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NOTE

From: Trio Presidency
To: High Level Working Group on Competitiveness and Growth
Subject: Strengthening the resilience of the Single Market

The COVID-19 pandemic has led to unprecedented challenges to the Single Market. The EU economy's ability to bounce back will undeniably depend on a fully functional and more integrated Single Market. For this we need to draw the right lessons from the crisis and act together.

Main challenges to the functioning of the Single Market for goods, services and persons in the initial phase of the COVID-19 pandemic

National restrictions introduced by some Member States in the initial phase of the COVID-19 pandemic hampered the ability of the Single Market to provide a collective EU response to the pandemic. Bans or other restrictions on intra-EU exports of certain key products and a lack of coordinated response came on top of general shortages (e.g. much needed personal protection equipment could not reach its final destination, delayed testing strategies due to shortages on laboratory services and reagents). Businesses repeatedly underlined the negative effect of such restrictions on their supply chains. In addition, harmful restrictive measures were often not notified to the Commission and other Member States, or were only notified as final acts already adopted.

Border controls restricting the free movement of persons created additional difficulties. They caused delays in freight traffic in several instances, leading to important disruptions to supply chains in many of the EU's ecosystems. Border restrictions also had a negative impact on the mobility of workers and service providers. They caused severe disruptions to businesses sending posted workers to a workplace abroad, frontier workers who could not reach their place of employment, and businesses relying on temporary or seasonal workers such as those active in the personal and household services, agricultural or retail sectors.

Beyond national restrictions, other types of challenges emerged. Certain products (e.g. cloth-face masks) lacked harmonised standards, or had too stringent product certification requirements (e.g. protective masks). Testing facilities for essential products closed down in some Member States, putting the EU's testing capacity under stress with implications for the industry and products concerned. Market surveillance authorities were faced with many non-compliant products imported from third countries and sometimes shipments were blocked by customs authorities in one Member State preventing a quick delivery to the Member State in need. Moreover, the risk of shortages of essential products protected by intellectual property rights triggered debates on the possible use of compulsory licensing¹ of patents provided under national law and the possible negative effects of using this measure in an EU-wide crisis without prior coordination between the Member States.

Public buyers had to deal with an immense increase in demand for similar goods and services while certain supply chains were disrupted. They had to ensure the availability of personal protective equipment and other medical supplies, but also hospital and IT infrastructure, to name only a few.

Finally, lack of sufficient information from the industry on existing capacity and supply gaps, insufficient use of digital public procurement in emergency situations and lack of clarity on applicable rules on movement across borders led to a lack of transparency affecting heavily SMEs in particular.

¹ A compulsory license may be issued by a public authority under certain conditions, permitting the use of a patented invention without the consent of the patent owner.

Measures taken to preserve the functioning of the Single Market

The Commission, in close coordination with Member States, took several **ad hoc actions** to support the functioning of the Single Market during the COVID-19 crisis. For example, guidelines on border management² allowing for improvements on the free flow of goods and essential services and practical advice on the free movement of essential workers³ facilitating the mobility of critical workers and service providers; and guidance on using all the flexibilities offered by the EU public procurement framework in the emergency situation caused by the coronavirus outbreak⁴. In addition, actions were taken to boost Europe's efforts to fight the crisis. For example, recommendations to testing bodies and market surveillance authorities facilitating the supply of personal protective equipment and medical devices were issued.⁵ The same applies to guidance on national measures relating to medical products and devices and of personal protective equipment⁶ to address the use of export restrictions. Moreover, the Commission, together with the Member States, stepped up efforts by launching joint procurement actions for various medical supplies.

² Guidelines for border management measures to protect health and ensure the availability of goods and essential services (C(2020)1753)

³ Guidance to ensure the free movement of critical workers (C(2020)2051).

⁴ Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis (2020/C 108 I/01).

⁵ Recommendation on conformity assessment and market surveillance (C(2020)1712).

⁶ Communication on a coordinated economic response COM(2020) 112 final.

In its conclusions of 21 September 2020 on “A Deepened Single Market for a Strong Recovery and a Competitive, Sustainable Europe”⁷, the Council stressed the need to **improve the governance** of the Single Market in order to make it more **resilient** and to **prevent restrictions** to the Single Market, including in the event of possible future crises. The Council also emphasised that it is important to make **full use of existing procedures** for provision of information, coordination and cooperation between Member States and the Commission. The Council called on the Commission to assess in its Strategic Report the resilience of the Single Market, by first drawing lessons from the COVID-19 crisis and evaluating the robustness of existing procedures, and to analyse on this basis the need for further regulatory and non-regulatory actions for further improvement and development of the Single Market. In its Conclusions of 1 and 2 October 2020⁸, the European Council also stressed to “draw the lessons from the COVID-19 crisis, address remaining fragmentation, barriers and weaknesses, and increase our ambition”⁹, and gave instructions to that effect.

