions should state, like in the case of notified bodies, that market surveillance measures under the emergency mode should not lead to disproportionate corrective actions compared to normal times.



65. Prioritisation of market surveillance would also address the issue of products placed on the market through accelerated conformity assessment (or derogation) procedure. The cooperation between market surveillance authorities and industry, already foreseen in Regulation (EU) 2019/1020 on market surveillance under Article 9, should be fully exploited.