



Lessons from the Pandemic

Designing a Single Market
crisis management mechanism

2022



Foreword

Seldom has a crisis directly affected the core functions of the Single Market as the COVID-19 pandemic. Indeed, it is the very idea of freedom of movement that was targeted by national countermeasures in the form of border controls, export bans and other restrictions on transport services (to name a few). All in all, three of the four freedoms that constitute the backbone of the Single Market were negatively affected by these unilateral measures.

In its capacity as the Swedish agency for the Single Market, the National Board of Trade is closely following these developments.

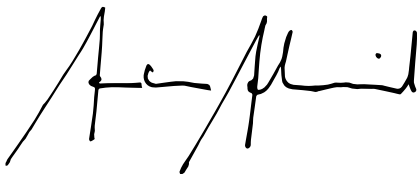
With the present report, we aim at addressing two main questions:

- *How did the Single Market fare in the pandemic?* To answer that question, we map out national COVID-related measures as well as the various EU responses and discuss their impact on the freedom of movement.
- *How can the Single Market be strengthened in times of crisis?* Drawing on lessons from the pandemic, we provide some recommendations for improving the functioning of the Single Market and boosting its resilience ahead of future crises.

Our hope is that this paper contributes to the discussions on the state of the Single Market in times of crisis and, in particular, the incoming proposal for a Single Market Emergency Instrument ('SMEI').

This report was written by Olivier Linden with input from Sara Sandelius. It was reviewed by Johanna Nyman and Hannes Jägerstedt.

Stockholm, June 2022

A handwritten signature in black ink, appearing to read 'Anders Ahnlid', with a stylized, cursive script.

Anders Ahnlid
Director-General
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Executive summary

The COVID-19 crisis is impacting the functioning of the Single Market in different ways. Disrupted supply chains, export restrictions on health-related products, border controls (to name a few) affect negatively three of the four freedoms that constitute the backbone of the Single Market. In addition, the huge financial support to businesses in the form of State aids (up to €3.18 trillion) as well as measures aiming at promoting local goods or companies can distort free movement and competition within the Single Market.

Yet, our review of these national measures shows the resilience of the Single Market in maintaining the freedom of movement — and, remarkably so, the free flow of foodstuffs and other essential consumer goods.

Subject to qualifications, we find that the bulk of the countermeasures affecting the freedom of movement are motivated by the protection of public health and likely are, in most cases, in line with EU law. In other words, for all their disruption, the legal architecture of the Single Market is sufficiently flexible to accommodate such far-reaching restrictions. In fact, given the nature of the crisis and the limited competence of the EU in the field of health protection, it is important to allow the full, almost unimpeded, use of the Member States' capabilities to address the pandemic.

At the same time, the Single Market plays a key role (albeit a discreet one) in mitigating the negative impact of the crisis on the freedom of movement. It does so in two manners.

First, it precludes national restrictions that are not motivated by public health. In practice, the few attempts by some Member States to protect their own goods or businesses (in the form of quotas, preferential procurement regimes or calls for food patriotism) were, in most cases, swiftly withdrawn after pressure from the European Commission or other stakeholders.

Second, it provides a strong incentive to find common solutions and thereby defuses any widespread temptation for excessive unilateral responses by the Member States. In practice, the various EU initiatives (from the green lanes to the Digital COVID Certificate) provide practical solutions to concrete obstacles to the free movement. But, beyond that, the EU offers a natural platform for problem resolution and shows that the Single Market, with its idea that the sum is greater than its parts, is a means to overcome an 'everyone for themselves' approach.

But, even if the Single Market proves itself to be resilient at large, our survey of the national countermeasures also reveals the need for technical improvements to strengthen it in times of crisis:

- Increased transparency: in times of crisis, it is particularly important for the functioning of the Single Market that all parties have access to real time, accurate and exhaustive information on the restrictions put in place by the Member States. We therefore recommend strengthening the existing notification regimes for

goods, services and persons. We also propose to consider a horizontal information mechanism adapted to crisis situations.

- Better enforcement: the Single Market already suffers from a huge compliance deficit and the risk of violations of EU law is exacerbated in times of crisis. Improved enforcement in normal time is therefore critical to building the norms and discipline that helps maintaining the freedom of movement and securing the supply of goods and services in emergency situations. The European Commission does not have the possibility to monitor all local compliance problems. It is therefore crucial that the Member States take greater responsibility in the enforcement of Single Market rules. Proposals in that direction would contribute in an effective and significant manner to strengthening the Single Market, especially in times of crisis. We therefore recommend integrating an ambitious enforcement dimension along these lines in any future crisis management proposal.
- Stronger cooperation mechanisms: additional crisis mechanisms may be considered in line with the recent EU initiatives. But their shape and efficiency will vary depending on the type of crisis envisaged and the EU's competence for each situation. We argue, therefore, that a prerequisite for efficient, relevant and flexible mechanisms is to provide an in-depth analysis of relevant crisis scenario based on evidence from a wide range of areas (including, but not limited to health management, defence affairs, environmental science or food security).

