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Orgalim Position on the Single Market Emergency Instrument (SMEI) proposal

Executive summary

Orgalim, Europe's Technology Industries, appreciates the European Commission's attempt to respond to calls for a horizontal tool to respond to crises that impact the single market. However, we are deeply concerned by the broad scope of the proposed Regulation establishing a Single Market Emergency Instrument (SMEI) and repealing Council Regulation No (EC) 2679/98 (SMEI) and the level of intervention it foresees in the private economy. We believe the current text goes far beyond ensuring the single market freedoms and increased cooperation. This position paper highlights our concerns and recommendations, which can be summarised as follows:

- **Scope** – The SMEI should focus on ensuring the single market freedoms, coordinating measures for crisis mitigation, and providing for coordinated information sharing. Orgalim is concerned about the attempt of the SMEI to address issues linked to disruptions in the supply chains.
- **Definition of crisis** – The definition of crisis in Article 3.1 is too vague and leaves too much room for interpretation. We suggest including a reference to the impact of the crisis on the freedoms of the single market. Furthermore, the definition should refer to the potential for the event in question to cause widespread harm or negative impact and to the need to take urgent action.
- **Proportionality** – The SMEI proposal should respect the proportionality and necessity criteria. In addition, co-legislators should ensure that temporary crisis measures do not become *de facto* permanent.
- **Vigilance mode** – This is one of the most concerning elements in the Commission proposal as it is intended to address issues related to supply disruptions, rather than to the free movement of goods across the single market. We are particularly concerned about the impact of the monitoring measures on global markets and the possibility for the Commission to request Member States to provide information on, and build, reserves of "goods of strategic importance". Should this mode remain part of the SMEI, we recommend that in order to activate, extend and de-activate it additional criteria are set up.
- **Emergency mode** – We recognise that in times of crisis additional information sharing and more interventionist measures may be needed to respond to, and mitigate, the disruptions. We support the objective of Title II of Part IV of the proposal concerning "re-establishing and facilitating free movement", and Chapter II on "Transparency and administrative assistance". However, we caution against the inclusion of vague provisions ultimately supporting restrictions to the single market freedoms. We strongly oppose Article 27 on priority orders and we question whether establishing strategic reserves through public policy will achieve the desired results. We further believe that the proposed fines severely undermine the cooperative spirit that should be nurtured in times of crisis and that the burden of proof on companies is disproportionate.

- **Role and composition of the Advisory Group** – The Advisory Group should have a more prominent role in the decisions to activate, extend and de-activate the vigilance and emergency modes, and the Commission should consult the Group on a mandatory basis when assessing the findings of monitoring measures. Industry representatives should be permanent members of the Group.
- **Omnibus proposal** – We support the targeted amendments proposed to sectoral legislation under the New Legislative Framework (NLF) to ensure speedy access to market for "crisis relevant goods". However, we are concerned by the free movement limitation for goods that have been placed on the market of a Member State under derogation. We also oppose the provision placing an obligation on manufacturers to ensure that the product does not leave the territory of the Member State which issued the authorisation. Common specifications should be considered as a measure of last resort, should remain voluntary, and should be developed only if no international, European, European harmonised, or national standards exist.

General remarks

The last few years have seen a number of crises affecting the EU to a different extent: starting with the COVID-19 pandemic, which hit Europe's technology industries hard¹, continuing with the severe disruptions in the supply of raw materials which were triggered by the pandemic, and followed by the geopolitical instability created by the Russian war against Ukraine and the subsequent energy crisis.

The pandemic, in particular, has been an eye-opener for Europeans on how fragile our single market can be and how easily it can be disrupted in case of crisis. For this reason, Orgalim has called for a European instrument that can ensure the integrity of the single market in times of crisis, by ensuring the freedoms of the single market and creating an effective and efficient system for administrative cooperation among the Commission and the Member States. This would also provide clear and timely information on the crisis measures to citizens and businesses.

On 19 September 2022, the Commission presented its proposal for a Regulation establishing a single market emergency instrument and repealing Council Regulation No (EC) 2679/98 (SMEI) and a package amending the harmonised legislation under the NLF (the "omnibus") to ensure alignment with the SMEI. We welcome this initiative in as far as it provides a response to our call for a horizontal tool to respond to crises that impact the single market. However, **we are deeply concerned by the broad scope of the proposal and the level of intervention it foresees in the private economy**. We believe the current text goes far beyond ensuring the single market freedoms and increased cooperation (both between Member States and with the industry).

