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Consultation response

The European Commission's proposed Single Market Emergency Instrument

The Confederation of Swedish Enterprise is grateful for having the opportunity to comment on the aforementioned consultation, and would like to offer the following comments:

Summary

- The Confederation of Swedish Enterprise is opposed to the European Commission's proposal for the Single Market Emergency Instrument (SMEI). As an emergency instrument for use in any future crisis, we believe that the SMEI should be focused exclusively on those aspects that reinforce the Single Market by ensuring the continuity of free movement during any future crisis.

- The Confederation of Swedish Enterprise believes that the requirements imposed on Member States in Articles 16–19 are appropriate. However, it must be made clear that these requirements must not in any way limit those existing obligations to maintain free movement that already apply under the EU Treaty. Although Article 16 sets out general requirements for measures to address emergency situations in the Single Market that may restrict free movement, we believe that it should be made clear that any such steps introduced must be proportionate.

- The Confederation of Swedish Enterprise believes the proposal is too far-reaching in its entirety:
    - Scope: references to supply chains must be removed to ensure the SMEI is purely an emergency instrument. Encountering obstacles in supply chains is part of daily life for businesses in a global market, and require business-specific measures. They should therefore not be subject to an emergency instrument.
    - Contingency planning: the proposal creates *de facto* mandatory information gathering. To fulfil the requirement to establish a framework for the SMEI, Member States will have to establish national requirements for obtaining information from businesses, despite the proposal stipulating that supplying

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such information is to be voluntary. The Confederation believes that this would likely lead to national over-implementation.

- Vigilance mode: it should be clarified that building up strategic reserves will only apply to those businesses with relevant supply agreements with Member States, and not to all businesses based in a given country. Otherwise, businesses would be subject to considerable burdens when Member States are required to build up their strategic reserves. Having to put in place systems that can adapt to and comply with such requests in the event of a crisis would increase costs for businesses.

- Emergency mode: the proposal grants the European Commission excessive powers, and is overly intrusive into business operations and undermines their rights to corporate confidentiality. Swedish Enterprise questions whether the European Commission has either the mandate or the expertise to propose priority-rated orders.

General points

The Confederation of Swedish Enterprise welcomes the European Commission's wish to improve mobility in the Single Market during times of crisis. A well-functioning Single Market, with free movement of goods, services, persons and capital is invaluable to Swedish business. The responses by various Member States to the COVID-19 pandemic and Russia's invasion of Ukraine demonstrate that it is vital to protect free movement in the Single Market; clearly, the European Commission's proposal sets out to deliver this. However, several of the measures in the proposal risk having the opposite effect and could damage European businesses as a result. In some cases, the measures imply restrictions on business freedoms and pose challenges to the principles of a market economy. For this reason, The Confederation rejects the European Commission's proposal. In order for an emergency instrument to prove useful in a future crisis, we believe that it must focus exclusively on those aspects that strengthen the Single Market by ensuring the free movements during a crisis.

Swedish Enterprise would also like to stress that the proposed regulatory framework must be considered in conjunction with the principle of legality. The internal balance between EU institutions must be considered, in order to avoid power being shifted to the European Commission in ways that are unclear and overly general; it is essential to maintain predictability and a division of responsibilities within the EU.

A key issue of principle at stake is whether public intervention and control - to the extent that is currently being proposed - is compatible with the EU treaties. Granting the European Commission the mandate to designate strategic resources, critical goods and services and even to limit the free movement of these in response to a crisis undermines the fundamental values of the EU Single Market. Instead, Swedish Enterprise believes that the SMEI should focus on those regulations that seek to achieve its original purpose – i.e. ensuring the free movement of goods, services and persons, even during times of crisis. Maintaining these basic freedoms during crises creates a robust market that enables businesses to sustain production and keep people in work.

The European Commission and the Member States must show greater confidence in the Single Market and its functions as a market economy. We see a worrying trend, where different types of critical goods are hit by this type of regulatory requirement, as seen, for

example, in the European Chips Act (ECA). Free, well-functioning and dynamic markets risk becoming more rigid and restricted. The willingness of foreign actors to trade with, and invest in, the EU may be undermined by the imminent risk that production could be restructured, and that agreements cannot be met in the event of a crisis. The Confederation of Swedish Enterprise is opposed to rules that could damage the EU's trading relationships with third countries and reduce the willingness to invest. More specific comments on the relevant articles are provided in the detailed section below.

The proposal becomes too far-reaching when the scope of application extends to business supply chains. The Confederation discourages such a broad scope of crisis preparedness at EU level. Swedish Enterprise and other European business organisations have stressed this point repeatedly in various consultations with the European Commission during the drafting of the current proposals. Despite this, we do not consider that the concerns expressed by the business community and others during the consultation period have been taken into account.