Some elements for lessons learnt

While existing instruments and ad-hoc reactions by the Commission and Member States (e.g. quick reactions from European Commissioners to successfully challenge national export restrictions) have been useful in addressing the disruptions during the COVID-19 crisis, the current legal framework appeared insufficiently adapted to challenging situations like these. **Improving transparency** to avoid divergence and fragmentation in national approaches across the Single Market has become essential. Lack of clarity and the use of export restrictions for products negatively affected the free movement of goods and services and created an unpredictable environment for SMEs and industry. In addition, **gaps in our existing legislation and practices** (including as regards public procurement) hindered notably our industry and SMEs. Increasing the EU’s capacity and resilience to ensure the availability of products and robust supply-chains has become essential. In the same vein, market surveillance authorities have to be able to carry out their work as efficiently as possible.

⁷ 10698/20

⁸ EUCO 13/20

⁹ EUCO 13/20, para. 4

Member States and the Commission need to be better prepared to face future crises, based on forward-looking and structural solutions that allow for predictability and legal certainty in the Single Market.

Possible actions to strengthen the resilience of the Single Market in times of crisis

As part of a revamped Industrial Strategy, the Commission is considering a number of actions that will build on lessons learnt from the COVID-19 crisis and reinforce the EU's crisis management of the Single Market.

Such actions would aim to preserve the Single Market for goods and services during emergency situations, by increasing coordination and transparency, availability of essential products and services, and promoting clear rules also for public procurement, and thereby improving the Single Market regulation framework in general. They would complement the recent Commission proposal on serious cross-border threats to health and the forthcoming review of the Schengen Code Regulation.

Member States are invited to consider the following examples of possible structural measures and tools to be enacted as part of a revamped industrial strategy, to reinforce the EU's management capacity during a period of emergency:

- **Reinforced governance tools** (e.g. based on a new Single Market Emergency Committee);
- **Mechanisms to increase transparency and coordination** (e.g. urgent notification procedures for emergency measures restricting exports or restricting the freedom to provide services);
- **A crisis protocol for emergencies** setting criteria and thresholds for deciding whether to introduce restrictive measures on service providers and their posted workers;

- **Structural and digital solutions to preserve the free flow of goods and services** in case of border restrictions (e.g. consecrating the use of green lanes for internal crossing of borders, and digital tools to allow service providers and workers to share information with national authorities more easily);
- **Measures to ensure and speed up the availability of essential products** (e.g. introducing flexible conformity assessment procedures, new mechanisms for standards setting, a reinforced network of testing laboratories; an “early warning” mechanism for compulsory licensing, an enhanced market surveillance procedures);
- **Measures** aiming at **protecting SMEs** and at reinforcing transparency in relation to public procurement, including for example, the mandatory use of digital public procurement in emergency situations; and the encouragement of a cooperative approach in procurement;
- **Measures** to facilitate **requests of information from industry** in times of crisis for the purposes of steering an improved and coordinated response at EU level. Similar measures could be put in place to get information on the public demand of certain products and services.

Questions

During the debate, the Trio Chair intends to use a digital polling tool with multiple-choice questions. The answers generated would complement the views expressed by Member States in their interventions. *Please elaborate as you wish.*

Questions and possible answers for digital polling tool

1. *What do you consider the main lessons from the COVID-19 crisis that the EU should act upon in order to enhance the resilience of the Single Market? Choose **three at maximum!***
 - a) *Ad-hoc actions (e.g. guidelines) have proven to work well*
 - b) *Need to make full use of existing procedures*
 - c) *Need for improved governance to foster resilience and the functioning of the Single Market*
 - d) *Need for improved transparency*
 - e) *Need to close gaps in existing legislation and practices*
 - f) *Others (please fill in): _____*

2. *What concrete actions and structural solutions do you consider a priority to increase the resilience and crisis preparedness of the Single Market? Choose **three at maximum!***
 - a) *Analysis use of existing procedures (for information provision, coordination and cooperation between Member States and the Commission) with a view to improvements to ensure effective and full use*
 - b) *Reinforced governance tools*
 - c) *Mechanisms to increase transparency and coordination*
 - d) *Crisis protocol for emergencies*
 - e) *Structural and digital solutions to preserve the free flow of goods and services*
 - f) *Measures to ensure and speed up the availability of essential products*
 - g) *Measures aiming at protecting SMEs, esp. in view of transparency regarding public procurement*
 - h) *Measures to facilitate requests of information from industry*
 - i) *Other measures (please fill in): _____*

Question for discussion

What would you like to emphasise regarding concrete actions and structural solutions to be prioritised in order to increase the resilience and crisis preparedness of the Single Market?