Finally, we note the Commission's plan for a Single Market Emergency Instrument ('SMEI'). Although no concrete proposal has been presented yet, we understand that the SMEI would focus on means to strengthen the Single Market in times of crisis, but also on how the Single Market could contribute to solving such crises.

We are concerned by the seemingly ambiguous objective of this initiative which appears to straddle two distinct, not always aligned, policy areas (the Single Market and the Industrial Strategy). The risk with such multipurpose policy tool is that it becomes inefficient. Poorly thought through initiatives also risk creating a false sense of security that may prove counterproductive once a crisis strikes.

In any case, we recommend that any SMEI proposal focuses on strengthening the Single Market by integrating the three dimensions mentioned above: increased transparency, better enforcement, and stronger cooperation mechanisms. In addition, it shall: (i) rely on experiences from the pandemic (in particular the various coordination mechanisms launched by the Commission) and an in-depth analysis of the crisis scenarios that it seeks to address; (ii) not undermine the openness of the Single Market towards third countries; (iii) take into account existing crisis management initiatives; and (iv) not put an unnecessary burden on businesses.

In other words, the SMEI should be based on a dynamic strategy that uses the freedom of movement in the Single Market as well as our external openness to boost resilience while avoiding the pitfalls of bureaucratisation.

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Introduction

More than many past crises, COVID-19 affects the core functions of the Single Market.

Indeed, preventing the spreading of a deadly human-borne virus is on an unavoidable collision course with the very idea of freedom of movement of persons. And restrictions on this freedom inevitably affect the free movement of closely related services (such as transport, tourism, or logistics) and goods (broken supply chains). Additional problems, such as shortages in health-related products, led in the initial phase of the pandemic (March to May 2020) to some intra-EU export restrictions. Finally, the cost of the crisis on the economy triggers a huge financial support to businesses in the form of State aids (up to €3.18 trillion), with the temptation for some Member States to take advantage of the situation and pursue a protectionist agenda.

The National Board of Trade (the ‘Board’) is closely following these developments. In October 2020, we published a preliminary analysis in Swedish covering the initial period of the crisis.¹ The present paper follows up on this analysis. It identifies national COVID-related measures that restrict the freedom of movement and negatively impact the functioning of the Single Market.

The purpose of this survey is, in part, to serve as a basis of discussion for strengthening crisis management mechanisms at the EU level.

Scope, structure, method and limitations

As a preliminary remark, we note that COVID-19 covers different types of crises that each have an impact on the functioning of the Single Market. On the one hand, the health crisis led to lockdown measures, export restrictions on health-related goods and border controls – all of which affected the freedom of movement in the Union. On the other hand, the social and economic crisis triggered national responses in the form of State aids or the promotion of local goods or businesses which can distort free movement and competition within the Single Market.

It is important to dissociate these two types of crises, not the least because, from an EU law perspective, the margin of manoeuvre of the Member States is much broader when it comes to fighting the pandemic, i.e. protecting the health of their citizens, than when it is about restoring the competitiveness of their national industries, i.e. invoking economic reasons.

In our paper from 2020, we only focused on the health crisis and the national measures that were put in place by the Member States to fight the pandemic. By contrast, the present mapping exercise covers both the health and the social and economic crises, although they are treated separately:

- **Section 1 (“The Health Crisis”)** addresses national restrictions that are motivated by the protection of public health. As such, these measures are presumed to pursue a legitimate objective since their primary focus is on the protection of non-economic interests. Obviously, such presumption can be rebutted, in particular if a closer look at the measures in question reveals a hidden agenda or some form of arbitrary discrimination.
- **Section 2 (“The Social and Economic Crisis”)** focuses on national measures that aim at mitigating the economic and social effects of the pandemic. As mentioned, these include financial support by the Member States as well as non-tariff barriers to protect and/or promote local interests affected by the crisis. If anywhere, it is in respect of these measures that the risk of unlawful discrimination is the most important.

For each of these crises, we attempt, first, to identify the restrictions in place and, second, to analyse the rationale for these measures and, in particular, whether they may be in breach of the Single Market rules.

The first stage relies on a number of sources, primarily media reports and the various notification databases for export restrictions,² services requirements,³ barriers to the freedom of movement of persons⁴ and State aids.⁵ One idea behind this paper is to present and summarize in one and same place a digest of these findings to get a more comprehensive picture of the state of the Single Market during the pandemic.

The second stage combines a review of the vast literature on the COVID-crisis⁶ with the Board’s own analyses. The main challenge with this exercise is to conduct qualitative analyses of the restrictions in question. This is due to the unprecedented number of measures that are adopted by the Member States,⁷ the lack of detailed information on these measures and the novelty and complexity of the COVID-crisis.⁸ As a result, the Board’s review is subject to qualifications and shall be considered with caution.

Finally, we attempt, in the concluding part of this paper (**Section 3 “Managing Future Crises”**), to draw some preliminary lessons of our review of COVID-related measures for the management of future crises that may affect the Single Market. In particular, we discuss the need, role and possible shape of a Single Market Emergency Instrument (‘SMEI’) which is an upcoming proposal announced by the European Commission in its updated Industrial Strategy.⁹

A last word on the concept of ‘Single Market’ which may be interpreted in different ways, leading in turn to misunderstandings and false expectations. For the sake of clarity, we provide in Box 1, the definition upon which we base this paper.