Building up strategic reserves demands some type of joint storage capacity for strategic products and services. The Confederation is highly critical of this approach for a number of reasons. Improving preparedness should be a national commitment. The proposal amounts to major commitments for individual businesses and sectors that would entail extensive costs, which could distort competition. Extensive work is already underway to strengthen Sweden's robustness; while Sweden fully supports solidarity between Member States, national needs must be prioritised over EU commitments in these areas

For the same reasons, there are considerable risks associated with the transfer of information to the European Commission. Such information may be highly sensitive in terms of security policy and corporate confidentiality for individual businesses, and they may suffer financially if such information is inadvertently disclosed. The information collected could conceivably reveal weaknesses that the EU may have, in terms of the supply of specific goods and services. Such information insights and could be leveraged by foreign powers and other actors in ways that could pose a threat. Therefore, Swedish Enterprise seeks clarification from the European Commission on how it thinks such information should be stored and secured, and how it will prevent it from ending up in the wrong hands.

During the COVID-19 pandemic, many Member States failed to respect the principle of free movement as set out in the EU Treaty. Therefore, the difficulties and obstacles experienced by businesses in the Single Market were not caused by a lack of legislation; it is doubtful whether additional legislation – legislation that does not set out consequences for Member States violating the principles of free movement – will prove the solution to future crises. Given this, it seems strange that the SMEI will impose fines on businesses that fail to meet requirements, but no equivalent sanctions are outlined for Member States that fail to not comply with Articles 16–19.

Given that the SMEI is intended to cover all conceivable emerging crises, we see a risk that several crisis modes could be activated simultaneously in several different areas. Under such circumstances, a business could conceivably be part of several so-called strategic value chains and thus be subject to the SMEI in differing modes. This poses a risk of businesses being constantly overwhelmed by numerous information requirements during the vigilance mode, as well as in the emergency mode. The pressure on businesses would consequently increase, combined with the risk of fines. Swedish Enterprise believes that, during a crisis, it is unrealistic to impose such requirements on businesses that also have the

responsibility both to their employees and to continue operating. Furthermore, it also risks hampering the voluntary preparedness that businesses exhibited during the COVID-19 pandemic.

As part of the emergency mode, the Commission also puts itself in a position of control over businesses, for example by imposing priority rated orders. This is something that the Confederation discourages, because it is inconsistent with market economy principles and fails to consider ownership rights.

Detailed comments

In Article 1, point 1, “ensuring the availability of goods and services of strategic importance” should be deleted, in order to make the instrument purely an emergency instrument.

The wording of Article 1, point 4 is too broad and unclear in terms of the type of information the European Commission may obtain. Clearly, a certain degree of flexibility in the regulatory framework is understandable, given the inherent difficulties of predicting the nature of future crises. The wording in point 4, however, implies a far-reaching scope for the Commission to acquire all types of information it considers necessary to comply with the regulation. This approach creates legal uncertainty. To address this, we propose deleting point 4 in its entirety.

In Article 2, point 1, the reference to “supply chains” should be deleted to make the SMEI exclusively an emergency instrument. Obstacles in supply chains is part of day-to-day life of businesses in a global market. If such measures are called for, they need to be addressed through bespoke measures. Hence supply chains should not be the subject of an emergency instrument.

Article 3: there is no definition of “economic operator”, which creates considerable uncertainty regarding which economic operators will be subject to the SMEI. For example, it is not clear whether online platforms would fall into this scope. The omission of such a definition creates uncertainty over the scope of the regulation. For example, will foreign companies that establish themselves in the Single Market - on the same basis as European companies - be subject to measures that can be taken in during vigilance and emergency modes. If so, this may make the EU market less attractive to foreign businesses.

There is also no definition of “significant incidents”, which is used in, for example, Article 4, point 4(b) and Article 8, point 1. Introducing a further crisis concept may prove confusing for those authorities with reporting responsibilities and those businesses that may fall within its scope. The Confederation of Swedish Enterprise believes that references to “significant incidents” should be deleted, or at least that the term be clearly defined.

Article 3, point 1: it is to be expected that the definition of “crisis” is broad. However, it should include the concept that an event must have a “significant impact on the Single Market” in order to constitute a crisis covered by the SMEI.

Article 4: the role of the advisory group needs to be clarified and strengthened. In addition, the participation of business in the governance models needs to be safeguarded.

Article 4, point 3: it is important to specify that the European Commission should invite economic operators to meetings of the advisory group as observers. In addition, business

and stakeholder organisations should also be included, to ensure that the experiences and views of business are taken into account.