Orgalim comments

Proportionality

As a general remark, we believe that the SMEI proposal should respect the proportionality and necessity criteria and we are deeply concerned that **many of the measures foreseen in the proposal are disproportionately interventionist and create excessive burdens on industries which will be already under significant stress because of the crisis** this tool is trying to address. More specific arguments on this point are developed in the following sections on the vigilance and the emergency modes.

Co-legislators should ensure that temporary crisis measures do not become *de facto* permanent, as has been the case with some trade restrictions imposed as a response to the global financial crisis in 2008 and the suspension of border-free travel in parts of the Schengen Area.

¹ [Europe's technology industries hit harder by Covid-19 than the 2008 financial crisis](#), 9 October 2020

Scope

While we understand the intention of the legislator to develop a tool that can respond to a broad variety of crises affecting the single market while allowing public authorities to move fast and effectively when a crisis strikes, we believe that, in practice, the proposed instrument is far too interventionist and its measures too costly for European industries.

We believe that the SMEI should focus on ensuring the single market freedoms, coordinating measures for crisis mitigation, and providing for coordinated information sharing. For this reason, we support provisions on prohibited restrictions of free movement rights. We are further supportive of those elements in the proposal which improve administrative cooperation among Member States, such as the setting up of the single point of contact, and of specific crisis protocols to ensure the timely sharing of information and efficient cooperation among Union-level bodies and Member States and between Member States.

However, **we are concerned by the attempt of the SMEI to address issues linked to disruptions in the supply chains** for three fundamental reasons: firstly, because we believe that these are considerations for industrial policy, which should not be part of the emergency scheme; secondly because the specificities of each supply chain do not allow for a one-size-fits-all approach; and thirdly, because increased political management of industrial supply chains risks limiting the agility of European industry to adapt to disturbances to international trade and can therefore be counterproductive to achieving increased resilience when the next crisis occurs.

Definition of crisis

The definition of crisis in Article 3.1 is too vague. Although we appreciate that this definition should be read in combination with article 8(3) we still believe that it leaves too much room for interpretation. Given that the objective of the SMEI is to prevent and respond to the impact of crises on the single market, **we suggest including a reference to the impact of the crisis on the single market freedoms.** In addition, **the definition should mention that the event in question is not just "exceptional, unexpected and sudden", but that it has the potential to cause widespread harm or negative impact and that there is a need for urgent action to be taken.** If there is no negative impact and/or urgent action is not needed, then the event in question cannot be considered a crisis.

A serious reflection must be made on the risk that a too vague definition of crisis could result in the single market being in a perennial state of crisis (permacrisis) if the threshold for triggering the emergency mode is too low.

Vigilance mode

The vigilance mode is specifically intended to address issues related to supply disruptions, rather than to the free movement of goods across the single market and it is triggered when a "threat of significant disruption" is identified. As such, this mode already raises concerns because of what has been explained in the sections about the scope and the proportionality of the tool. Furthermore, we have identified several specific issues with this framework:

- It is the prerogative of the Commission **to activate, extend and de-activate the vigilance mode** through an implementing act (Articles 9 and 10). Given the serious interventions on the private economy that the vigilance mode triggers, we believe that **additional governance and transparency criteria should be met**, including the mandatory consultation of impacted stakeholders (through the Advisory Group).
- The monitoring activities triggered by the vigilance mode are very concerning because of the impact they could have on competition and the burden they would put on companies. Article 11.1 requires Member States to monitor supply chains affected by the vigilance mode. This will almost certainly translate to requirements imposed on companies at national level to disclose information such as production capacity, stocks, suppliers' limitations, possibilities for diversification and substitution, demand conditions, bottlenecks, etc. In turn, these requirements will not only create a disproportionate burden on companies supposedly already under stress, but

also create the risk of information leaks and disruption of competition. All of this at a moment when a full-blown crisis does not yet exist.

Article 11.3 calls on Member States to maintain an “inventory of the most relevant economic operators” operating in the sector(s) affected by the vigilance mode. We see this measure as extremely dangerous because it would necessarily create differences among the economic operators involved, with potential negative impacts for SMEs which are more likely to be excluded by the list, and more generally for the level-playing field.