Box 1 – The concept of 'Single Market'

The term 'Single Market' is a catch-all concept that encompasses different realities, which may be confusing when dealing with such important questions as how to improve its functioning in times of crisis.

A broad definition of the 'Single Market' would cover the EU's economy as a whole, but also critical aspects of our societies such as the public health systems of the Member States or their social welfare regimes, to name a few dimensions that are topical in the context of the pandemic. With such approach in mind, discussing the functioning of the Single Market in times of crisis becomes a complex issue involving many policy areas (from industrial policy to health, energy or even defence policies). It also calls for a delicate balancing exercise between the competences of the EU and of the Member States in respect of each of these policy areas.

A narrower approach would focus on the core functions of the Single Market whose role is to ensure the free movement of goods, persons, services and capital within the EU. Those functions consist in a range of mostly legal mechanisms that facilitate integration, such as the prohibition of unjustified barriers to trade (so-called 'negative integration') and the adoption of common rules by way of harmonisation or coordination ('positive integration'). In that context, a strengthening of the Single Market would merely concentrate on securing a continuous flow of goods, services, persons and capital in times of crisis.

For the purpose of this paper, we have opted for the second approach which, in our view, is more in line with the definition of the Single Market as it is set out in the EU Treaties.¹⁰ Another reason for choosing this narrower, 'legal' (or 'technical') line, is that an all-encompassing 'political' approach would have called for expertise in a broad range of domains (from health policy to national security or the management of natural disasters) that is not readily available to the Board.

For this reason, our review of the impact of the pandemic on the Single Market (Sections 1 and 2) is circumscribed to restrictions to the free movement and does not address the broader effect of the crisis on the economies of the Member States or on their health and social regimes. Thus, this paper will cover broken supply chains resulting from border controls but not those due to the closing of suppliers' factories in other Member States. The latter is the flip side of the high integration level of the Single Market but is unrelated to the introduction of intra-EU barriers.

Likewise, we focus, in Section 3 on means to smoothen the freedom of movement in the EU rather than addressing the shortcomings of our economies that were unmasked by the pandemic.

1. The health crisis

Two types of measures were adopted by the Member States to protect public health: export restrictions to secure the supply of certain health-related products and lockdown measures to mitigate the spread of the pandemic. Those are examined separately in this section.

1.1 Export restrictions on health-related products

Health-motivated restrictions on the export of goods concern a group of products ranging from Personal Protective Equipments ('PPEs'), medicines, medical products, and medical devices. These measures were subject to prior notification to the European Commission in accordance with the Single Market Transparency Directive.¹¹ To the extent that the Member States complied with this notification obligation (which is likely but cannot be fully ascertained), we provide an exhaustive list of the export restrictions introduced in the wake of the pandemic, see Table 1 below.¹²

Table 1 – Notified export restrictions (March 2020 - March 2022)

Country	Date of notification	Product type	Notified measure
Belgium	2020-10-15	Vaccine (flu)	Export ban
Bulgaria	2020-03-11	PPEs	Export ban (until 25-mar)
	2020-04-24	Medicines	Export ban
	2020-12-18	Medical products	Export restrictions
	2021-03-10	Medical products	Export restrictions
	2021-04-06	Medical products	Export ban
	2021-08-27	Medicines	Export ban
Czech Republic	2020-03-12	Medical products	Export ban
	2020-03-17	Medicines	Export ban
	2020-04-01	Medicines	Export ban
Denmark	2020-03-22	Medical products	Storage requirement
	2020-03-26	Medical products	Storage requirement
Estonia	2020-04-06	Medicines	Export ban
France	2020-03-05	PPEs	Requisition (until 31-may)
	2020-03-20	PPEs	Requisition (until 31-may)
	2020-03-24	PPEs	Requisition (until 11-may)
	2020-03-26	Medicines	Export ban (until 11-may)
	2020-03-27	PPEs	Requisition
	2020-04-01	PPEs	Requisition
	2020-09-29	Medicines	Storage requirements
Germany	2020-03-04	PPEs	Export ban (until 23-mar)
	2020-03-12	PPEs	Export ban (until 23-mar)
	2020-03-14	PPEs	Export license (until 23-mar)
Hungary	2020-03-25	Medical products	Export ban (until 9-apr)
Italy	2020-03-06	PPEs	Export license (until 24-apr)
Lithuania	2020-04-17	Medical products	Export ban
Poland	2020-04-18	Medical devices	Export ban
Romania	2020-04-14	Medical devices	Export ban (until 23-apr)
	2020-04-22	Medical products	Export restriction (until 23-apr)
	2020-04-23	Medicines	Export requirements
	2020-07-15	Medical devices	Supply ban
	2020-10-21	Medical products	Supply ban
Slovakia	2020-03-23	Medical products	Export ban (until 9-apr)
	2020-04-09	Medicines	Export ban

Source: TRIS-database and National Board of Trade

As shown in this table, the bulk of the export restrictions were adopted by a dozen Member States in the early stage of the crisis (March to May 2020) and lasted, at most, a couple of months. These drastic measures were motivated by skyrocketing demand for certain health-related products that could not immediately be matched by domestic or international supply. Export restrictions were an attempt at mitigating the risk of shortage of critical products in the fight against the pandemic.

