



**Independent
Retail Europe**

**COMMISSION PROPOSAL FOR A SINGLE MARKET EMERGENCY
INSTRUMENT (SMEI)
- COMMENTS OF INDEPENDENT RETAIL EUROPE -**

20 December 2022



EXECUTIVE SUMMARY

Independent Retail Europe considers it essential to preserve the integrity of the Single Market in all circumstances, also in times of exceptional crisis. The EU treaties' 'four freedoms' are a critical part of the EU acquis and should not be weakened, especially as the EU treaties provide the necessary flexibility to cater for adverse situations generated by major crises. We therefore welcome the proposal for a Single Market Emergency Instrument, and in particular the framework it establishes for preserving the functioning of the Single Market.

However, we consider that some adjustments are needed to ensure that:

- the SMEI's exceptional framework does not become a 'routine' framework; and
- the SMEI is not perceived as establishing a derogatory regime to the Single Market in cases of emergency situations

Moreover, safeguards are needed in relation to the proposed Commission's additional powers:

- Information requests should always be preceded by a broad call for evidence of affectation/need;
- The double activation procedure foreseen for mandatory information requests should be maintained;
- There should be clearer limitations to the use of information obtained through mandatory information requests;
- Additional safeguards should be introduced for priority-rated orders (concerning their scope and the price for priority-rated orders).

COMMENTS OF INDEPENDENT RETAIL EUROPE ON THE SINGLE MARKET EMERGENCY INSTRUMENT

1. THE SMEI should not turn exceptional situations into routine

The Single Market Emergency Instrument (SMEI) is – and should remain – an instrument that can only be used in exceptional times, with the view to ensure the smooth functioning of the Single Market even in times of exceptional crisis. It is therefore essential that the SMEI ensure that

- its exceptional framework cannot be applied for everyday situations, but only in truly exceptional times;
- the four freedoms that are the backbone of the Single Market and the EU acquis are not put into question by the framework of the SMEI.

a. The definitions used in Article 3 should be clear and narrow in their scope

To ensure that the SMEI's framework – foreseen for exceptional crises – does not become a routine framework, it is crucial that the definitions used in Article 3 are extremely clear, precise and narrow in scope. Any widening of said definitions would risk turning the exceptional nature of the SMEI into a permanent and routine instrument. This would be contrary to the nature and the objective of the instrument.

Action proposed:

→ Definitions in Article 3 should be as clear, precise and narrow in scope as possible to avoid any enlargement of the cases where the SMEI could be activated.

b. List of prohibited measures during Single Market emergencies (Article 16 and 17)

We consider that the list of measures prohibited by Article 16 and 17 is comprehensive and should not be diluted. These measures are key to preserve the Single Market from fragmentation.

However, these measures correspond to basic Single Market obligations derived from the EU treaties and secondary legislation. By failing to acknowledge explicitly that fragmenting the Single Market is prohibited unless conditions set by the EU treaties or ECJ jurisprudence are met, the SMEI inadvertently weakens these prohibitions and the Single Market. For instance, the use of words such as “*refrain from*” or “*unless inherent to the nature of the crisis*” also adds to the confusion and seem to indicate that the SMEI provides for a new ‘ad hoc regime’ that applies outside of the ordinary Single Market framework provided by the treaties.

To address these flaws, Title II on “Free Movement during the Single Market Emergency” should strongly and unambiguously reaffirm the preeminence of the Single Market’s four freedoms, also in times of crisis. In addition, Article 17 should unambiguously state that the SMEI does not establish a derogatory regime, but rather contains a non-exhaustive catalogue of measures considered as contrary to the EU treaties, unless they comply with the derogations foreseen by the treaties or ECJ case law on the Single Market.

Action proposed:

- Article 16(1) should reaffirm explicitly that the Single Market’s four freedoms as established by the treaties remain fully applicable during a Single Market emergency.
- In Article 16(1), the words ‘*and in particular, with the requirements laid down in this Article*’ should be replaced by ‘**including** with the requirements laid down in this Article’
- Article 16(1) should also refer to the case law of the European Court of Justice on the application of the four freedoms.
- In Article 17: the list of ‘prohibited’ measures should be turned into a non-exhaustive list of measures that are considered to be in principle contrary to the four freedoms as established by the treaties, unless they meet the conditions set by the EU treaties or ECJ case law.
- In Article 17: avoid words such as ‘*refrain from*’ or ‘*unless inherent to the nature of the crisis*’ (as they introduce legal confusion/uncertainty), and replace by a reference to the derogations foreseen by the EU treaties or ECJ case law.

2. Information requests in Vigilance and Emergency modes

a. Information requests should always be preceded by a broad call for evidence of affectation/need

The SMEI foresees in the possibility for the Commission (and the Member States) to inquire about certain sectors potentially impacted, both in the vigilance and emergency modes, through information requests addressed to relevant economic operators.

We consider that this power to send information requests should always be preceded by a general call for evidence of affectation by the crisis on a voluntary basis. Given the complexity and interdependency of most supply chains in the EU, it is doubtful that the Commission and/or the Member States will have the necessary comprehensive knowledge to assess by themselves which businesses might be affected by (a threat of) disruptions. This may lead to situations where difficulties faced by businesses/sub-sectors may not be effectively heard, and therefore assessed, creating an inaccurate picture of the situation. For this reason, before having recourse to the power to send (voluntary or mandatory) information requests, the Commission should first organise a call for voluntary provision of evidence. The result of this call should constitute the first step in the assessment of the situation in the Single Market to understand the possible need for additional information and can constitute a valid base for subsequent (voluntary or mandatory) requests addressed to specific supply chain actors when it appears that there is a lack of critical information on the state of the supply chain of certain crisis relevant goods.