The impact of these monitoring measures on global markets should not be underestimated. We fear that they would send the wrong signal and risk aggravating the existing threat.

- **The possibility for the Commission to request Member States to provide information on, and build reserves of, “goods of strategic importance” raises a number of issues.** Similar to the point made regarding Article 11, here again Member States will need to acquire the relevant information from businesses which will be required to share sensitive information in a situation which is already highly likely to be putting them under strain. In addition, the Article grants the Commission the power to require Member States to create strategic reserves. This measure could have significant impacts on the markets and there is not enough information provided on who would bear the costs of such stockpiling, especially if the crisis does not materialise and/or eventually these reserves become redundant. Ultimately, stockpiling is a Member State prerogative relating to national civil preparedness and resilience planning, or as part of defence and security alliances, and should follow national legislation.

Emergency mode

We recognise that in times of crisis additional information sharing and more interventionist measures may be needed to respond to, and mitigate, the disruptions. We appreciate that this framework is triggered by a Council implementing act and that clear criteria for activation are listed in Article 13. We further appreciate that the objective of Title II of Part IV of the proposal concerns “re-establishing and facilitating free movement”, which in our view should be the main purpose of the SMEI. We also support Chapter II on “Transparency and administrative assistance”. However, we would like to highlight the following concerns:

- **The wording of Article 16 should be improved to ensure that it does not become a provision supporting restrictions to the single market freedoms.** Expressions such as “the underlying crisis”, “as soon as the situation allows” or “undue or unnecessary administrative burden” are too vague and, if coupled with the broad definition of “crisis”, they could be used to justify restrictive measures that are not strictly necessary and allowed under the Treaties and the additional conditions put forward by SMEI.
- Articles 17(2) and (3) give Member States the possibility to allow exceptional measures if they are “inherent to the nature of the crisis”. We believe this is a vague condition that leaves too much discretion to Member States and **call for the removal of this paragraph.**
- Title III of Part IV is heavily reliant on disproportionate obligations placed on the economic operators to provide information and to prioritise production orders. As stated above, we understand the need to share more information in times of crisis so that appropriate public policy measures can be implemented to mitigate the impact of the crisis. However, the granularity of the information demanded (Article 24(3)(a) and (b)) and the mandatory elements (Article 24(2)) are unjustified. During the COVID-19 pandemic, businesses have shown their willingness to cooperate and share information as needed, without the need for impositions or threats of fines. Furthermore, the type of information requested in Article 24 includes commercially sensitive information which would severely expose companies despite the safeguards put forward in Article 25. Even if companies would be able/willing to provide the information demanded, we question whether the Commission will be able to aggregate it and/or compare it as there is no uniform system to keep track of data such as production capacities, stocks, expected production output, etc.

- Article 24 implies that the Commission requests for information may be directed to “Representative organisations”. We would like to stress that organisations such as Orgalim would not be able to comply with mandatory information sharing because they cannot request such data from their members.
- **We strongly oppose Article 27 on priority orders and we question the effectiveness and efficiency of such a provision.** Firstly, we believe it is not a prerogative of the Commission to take industrial policy decisions which can have significant and unpredictable impacts on the market. Secondly, we believe the COVID-19 pandemic experience has shown that businesses have been able to make changes to their production lines to respond to the need for crisis-relevant goods². They have done so in line with market demands and safeguarding jobs and we question whether such an imposition dictated by public policy will be faster and more efficient than what the private sector is already capable of doing. Thirdly, the Article does not elaborate on who would bear the costs of an imposed order prioritisation. Additionally, priority orders are likely to limit the attractiveness of foreign investments in Europe, as orders from third countries may be redirected in times of crisis. As a result, it may also lead to costly countermeasures that limit foreign sourcing from European industry.
- **The burden of proof** if companies cannot meet some of the demands for information sharing or for priority-rated orders rests entirely on companies. This is **unacceptable as it adds disproportionate burdens on businesses** in times of crisis and would be particularly damaging for SMEs who may not have in-house legal services to support this activity.
- We strongly oppose Articles 28-31 related to fines. One of the lessons learnt from the COVID-19 pandemic is that the business community has had a key role in ensuring the availability of crisis-relevant products, safeguarding jobs, maintaining operations and reacting to changing situations. **We believe that the system of fines developed in the SMEI is unacceptable and severely undermines the cooperative spirit that should be nurtured in times of crisis.** Furthermore, the level of fines is disproportionate. In certain cases, it can be calculated as a percentage of the turnover in the previous year (when supposedly there was no crisis) therefore having a clear punitive goal which misses the point of the instrument.
- **Chapter II on strategic reserves would require additional clarification and more in-depth analysis of the costs and benefits of establishing strategic reserves through public policy.** In today’s interconnected economy, it will not be easy to predict when to stockpile and for which products, with the possible unintended consequence of creating further disruption. A further lesson learnt from the COVID-19 pandemic is that companies with production sites in different locations were able to maintain supplies by scaling up production or supplies from regions not experiencing shutdowns. If they were to be mandated to stockpile products in one or more of their locations, they may not be able to respond to sudden challenges as well as they have done in the past. Here again, little information is provided on who will bear the costs of mandated stockpiling and what will happen to the unused goods once the crisis is over, if the market conditions have changed, etc.