From a Single Market perspective, the appropriateness of these measures can be questioned as they run counter the principle of EU solidarity and the principle of freedom of movement. Yet, as discussed below, a closer look at these two perspectives provides a more nuanced picture.

1.1.1 Principle of EU solidarity

With regard, firstly, to the principle of solidarity, the Commission expressed concerns that such unilateral actions may have a negative impact on the security of supply in critical products in other countries:¹³

“It has become apparent that protectionist measures are affecting the global pharmaceutical supply chain. Export bans and national stockpiling, within and outside the EU, can easily lead to inequitable supply and shortages in the EU and worldwide.”

Indeed, there are indications that, at the micro level, certain measures may have impacted the supply in other EU countries. One such example concerns the requisition by the French authorities of face masks stored in the Swedish company Mölnlycke’s warehouse in Lyon.¹⁴ Out of the five million masks that were requisitioned, two million were destined for the Italian and Spanish markets which, at the time (March 2020), were in dire need for PPEs. The French requisition which, in practice, amounted to an export ban, was lifted within a month after pressure from the Swedish Government.¹⁵

However, on a more aggregate level, it is unclear whether the specific export restrictions adopted in the wake of the pandemic led to immediate shortages in other EU countries. As far as we understand, the main reason for such shortages was a sudden spike in demand that could not be met on short notice through existing production levels and available stocks.¹⁶ It is likely that the export restrictions have had a marginal effect on the situation, but we lack information on that.

We note however that, for the period January to May 2020, intra-EU trade in PPEs and medical devices decreased by 1.9% and 0.4% respectively whereas it increased by 10.8% for medicines and medical products (compared to the corresponding period for 2019).¹⁷ During the initial phase of the crisis, it is possible that part of the growing demand for PPEs and medical devices was met by imports from third countries and, to a lesser extent, by increased local production.¹⁸

1.1.2 Principle of freedom of movement

In respect, secondly, of the principle of freedom of movement, the export restrictions constitute a serious deviation from the very idea of a Single Market without internal borders. Yet, our preliminary legal analysis for the period March to May 2020 shows that it is likely that most of those restrictions complied with the EU rules on free movement.¹⁹

In particular, we note that, given the limited EU competence in that field, the Member States enjoy a broad margin of manoeuvre to adopt public health protection measures.²⁰ In that respect, it is important to recall the words of the Court of Justice of the European Union (‘CJEU’) in a landmark ruling from 1976:²¹

“Health and the life of humans rank first among the property or interests protected by Article 36 [on the freedom of movement of goods] and it is for the Member States, within the limits imposed by the Treaty, to decide what degree of protection they intend to assure and in particular how strict the checks to be carried out are to be.” (para. 15).

The margin of manoeuvre of the Member States includes the possibility to restrict trade to secure the supply of critical products for health protection such as PPEs and medicines. Obviously, such discretion does not amount to a ‘carte blanche’ and it is for the Member States to show that health-related restrictions are proportionate to that objective.²²

In our view, the following arguments support the proportionality of the export restrictions in question.

Primarily, it is important to recall the context within which these measures were introduced, notably the fact that, in its early stage, the Member States were facing a rapidly unfolding crisis of unprecedented nature and with severe consequences for human life and the national health systems. At the time, the considerable scientific uncertainty and the need for swift actions may, in line with the EU precautionary principle,²³ have justified far-reaching protective measures without having to wait until the reality and seriousness of those risks become fully apparent.

Furthermore, the limited scope of the export restrictions – in term of targeted products and their timeline – indicates a relatively circumscribed response. As mentioned above, the export restrictions lasted, at most, a couple of months but were, in some cases, recalled before that – as was the case with the German ban on PPEs which lasted a few weeks in March 2020.

For these reasons, we find it difficult to question the lawfulness of the export restrictions put in place by the Member States in the early phase of the crisis. In any case, it would ultimately be a matter for the CJEU to assess the compliance of such measures with the Single Market rules. At this stage, however, we have not seen any such case being brought before the CJEU, nor are there any indications that the European Commission intends to initiate infringement proceedings against such measures.²⁴

Still, it is important to nuance our preliminary legal analysis in several respects.

Firstly, we note the lack of detailed information on the nature, motivation and potential effects of the export restrictions notified by the Member States in the early phase of the pandemic. Given this opacity – which is discussed more in detail below (Section 3.1.1) – a thorough legal analysis of each individual measure would be speculative. For this reason, our preliminary assessment above is necessarily of a general nature.

Secondly, it cannot be excluded that export restrictions that complied with the Single Market rules were applied in individual cases in an arbitrary manner. For instance, the possibility for the French authorities to requisition PPEs may be motivated by the need to ensure the security of supply of those critical products. However, the actual requisitioning of Mölnlycke’s masks by the local authorities in Lyon, may be questioned given that these products remained in the company’s warehouse for a month without being placed in the French market or otherwise benefit the local healthcare sector.