Action proposed:

- ➔ Introduce a new first step in the Commission's assessment of disruptions in supply chains of crisis-relevant goods based on a call for (voluntary) evidence.
- ➔ This call for (voluntary) evidence should be open to all economic operators, and should constitute the basis for the initial assessment of a given crisis.
- ➔ Information requests (voluntary or mandatory) should only be addressed to economic operators after this first call for evidence, once the lessons have been drawn from the call, and when it showed a lack of critical information on the state of the supply chain of crisis relevant goods.

b. The double activation mode for information requests should be upheld

During a Single Market Emergency, it is important that the Commission would be able to assess the state of critical supply chains of crisis-relevant goods. Article 24 of the SMEI gives the power to the Commission to address information request for this purpose, through a double activation procedure. **We fully support the 'double activation' procedure foreseen**, as it represents a significant safeguard against unnecessary and disproportionate interferences with economic operators' legitimate interests.

Action proposed:

- ➔ Keep the 'double activation' mechanism foreseen for mandatory information requests in Article 24.

c. Limitations on the use of data subject to a mandatory information request

When the Single Market Emergency mode is activated, Article 24 gives to the Commission the power to address mandatory information requests to economic operators to gauge the state of their production capacities and supply chain disruptions.

Article 25(1) foresees only a vague limitation on the possible use of such data, stating that they should be used *"only for the purpose for which it was requested"*. **This provision should be strengthened and**

clarified. In particular, Article 25(1) should explicitly state that information received on the basis of the SMEI should only be used to assess the state of production and supplies capacities of crisis-relevant goods and the existence of important disturbances in the supply chains of crisis-relevant goods, as mentioned in Article 24.

Action proposed:

➔ Amend Article 25(1) as below:

“(1) Information received as a result of the application of this Regulation shall be used only ~~for the purpose for which it was requested~~ to assess the state of production and supplies capacities of crisis-relevant goods and the existence of important disturbances in the supply chains of crisis-relevant goods”.

d. Article 25 should oblige the Commission to inform companies in case of data breaches

Article 25 provides guarantees on the confidentiality of the data and information received by the Commission from economic operators following an information request, including concerning the preservation of trade secrets and sensitive information.

However, Article 25 should include a provision for cases of data breaches (i.e. when the information gathered is exposed to an unauthorized person, due to either a cyber-attack, or negligence). Such provisions are common in legislation that allow for the collection of sensitive data, for instance, the GDPR. Article 25 should therefore oblige the Commission to inform the economic operators concerned when the data that they have shared with the Commission was subject to a data breach.

Action proposed:

➔ Introduce in Article 25 an obligation on the Commission to inform the economic operators concerned when a data breach occurred, as this results in a breach of the obligation of confidentiality.

3. Priority rated orders in the Single Market Emergency Mode (Article 27)

When the Single market Emergency mode is activated, the SMEI gives the Commission the possibility to instruct economic operators to prioritise the production or supply of crisis-relevant goods. Although this power may be necessary under certain exceptional crisis conditions, it lacks some basic safeguards for the companies that may be subject to such priority rated orders. Safeguards are necessary as such orders may severely disrupt or negatively affect companies’ business and the market economy.

Article 27 should therefore make clear that the companies subject to such an order are only obliged to fulfil such order provided that their own suppliers are capable of delivering goods, products or supplies necessary to fulfil the priority order, and at agreed prices or, in the absence of an agreement on prices, at prices in line with the market.

This requirement is particularly important to ensure that the Single Market remain a market economy, as provided by Article 3 of the Treaty on the European Union, even in times of crisis.

Action proposed:

- ➔ Introduce in Article 27 a provision stating that economic operators subject to a priority rated order must only comply to that order if their own suppliers are capable of providing them the necessary goods, products, supplies for the fulfilment of the order.
- ➔ Introduce in Article 27 a provision stating that, to implement an order, the economic operator(s) concerned and the European Commission should agree on a price, or in absence of agreement, that the price of the order must be in line with market prices.

Original version: English – Brussels, 20 December 2022

*Established in 1963, **Independent Retail Europe** (formerly UGAL – the Union of groups of independent retailers of Europe) is the European association that acts as an umbrella organisation for groups of independent retailers in the food and non-food sectors.*

Independent Retail Europe represents retail groups characterised by the provision of a support network to independent SME retail entrepreneurs; joint purchasing of goods and services to attain efficiencies and economies of scale, as well as respect for the independent character of the individual retailer. Our members are groups of independent retailers, associations representing them as well as wider service organizations built to support independent retailers.

Independent Retail Europe represents 23 groups and their over 403.900 independent retailers, who manage more than 759.000 sales outlets, with a combined retail turnover of more than 1,314 billion euros and generating a combined wholesale turnover of 484 billion euros. This represents a total employment of more than 6.620.000 persons.

Find more information on [our website](#), on [Twitter](#), and on [LinkedIn](#).