Article 4, point 5: the powers held by the European Commission are unclear and uncertain under circumstances where the opinions of the advisory group do not carry sufficient weight to trigger the vigilance mode.

Article 4, point 6: the role of economic actors should be included in the emergency mode in the same way as it is in the vigilance mode, (compare Article 4, point 5(c)).

Article 5: Central liaison offices should have the responsibility for ensuring that there is a national 'Single Point of Contact' and liaise with these to ensure the efficient provision of information to relevant authorities, businesses and the public.

Article 8, point 2: this article is important, because it stipulates responsibility for confidentiality.

Article 10, points 1 and 2: the proposal grants the European Commission too large a mandate. The Commission should follow the advisory group's recommendation or otherwise justify why it deviates from it.

Article 11, points 1–3: there is a clear risk that the proposal will create a situation of *de facto* mandatory information gathering from businesses. If Member States are to fulfil any requirement to provide information on stock levels and shortages to the European Commission, consequently they will have to create national reporting requirements in order to obtain such information from businesses. This is in spite of the fact that the proposal stipulates that providing such information is to be voluntary. The Confederation of Swedish Enterprise foresees that this would most likely lead to national over-implementation.

Article 11, point 3: the meaning of "shall set up and maintain an inventory" is about more than making a list. Such an inventory must also be kept up to date, which may lead to national requirements being imposed on businesses to provide such information repeatedly. There is a major risk that those businesses that have already invested resources into crisis preparedness are the ones that will be saddled with further administrative obligations.

Article 11, point 5: although this Article sets out to limit the administrative burden on businesses, the wording is too weak to act as a safeguard against excesses. Similarly, the time frame during which Member States must supply information to the European Commission will create additional pressure on businesses.

In addition, the requirements set out in Article 11, points 3 and 4 - on inventory and collecting information from businesses and then discussing this in the advisory group, according to point 6 - pose a risk to business confidentiality and pose a security risk to Member States. It is clear that the information in question may potentially include trade secrets, which is why clear responsibilities should be placed on the recipients of such information. In Article 9 of the Trade Secrets Directive, there is a rule of responsibility for such information obtained through court proceedings, which the Confederation believes should also apply here[1].

[1] EUR-Lex - 32016L0943 - EN - EUR-Lex (europa.eu)

Article 12, point 2: Swedish Enterprise believes that the reference to “strategic reserves” should be clarified, in order to make it clear it is restricted to such reserves to which the Member State authorities has access. Reserves belonging to businesses should not be included in its scope unless a business has such a supply agreement with a Member State. The mere fact that goods are located on the territory of a Member State should not constitute sufficient grounds for that Member State to request information. We cannot accept requests for disclosure of information in accordance with Article 12, point 2, as they are incompatible with both commercial secrecy and national secrecy and security interests. Sharing such information in a turbulent market that risks escalating into a crisis makes it even more sensitive

Article 12, point 3: it should be clarified that this only applies to businesses with relevant supply agreements with Member States, and not to all businesses located in a given country. Otherwise, businesses would be subject to considerable burdens when Member States are required to build up their strategic reserves. Having systems that are capable of adapting to and complying with requests in the event of a crisis would increase costs for businesses. Furthermore, singling out specific suppliers would distort competition.

Article 12, point 6: the proposal gives the European Commission the right, in co-operation with Member States and with an implementing act, to require Member States to stock products. Given that this includes stocking products on business premises, compensation for stocking should therefore also be included in the proposal.

Article 13: this article needs to be clarified, including on how the different criteria relate to one another and how they are prioritised.

Article 14, point 5: the list provided by the European Commission of goods and services covered by an emergency constitutes sensitive information. As such, it should be clarified as to how the list will be handled in order to protect confidentiality and national security interests. In Article 14, point 5, paragraph 2, the Commission is given the mandate to adopt an Implementing Act through two alternative procedures; however, it remains unclear as to when each procedure would be applied.

Article 15: The Confederation questions why the requirements in point 1 - for extending the crisis stage - are apparently lower than the requirements for deactivating the crisis stage in point 2. Compare “the Commission considers” with “where the advisory group has concrete and reliable evidence”.

Articles 16–19: The Confederation supports the proposal that demands can be made of Member States for measures taken during a crisis, However, it should be made clear that these must not in any way limit the existing obligations to promote free movement that already apply according to the EU Treaty. Article 16 aims at general requirements for measures that may restrict free movement in order to address an internal market emergency. However, we believe that it should be made clear that any measures introduced must be proportionate in terms of the balance struck between the objectives sought and the measures to be taken. In concrete terms, this means that - given the purpose - the alternative that entails the lowest costs and easiest application for businesses should be the one selected. While proportionality is included in the treaty, it should attract specific attention.