Finally, export restrictions that were introduced after the initial period of the pandemic (March to May 2020) would, in our view, be subject to a higher burden of proof. Indeed,

with time passing came a greater knowledge of the virus as well as a coordinated approach on the procurement of health-related products.²⁵ This would, in turn, limit the need for radical measures.

As shown in Table 1, only a handful of export restrictions were introduced after May 2020 in three Member States: Romania, Belgium and Bulgaria. As far as we understand, the timing of the Romanian supply bans on medical devices notified in July 2020 was challenged by the European Commission.²⁶ The Belgian export ban on flu vaccines (October 2020 to February 2021) and the Bulgarian export bans on certain medical products such as oxygen (March to April 2021 and September to October 2021) seemed, in our view, more thoroughly motivated.²⁷ To the best of our knowledge, neither the Belgian, nor the Bulgarian measures were opposed by the European Commission.

1.1.3 Concluding remarks on export restrictions

In economic theory, export restrictions (taxes, quotas, or bans) are generally regarded as a trade policy instrument to be avoided. They distort prices and thereby influence the decisions of consumers and producers, which leads to economic efficiency losses both in the implementing country and its trading partners. In short, efficiency losses occur because production is shifted away from (presumably) efficient domestic producers to less efficient foreign ones, and because domestic consumers ‘over-consume’ in relation to their preferences, whereas foreign consumers are not able to attain their desired level of consumption.

There is also a “terms-of-trade”-effect, which favors the country implementing the export tax at the expense of its trading partners. In this sense, an export restriction is a policy which risks leading to an unhealthy “beggar-thy-neighbor” dynamic in trade relations, benefitting no one.²⁸ In the case of quantitative restrictions, further harm may be caused by so-called rent-seeking behaviour of firms, which gives rise to a host of economic issues.²⁹

The use of export restrictions has historically been motivated by a number of reasons, such as infant-industry protection, counteracting inflationary pressure, income redistribution and State revenue collection. The success of these measures has been mixed at best and very rarely are export restrictions the first-best solution to these challenges.³⁰

This general criticism of export restrictions applies, likewise, to the measures adopted in the early phase of the pandemic. Yet, as discussed above (Sections 1.1.1 and 1.1.2), we note that these specific measures may not have had such a negative impact on trade, nor have they necessarily been in breach of the EU rules on free movement. This apparent paradox may be explained in two manners.

First, it is important to recall that the export restrictions on PPEs and medicines aimed at protecting the health and life of humans. Faced with a contagious and deadly virus, the need for immediate action was prioritised over any other mid-term considerations by the Member States adopting these measures. In that sense, the EU law test applying to these restrictions – in particular, the acknowledgement of human life as the highest-ranking interest to protect – merely reflects the hierarchy of values in our societies.

It can be argued that export restrictions may, indeed, protect health in the short term (e.g., by granting immediate access to critical products) but could have a far more negative impact on that objective in the longer term (e.g., by reducing the overall availability of those products). But, given the limited competence of the Union in that area, EU law can but acknowledge that it is for each Member State to solve this ethical dilemma.

Thus, in our view, the (presumed) lawfulness of these export restrictions does not constitute a legal peculiarity at odds with the economic and public health reality posed by the pandemic. On the contrary, it reflects the challenges faced by a multi-layered political system (with EU and national levels) in addressing complex problems (with conflicting short- and

long-term perspectives). The logic here is that, lacking own powers to act, the EU shall not limit the ability of the Member States to protect the health of their citizens as they see fit.

But, and that is our second point, the EU can instead propose common solutions that render the use of national export restrictions superfluous.

The role of the European Commission was crucial here. It engaged in a dialogue with the Member States (both informal and via the procedure set in the Single Market Transparency Directive) to explain the need to maintain the free flow of critical products in the Single Market. In that sense, it played the role of a mediator between the Member States, hence limiting the risk of a ‘race to the bottom’ in terms of national export control. The Commission also launched important initiatives to coordinate the supply of these products in the Member States by way of joint procurements and of an EU-wide export authorisation system towards third countries.

These actions contributed to the limited scope of the export restrictions, both in time and in reach. It explains, in turn, why these measures, which were potentially damaging, did not have time to lead to the economic efficiency losses commonly associated with this type of trade policy instrument.

Thus, the EU played a positive role in rapidly reinstating the free movement of critical health products in the Single Market. However, looking forward, this does not necessarily mean that future crises would see the same outcome. More severe threats, for instance in terms of higher fatality rates, may have a far more disruptive impact which is why it is necessary to reflect on means to strengthen the Single Market in times of crises.³¹

1.2 Lockdown measures and border controls

Lockdown measures and border controls aim at limiting the spread of the coronavirus. The Member States have adopted a wide variety of such measures, from entry bans to the closure of shops, workplaces and schools, social distancing and self-isolating obligations and other limitations on the circulation of persons (e.g. masks and/or vaccine passports requirements). In many cases, these measures were combined with declarations of a ‘state of emergency’.

