Council of the European Union

Brussels, 14 February 2024
(OR. en)

6288/24

Interinstitutional Files:
2022/0278(COD)
2022/0280(COD)
2022/0279(COD)

LIMITE

MI 134
COMPET 139
IND 62
CODEC 337
CONSOM 55
IPCR 6

PUBLIC

NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee
No. prev. doc.:	5707/24
No. Cion doc.:	12573/22; 12576/22 + ADD 1-5; 12572 + ADD 1-5
Subject:	Regulation on the Single Market Emergency Instrument Regulation amending Regulations (EU) 2016/424, (EU) 2016/425, (EU) 2016/426, (EU) 2019/1009 and (EU) No 305/2011 as regards emergency procedures due to a Single Market emergency Directive amending Directives 2000/14/EC, 2006/42/EC, 2010/35/EU, 2013/29/EU, 2014/28/EU, 2014/29/EU, 2014/30/EU, 2014/31/EU, 2014/32/EU, 2014/33/EU, 2014/34/EU, 2014/35/EU, 2014/53/EU and 2014/68/EU as regards emergency procedures due to a Single Market emergency - Analysis of the final compromise text with a view to agreement

I. INTRODUCTION

1. On 19 September 2022, the Commission adopted a proposal for a Regulation of the European Parliament and the Council establishing a Single Market emergency instrument and repealing Council Regulation No (EC) 2679/98[1]. The Commission Proposal is based on Articles 114, 21 and 45 of the Treaty on the Functioning of the European Union (TFEU).

2. The Single Market emergency instrument (SMEI Regulation) proposal is aimed at anticipating, preparing for and responding to the impacts of crisis. It builds on the Union's lessons learnt by ensuring a continuous monitoring on possible upcoming crises, by entering into a vigilance or emergency modes whenever a threat becomes clear and by strengthening the involvement, responsibility and commitment of both economic operators and public authorities. The Commission proposal also put in place a governance structures allowing Member States to coordinate decision-making.

3. On 19 September 2022, the Commission also submitted to the Council and the European Parliament the proposal for a Directive of the European Parliament and of the Council amending Directives 2000/14/EC, 2006/42/EC, 2010/35/EU, 2013/29/EU, 2014/28/EU, 2014/29/EU, 2014/30/EU, 2014/31/EU, 2014/32/EU, 2014/33/EU, 2014/34/EU, 2014/35/EU, 2014/53/EU and 2014/68/EU as regard emergency procedures for the conformity assessment, adoption of common specifications and market surveillance due to a Single Market emergency[2] and the proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2016/424, (EU) 2016/425, (EU) 2016/426, (EU) 2019/1009 and (EU) No 305/2011 as regards emergency procedures for the conformity assessment, adoption of common specifications and market surveillance due to a Single Market emergency[3]. The Commission proposal for the Regulation is based on Article 114 of the TFEU and the proposal for the Directive is based on Articles 91 and 114 of the TFEU.

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1 Proposal for a Regulation of the European Parliament and of the Council establishing a Single Market emergency instrument and repealing Council Regulation No (EC) 2679/98, doc. ST 12573/22 + ADD 1-5.

2 ST 12572/22 + ADD 1-5.

3 ST 12576/22 + ADD 1-5

4. The two proposals (SMEI Omnibus) aim at complementing the SMEI Regulation proposal and seek to ensure that the crisis-relevant goods referred to in the SMEI Regulation may be swiftly placed on the Union market to contribute to addressing and mitigating the disruptions.

5. The SMEI Regulation proposal was discussed at the Competitiveness Council on 29 September 2022.

6. The Council Legal Service issued its opinion on the legal basis and proportionality of the SMEI Regulation proposal on 4 April 2023[4].

7. On 7 June 2023 the Permanent Representatives Committee endorsed the compromise text of the SMEI Regulation proposal and instructed the Presidency to start negotiations with the European Parliament as soon as possible, in order to reach an agreement at first reading on this basis.

8. On 11 October 2023 the Permanent Representatives Committee endorsed the compromise texts of the SMEI Omnibus proposals and instructed the Presidency to start negotiations with the European Parliament as soon as possible, in order to reach an agreement at first reading on this basis.

9. On 16 December 2022, the European Parliament's Committee on Internal Market and Consumer Protection (IMCO) appointed Mr Andreas Schwab (EPP, DE) as rapporteur for the three proposals.

10. The Parliament adopted its position on the three proposals on 13 September 2023.

11. The European Economic and Social Committee gave an opinion on the three proposals on 14 December 2022.

[4] ST 7515/23 + COR 1 (EN version)

II. INTERINSTITUTIONAL NEGOTIATIONS – STATE OF PLAY

12. Following the adoption of the positions of both co-legislators, the interinstitutional negotiations started with the first informal trilogue on 20 September 2023 on the SMEI Regulation proposal followed by the second informal trilogue on 25 October 2023, when the negotiations on the SMEI Omnibus proposals also started. The third informal trilogue took place on 7 December 2023, and the last conclusive informal trilogue took place on 1 February 2024.