Role and composition of the Advisory Group

We believe that given the impact of the SMEI on the industry and the level of involvement required for the industry in order to comply with the current provisions, **industry representatives should be permanent members of the Group, together with Member States.** Considering the impact on the market of decisions taken under SMEI, we believe the role

² Some examples:

- Groupe PSA, Schneider Electric and Valeo changed their production lines to team up with Air Liquide and produce more respirators for hospitals and healthcare workers ([Le Point](#), 31 March 2020).
- 3D printing companies across the EU such as Ultimaker, In Brescia or FabLab adapted their production lines to replicate missing ventilator valves ([Euractiv](#), 19 March 2020; [RTL Info](#), 24 March 2020; [Kilburn & Strode](#), 28 April 2020).
- [Grundfos](#), a pump manufacturer, has modified production to deliver up to 5,000 face shields per day to aid Danish health services in the fight against coronavirus ([Chemical engineering](#), 8 April 2020).

of the Advisory Group should be strengthened and that its recommendations should be followed when taking binding decisions. Furthermore, its activities should be transparent and its recommendations accessible to the wider public.

The Group should have a more prominent role in the decisions to activate, extend and de-activate the vigilance and emergency modes. We believe that the Commission should consult the Group on a mandatory basis when assessing the findings of the monitoring measures outlined under the vigilance mode. Currently, this is only indicated as an option under Article 11(6).

The proposal does not foresee the involvement of the Advisory Group in the decisions related to the building of strategic reserves (Article 12(6) and Article 33). We believe that the Group could help by providing an analysis of whether such reserves are needed and should therefore be consulted.

Omnibus proposal

We understand and support the need for the targeted amendments proposed to the sectoral legislation under the NLF in order to ensure speedy access to market for “crisis relevant goods”. We support the derogations proposed to conformity assessment procedures and the prioritisation of market surveillance activities for the crisis-relevant goods that are under derogation. However, we call for the amendment of the following elements:

- We are concerned by the free movement limitation for **goods** that have been placed on the market of a Member State **under derogation**. While we understand and agree that these goods cannot be CE-marked, we believe that they **should be allowed to access the markets of other Member States through mutual recognition**. Conversely, this would amount to an intra-EU export ban on crisis-relevant goods, which could further exacerbate the crisis.
- We are opposed to the provision placing an obligation on manufacturers to “deploy all reasonable measures to ensure that the [product which has been granted a conformity assessment derogation] does not leave the territory of the Member State which issued the authorisation”. This is practically impossible to achieve for a manufacturer which has limited or no control on the life of the product once it is placed on the market.
- We underline that **common specifications should be considered as a measure of last resort**, should remain voluntary (as it is the case for harmonised standards) and should be developed only if no international, European, European harmonised, or national standards exist.

Orgalim represents Europe’s technology industries, comprised of 770,000 innovative companies spanning the mechanical engineering, electrical engineering, electronics, ICT and metal technology branches. Together they represent the EU’s largest manufacturing sector, generating annual turnover of over €2,497 billion, manufacturing one-third of all European exports and providing 10.97 million direct jobs. Orgalim is registered under the European Union Transparency Register – ID number: 20210641335-88.



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