It is not feasible to identify and list the thousands of restrictions that were put in place at the national, regional and local levels in the last two years.³² Those varied in time, space and amplitude depending on the local epidemiological situation³³ and factors such as the vaccination rate and the emergence of new variants.

Hence, for the purpose of this mapping exercise, we focus on (i) the most serious restrictions on the freedom of movement of persons; and their effects on (ii) the freedom of movement of services and (iii) the free movement of goods. We conclude this review with (iv) assessing the compliance of these restrictions with the Single Market rules.

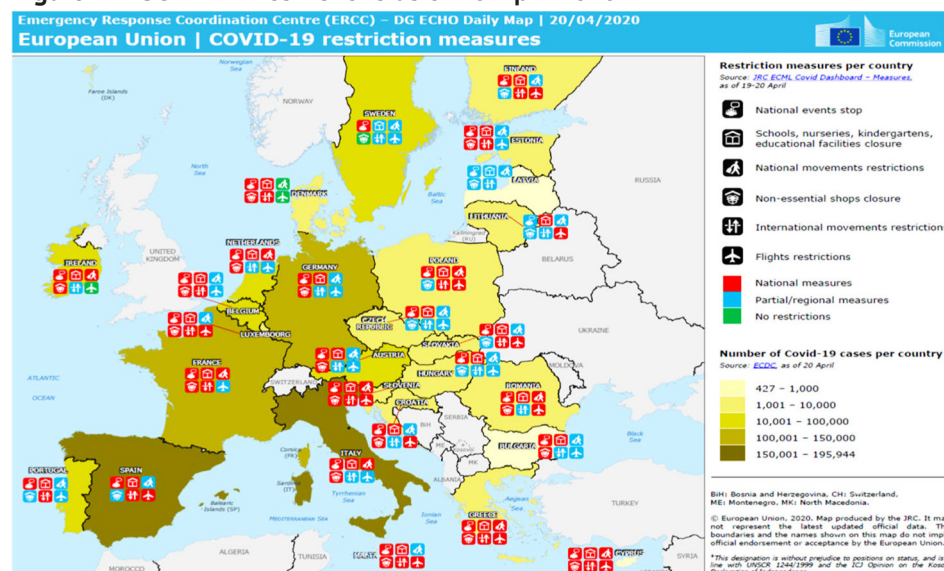
1.2.1 Restrictions on the free movement of persons

For the initial phase of the pandemic (March to May 2020), we have identified hundreds of barriers to the freedom of movement of persons that were introduced at the national, regional and local levels.

These barriers took the form of border controls, restrictions for passenger transport services and other travel restrictions but also gathering limitations, closing of shops, factories and workplaces, as well as capacity limits in bars, restaurants and public transportations.³⁴ In some cases, these restrictions took the form of recommendations (e.g. encouraging teleworking, voluntary quarantine or government advice against non-essential travel). Typically, these measures were in place for a few weeks or, at most, a couple of months, i.e., the duration of the first outbreak.

As mentioned above, it is not feasible to provide an exhaustive picture of these restrictions. The map established by the European Commission and presented in Figure 1 gives an instant overview of the situation on 20 April 2020, when the EU reached its first peak of contamination.

Figure 1 – COVID-19 restrictions as of 20 April 2020



Source: European Commission

In the following outbreaks, some of these restrictions were re-introduced, albeit often in a milder form. New types of barriers were also adopted, such as completing Passenger Locator Forms, testing negative for COVID-19, presenting a vaccination passport before intra-EU travel or completing quarantine upon arrival in another Member State.

Past the first outbreak, the EU attempted to coordinate the national travel restrictions by way of a Council recommendation that was amended several times during the pandemic.³⁵ This recommendation includes common contamination thresholds to justify restrictions with reference to the color-coded maps of EU regions which are published weekly by the European Center for Disease Prevention and Control ('ECDC'). It also introduces protocols for such restrictions, in particular rules on quarantine and self-isolation, as well as documentation to be presented for entry such as the EU Digital COVID Certificate (June 2021).³⁶

Box 2 – The EU Digital COVID Certificate

The Digital COVID Certificate is an EU-standardized document issued by the health authorities of each Member State and which proves that a person has been vaccinated against COVID 19, has a negative test result, or has recovered from the disease. The COVID Certificates are valid in all Member States and, thus, avoid a fragmented system of multiple national certificates.

In early 2022, the European Commission stated that a person with a valid COVID Certificate should in principle not be subject to any additional restrictions, such as tests or quarantine, regardless of their place of departure in the EU.