13. During the fourth and last informal trilogue on 1 February 2024, following the mandate given by COREPER on 31 January 2024, the Presidency reached a provisional political agreement with the Parliament and the technical level teams were mandated to finalise the compromise texts.

III. MAIN ELEMENTS OF THE FINAL COMPROMISE TEXT

14. On the key political issues, the compromise provisionally agreed with the European Parliament consists of the following elements:

Subject matter, Scope, Definitions and Governance

a) Title

15. The co-legislators agreed to amend the title of the act, so that it better reflects the preparedness for the emergency situations and also the resilience of the internal market.

b) Scope, objective and definitions

16. The objective of the proposal (Article 1) was clarified and tied more closely to ensuring the proper functioning of the internal market, by preventing the creation of obstacles to the proper functioning of the internal market and by preventing the application of divergent measures by Member States.

17. The scope (Article 2) of the proposed act was streamlined and the relationships with other crisis-relevant instruments were clarified. A reference to the Integrated Political Crisis Response (IPCR) is included in Article 2(4), as in Article 44(2).

18. Definitions (Article 3) were further framed to ensure that the purpose of the measures in the proposal is to improve the conditions for the functioning of the internal market in line with Article 114 TFEU. For better legal clarity, the definitions of "significant incidents" and "relevant economic operators" were added. A reference to "divergent national measures" in Article 3(1) was added, in order to reinforce a clear link with the internal market and other criteria of Article 114 TFEU.

c) Governance

19. The name of the "advisory group" was changed to the "Internal Market Emergency and Resilience Board" (the "Board") in order to reflect its strengthened role in the contingency planning, emergency and vigilance modes. Additionally, its tasks were more clearly spelled out.

20. The Regulation was completed with a number of additional provisions enhancing the democratic governance of the act. The emergency and resilience dialogue between the institutions was established (Article 4a). The Commission was tasked to create a stakeholder platform (Article 4b) to facilitate sector-specific dialogue and partnerships.

d) Contingency

21. The contingency framework of the act was spelled out in more details. Provisions on voluntary crisis protocols (Article 6a) and stress tests (Article 7a) were added. The Commission's obligations as regards organising trainings and simulations (Article 7) was further specified.

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e) Activation of vigilance and emergency modes

22. Member States' role in the internal market vigilance (Articles 9-10) mode was strengthened: its activation, prolongation and deactivation must be done by a Council implementing act. In the internal market emergency mode, the activation and the list of crisis-relevant goods and services are, where applicable, to be adopted by one Council implementing act (Articles 13-15). Furthermore, the Commission, when preparing the proposal for the Council implementing act, should consider the opinion of the Board. The Commission should also inform the Parliament about proposed or adopted acts (Article 4a).

23. The criteria for the activation of both internal market vigilance and emergency modes were clarified and further framed in respective Articles.

Free movement of goods, services and persons

f) Restrictions to free movement

24. The text of the provisional agreement aligned the wording of Article 16 so that it corresponds to the obligations set out in the Treaties. Member States' actions during the internal market emergency mode must fully comply with the Treaties, notably with the principles of non-discrimination, justification and proportionality.

25. Article 17 was amended stipulating clearly which national measures restricting the free movement of goods, services or persons must not be taken during the internal market emergency mode, as these are manifestly disproportionate. The rest of this Article was deleted, leaving any other national restrictive measure to be assessed against the requirements of the Treaties, including proportionality.

g) Mitigation measures

26. In addition, on mitigation measures (Article 18), the compromise solution foresees an obligation for the Commission to provide templates which could facilitate the free movement of the categories of persons involved in the production or supply of crisis-relevant goods and services. Those templates however can only be used on a voluntary basis by the Member States.

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h) Transparency

27. While Article 20 was deleted, Article 19 on notifications was renamed "Transparency" and amended to better frame Member States' obligation to notify the national measures taken in response to the crisis, which introduce limitations to the free movement of persons. The obligation was narrowed down to measures which are not already subject to other notification obligations pursuant to Union law. Furthermore, such notification does not prevent Member States from adopting their national measures.

Shortages of goods and services

i) Strategic reserves

28. The provisions on strategic reserves (Article 12) were deleted in the compromise text to better ensure the principle of proportionality and the rules on the distribution of crisis-relevant goods and services (Article 32) were adapted considering the deletion of the provision on strategic reserves.

j) Information requests

29. The provisions on information requests addressed to the economic operators (Article 24) were further framed, taking into account the requirements of Article 114 TFEU. The scope of the information that can be requested was clearly limited to the crisis-relevant goods and services as listed in the Council implementing act activating the internal market emergency mode. Commission can only issue such information requests if it has not obtained that information from other sources and if it clearly shows the necessity for such information request. Furthermore, additional safeguards were introduced in the text, notably the "comply or explain" possibility for the economic operators, better involvement of the Member States in the procedure, higher confidentiality requirements and national security safeguards. Fines for the non-compliance with the information requests were deleted in the provisional agreement text.