Article 16, paragraph 3: the wording provided aims only at the administrative burden, rather than the total burden. Concepts such as “undue” and “unnecessary” are unclear, and in practice can always be open to interpretation.

Article 21: in order to allow for the efficient flow of information, The Confederation of Swedish Enterprise proposes that the ‘Single Point of Contact’ should be linked to liaison offices.

Article 22: The Confederation is positive towards a coordination function; however, multiple contact points at several levels would leave it unclear as to where to turn for support.

Article 24: The Confederation believes that this Article grants the Commission excessive powers, and the proposed measures are overly intrusive into business operations and undermines their rights to corporate confidentiality and to trade secrets. Information can be shared voluntarily according to point 1, but if this does not happen, the Commission may demand such information. This means that it is clearly no longer voluntary for businesses to provide information. Requests should not be made for any more information than is necessary for a given purpose, and therefore the purpose for information gathering must be narrowly defined.

Article 25: The Confederation would like to stress how important it is that trade secrets are protected. Article 9 of the Trade Secrets Directive includes a liability rule for sensitive information obtained through court proceedings.[2] It would be beneficial to have more explicit wording - similar to the Article in the aforementioned Directive – in order to establish clear responsibility for the recipients of such information.

Article 26: The Confederation supports the views expressed in the Swedish Board of Trade’s consultation response under heading 7 ‘*Omnibus proposals/market control’*. In addition, the Confederation wishes to see references to “common specifications” in the Article deleted, in order to protect the way the New Legislative Framework works, as well as innovation-friendly regulatory framework in the EU.[3]

Article 27: This article is disproportionate, and the Confederation believes that it should be deleted in its entirety. At minimum, points 2, 4, 5 and 6 must be deleted. The Confederation questions whether the European Commission has the mandate and the expertise to propose so called ‘priority-rated orders’.

Depending on how such priority-rated orders are structured, they risk damaging the EU’s trade relationships with third countries. If an order is prioritised for the Single Market over existing agreements on exports to third countries, this would take the form of export controls. Although the legal basis probably exists for the EU to introduce such controls in accordance with its commitments under the WTO (GATT) and its free trade agreements, it entails considerable risk if the SMEI is misused. It creates unpredictability in trade between the EU and third countries and also increases the risk of retaliation, with negative consequences for international trade, which in the long run may damage the EU’s ability to access critical materials. At a time when European businesses need to diversify their supply chains, this is not the right signal to send to their trading partners.

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[2] EUR-Lex - 32016L0943 - EN - EUR-Lex (europa.eu)

[3] kommerskollegium.pdf (regeringen.se)

Article 28: this article is disproportionate and must be deleted in its entirety. Articles 29 and 30, which are derived from Article 28, therefore should also be deleted.

Article 31: this article needs to be reformulated in order not to refer to Article 28. Instead, businesses should be given a general right to make their views clear on those measures to which they will be subject as the result of the use of the SMEI.

Article 32: The Confederation supports solidarity and the efficient use of resources in emergency situations. However, given that Swedish Enterprise does not think that the proposals should not include strategic reserves as set out in Article 12, we believe that Article 32 should be reworded.

Article 33: this Article must be deleted in its entirety, as it is unreasonably far-reaching. Although these are recommendations, the European Commission should respect the principle of legality.

Section 5: it is positive that the SMEI addresses the coordination of procurement during a crisis. Joint procurement by the EU can be both good and bad. For products such as vaccines, it worked. However, this does not mean it applies to all product categories. For example, in the case of semiconductors and other highly specialised and diversified products, it is an almost impossible task.

Article 40, point 3: the wording is unclear. Compulsory data sharing in the event of a crisis/emergency situation is already included in the Data Act (COM (2022) 68 final), chapter 5. Therefore it is important to have a coherent framework in place. Is the SMEI intended to introduce additional requirements (*lex specialis*) on mandatory B2G data sharing? Information that businesses are obliged to share under such circumstances should only refer to such necessary information as businesses receive and are entitled to share (due to data protection regulations, IP rights and competition legislation). Proportional and appropriate rules are important, and it must be ensured that only “need to have” rather than “nice to have” information is requested.

Article 41: in order to establish effective collaboration and immediate access to information, it is clearly necessary to have the appropriate digital tools and digital infrastructure. However, it is unclear whether the European Commission already has a specific model in mind, and whether said digital tools and infrastructure are intended to keep those businesses, private individuals, sectors and regions affected by a crisis adequately informed.

This response has been drafted by Cemille Üstün.

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