According to the European Commission, the EU Digital COVID Certificate has had "a very positive impact on free movement at a time where Member States continue to restrict travel on grounds of public health. It ensures that citizens enjoy a right to receive interoperable and mutually accepted certificates on COVID-19 vaccination, testing and recovery that they can use when exercising their right to free movement."³⁷

This recommendation is not binding but was generally complied with by the Member States and, thus, contributed to facilitate the freedom of movement of persons. In a few cases, however, the Commission indicated its concerns vis-à-vis stricter national measures than had been agreed upon at the EU level, notably the introduction of border controls in Germany, Belgium, Hungary, Finland, Denmark and Sweden in February 2021.³⁸ According to media reports, these restrictions included:

“[A] broad ban on non-essential travel imposed by the governments of Belgium and Sweden and the selective entry restrictions enforced by the German government on traffic from Austria’s Tirol region, the Czech Republic and Slovakia. Currently only German citizens, foreign residents and essential workers are allowed to cross the border.”³⁹

In December 2021, the fifth outbreak and the emergence of a new variant led several Member States to re-introduce stricter entry obligations. These included the requirement for a third booster to access services in France⁴⁰ and for a negative PCR-test to enter Portugal, Italy, Greece and Sweden.⁴¹

At the time of writing, the EU offers a more positive, but still slightly contrasting picture. The epidemiological situation has considerably improved with high vaccination rates⁴² and a less severe variant. As a result, most Member States have lifted their travel restrictions,⁴³ and in some cases downgraded the risk level associated with COVID-19.⁴⁴ Yet, in a few Member States, we note that some entry restrictions are still in place, for instance, the obligation to present a valid vaccination, proof of recovery or test certificate to enter Italy, Spain or Portugal.⁴⁵

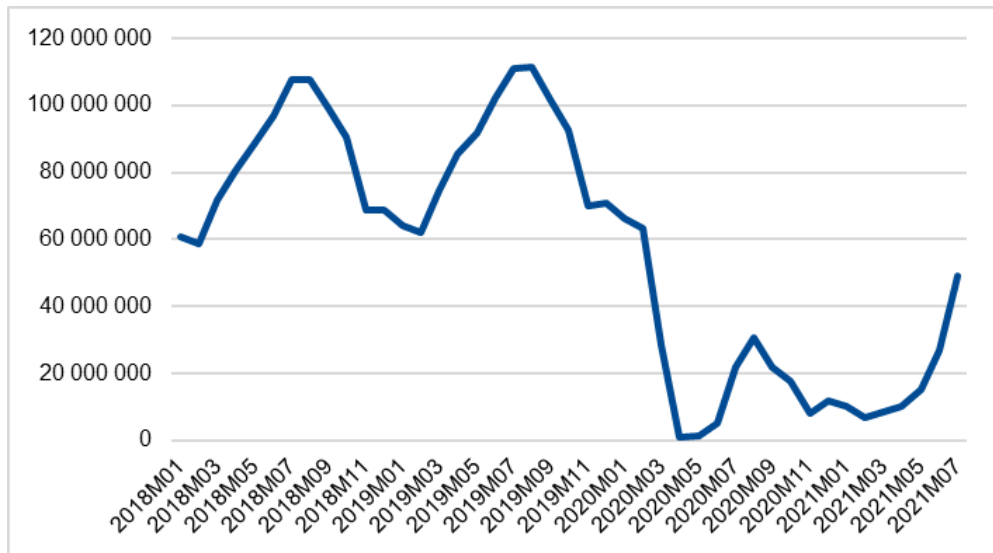
Aside from these general restrictions, the Board has, in its capacity of the Swedish SOLVIT-centre, come across other specific barriers to the free movement of persons. Although some of them may have already been solved, they illustrate the types of issues that arise in the context of the pandemic:

- Difficulties for the Swedish authorities to issue the Digital COVID Certificate to EU citizens partly vaccinated in other Member States or lacking a Swedish Personal Identification Number (‘PIN’).⁴⁶ Several complaints on these issues were brought before the Swedish SOLVIT-centre. As far as we understand, the absence of a Swedish PIN is now resolved by the competent Swedish authority,⁴⁷ but the problem remains for persons having obtained a vaccination dose in other Member States.
- Lack of compensation for Swedish frontier workers who were no longer able to work when Norway closed its borders with Sweden. Whereas Norwegian workers were compensated for losses of income resulting from local lockdowns, Swedish frontier workers could not benefit from that regime. That problem was eventually resolved at the political level.⁴⁸
- Changes in the social security affiliation of a foreign worker employed in Sweden but who was blocked in Germany. On a similar note, we understand that these restrictions also led to changes in the applicable taxation regime for frontier workers, for instance in the Øresund region comprising the Copenhagen area and Southern Sweden.⁴⁹

In conclusion, the free movement of persons was severely impacted by the restrictions that were unilaterally imposed by the Member States during the pandemic. The impact was especially noticeable in its initial phase and, to a lesser extent, during subsequent outbreaks. In total, around 150 border controls were temporarily introduced by a dozen Member States during the two-year pandemic, almost half of which (44%) concern the first two months of the crisis.⁵⁰ At the time of writing, only one such measure is still in place.⁵¹

The data on numbers of air passengers compiled by Eurostat illustrates both the severity and the evolution of the crisis.⁵² Whereas, prior to the pandemic, the number of air passengers in the EU varied between 60 and 110 million per months (depending on the season); it decreased sharply to less than 30 million in March 2020 and reached its lowest point the following month with 900,000 passengers (-94% compared to the same period in the previous year).