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k) Priority-rated requests

30. When it comes to the priority-rated orders (Article 27), the name was changed to "Priority-rated requests" and the possibility for the Commission to make such requests was further framed. The economic operators are free to refuse the priority-rated requests. In case companies accept the requests, they benefit from the legal protection against the claims from third parties. The economic operators can be subject to fines if, intentionally or because of gross negligence, they do not comply with the request. The amount of fines was considerably reduced.

l) Public procurement

31. The provisions regulating the procedure for public procurement of crisis-relevant goods and services by the Commission on behalf of Member States were further elaborated, clarifying the procedure in general and aligning the provisions to the rules of the Financial Regulation (Regulation (EU, Euratom) 2018/1046).

32. The ban of individual procurement action by participating Member States (Article 39) was renamed "Exclusivity clause" and better framed. The conditions under which the Commission may jointly procure on behalf of the participating Member States were specified, as well as the limitation of the participating Member States with regards to their own procurement procedures that should not undermine the Commission's ongoing procurement.

Final provisions

m) Information sharing

33. Article 25 was moved as new Article 40a on confidentiality, so that it now applies to all information received pursuant to the SMEI Regulation and it specifies Member States' and Commission's obligation to treat the information received confidentially and only for the purposes for which it is collected.

n) Date of application

34. Article 46 was amended to set the date of entry into application at 18 months after the entry into force of the SMEI Regulation.

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o) Scope

35. The list of legal acts amended by the proposed amending Regulation and amending Directive was revised. Only the products which could potentially be listed as crisis-relevant goods and for which emergency procedures for the conformity assessment are justified should fall in the scope of these amending Regulation and amending Directive. Hence, the Regulation (EU) No 2019/1009 on fertilising products was deleted from amending Regulation and the Directives 2013/29/EU on pyrotechnic articles, 2014/28/EU on the explosives for civil uses, 2014/31/EU on non-automatic weighing instruments and 2014/32/EU on measuring instruments were deleted from the amending Directive. Regulation (EU) 2023/1230 on machinery was added to the scope of the amending Regulation.

36. In addition, the amendments to Regulation 2023/1230 (General Product Safety Regulation) were included in the SMEI Omnibus Regulation. However, these amendments only introduce the presumption of conformity with the general safety requirement and the Member States' obligation to prioritise market surveillance activities.

p) Derogation from conformity assessment procedures

37. The competent national authority may authorise the placing of a market on their territory of a product which is designated as a crisis-relevant good and for which the conformity assessment procedures were not carried out by a notified body, on condition that the product complies with all essential requirements. The procedure and consequences of such emergency procedures were clarified, ensuring that the emergency procedures do not hamper the functioning of the Internal Market. The Commission may, by an implementing act, extend such authorisation so that the product in question can be placed on the market in the whole Union. Such product must bear the marking of "crisis-relevant good".

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q) Presumption of conformity based on standards and common specifications

38. The compromise text merges the provisions on presumption of conformity based on standards and common specifications and on the adoption of common specifications. It specifies what the Commission's implementing act should list as a reference for presumption of conformity, considering first the possible available standards, and establish a common specification only when standards are not available or cannot be used by the economic operators. The Article also clarifies that the presumption of conformity provided by the standard or common specification automatically ceases to apply when the Internal Market emergency is deactivated.

39. The provision allowing the Commission to establish, by implementing acts, mandatory common specifications was deleted, as it deviates from the New Legal Framework and there was no justification to give such powers to the Commission.

r) Final provisions

40. The date of application of the amending Directive and amending Regulation was adapted to that of the SMEI Regulation and was set at 18 months after the entry into force.

41. It is expected that Regulation (EU) No 305/2011 will be repealed and replaced by a new Construction Product Regulation[5] before the entry into application of the SMEI Omnibus Regulation except as regards the provisions necessary to ensure the transition between the two standardisation systems. In order to avoid a situation where the emergency provisions introduced by the SMEI Omnibus Regulation would be repealed 12 months after the entry into force of the new Construction Product Regulation and to ensure the continued application of the new emergency provisions to construction products both under Regulation (EU) No 305/2011 and the new Construction Product Regulation, those emergency provisions will be inserted into the new Construction Product Regulation before its final adoption while ensuring they are reflected in Regulation (EU) No 305/2011.

[5] ST 5762/1/23 REV 1

IV. CONCLUSION

42. In light of the above, the Permanent Representatives Committee is invited to:

a) approve the compromise text set out in the documents 6288/24 ADD 1-3, and

b) instruct the Presidency to send a letter to the Chair of the IMCO Committee of the European Parliament confirming that, should the latter adopt its position at first reading, in accordance with Article 294(3) TFEU and in the exact form set out in the Annex — subject to legal linguistic finalisation — the Council would approve, in accordance with Article 294(4) TFEU, the position of the European Parliament and the act would be adopted in the wording corresponding to the position of the European Parliament.

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