Figure 2 – Total passengers on board on intra- and extra EU27 flights



Source: Eurostat

As shown below, it is mainly the restrictions on the freedom of movement of persons which, in turn, have impacted the free movement of services and goods.

1.2.2 Restrictions on the free movement of services

Cross-border services that are highly dependent on the freedom of movement of persons were the most impacted by national COVID-restrictions. Those concern primarily the transport sector, logistics and tourism.

Border controls were particularly problematic in the first phase of the crisis. In March 2020, reports were made of lorries queuing for up to 20 hours in Germany to cross into Poland, with tailbacks stretching as far as 50 km inside Germany.⁵³ Similar disruptions were observed at the borders between Germany and France, the Czech Republic and Germany and Slovakia, Slovakia and Hungary, and Hungary and Romania. With regard to travel and accommodation, the introduction of the EU Digital COVID Certificate⁵⁴ before the summer of 2021 eased the provision of cross-border tourism services, as illustrated by Figure 2 above.

The posting of workers was also affected by restrictions on the freedom of movement of persons. In particular, the 14-day quarantine obligations imposed in some Member States rendered short trips abroad barely possible.⁵⁵ For instance, the Board was in contact with a Swedish company which produces medical equipment for cancer treatment and explained that it could not send technicians abroad to provide installation and maintenance services.⁵⁶ It is difficult to measure the size of this problem but, as an illustration, we note that, according to a survey,⁵⁷ the number of posted workers in Austria decreased by at least 46% in March 2020 (by 53% in the construction sector alone) compared to the same period in the previous year.

More generally, lockdown measures such as the closing of shops and workplaces and gathering limitations, have restricted activities in several other service sectors. That is the case for the physical retail sector (as opposed to e-commerce) as well as the culture, entertainment, and sport sectors. It is however unclear to which extent these measures which were merely targeting at the domestic market impacted the cross-border provision of these services. We note in that respect a lack of transparency of national restrictions on services which, although subject to an EU-wide notification requirement, have not been communicated to the European Commission.⁵⁸

Finally, it is worth noting that certain service sectors were either unaffected by lockdown measures or, even grew during the pandemic. That is for instance the case of e-commerce which benefited from the closure of brick-and-mortar stores in several Member States.⁵⁹

1.2.3 Restrictions on the free movement of goods

Aside from the export restrictions on health-related products, the free flow of goods was impacted by border controls and other hindrances to the freedom of movement of persons. Supply chain disruptions are, in part, the result of the high level of integration of the Member States' economies (where production halts in one country impacts downstream markets in other countries) but also of specific barriers to the freedom of movement. That is, for instance, the case with the transportation and logistics disruptions mentioned above.⁶⁰

For instance, the motor vehicle manufacturers Scania and Volvo closed their Swedish production lines in the initial phase of the pandemic due to the mandatory closing of their suppliers' factories in Belgium and France but also to border controls.⁶¹ Similarly, during that period, the Swedish company Mölnlycke experienced production losses of 40% in its factory in the Czech Republic due, in part, to the difficulties for frontier workers in Poland to cross the border.⁶²

The introduction of green lanes⁶³ by the European Commission in March 2020 ensured effective cross-border shipment of goods and thus *"the sustained functioning of the Single Market for goods"*.⁶⁴ Indeed, it is the Board's understanding that despite reports of hoarding, intra-EU trade in consumer goods, particularly foodstuffs remained stable during the pandemic.⁶⁵

Box 3 – The EU green lanes

In order to preserve the EU-wide operation of supply chains and ensure the functioning of the Single Market for goods, the European Commission recommended the Member States to designate priority lanes for freight transport (March 2020). It noted that *"going through these 'green lane' border crossings, including any checks and health screening of transport workers, should not exceed 15 minutes on internal borders."*

To that effect, the Commission provided a number of guidelines to minimize and streamline checks and screenings e.g. without drivers having to leave their vehicles. It also clarified that the checks shall be non-discriminatory and limited to certain documents (IDs and driver license). Finally, it encouraged the Member States to waive any travel restriction or mandatory quarantine for transport workers not displaying symptoms.

The Commission noted a few months later that the recommendations were complied with and that the 15 minute-target *"has been met at most road borders."* (October 2020).

1.2.4 Compliance with the Single Market rules

The restrictions on the free movement of persons, services and goods described here are in stark contrast with the idea of a Single Market without internal borders. It is therefore legitimate to question the compliance of these measures with the EU rules on free movement.

As in the case of the export restrictions examined above, it is not feasible for the Board to conduct a thorough legal analysis of the thousands lockdown measures adopted by the Member States in the last two years. We lack detailed, and often even basic information on the content, rationale and concrete impact of these measures. It is, in any case, for the CJEU to ultimately assess the lawfulness of lockdowns and border controls.

For this reason, we can merely recall that, given the limited EU competence in that field, the Member States have a broad margin of manoeuvre in adopting health protection measures but that this discretion is not absolute.⁶⁶ Restrictions on the freedom of movement of persons may, for instance, be justified in the case of “*diseases with epidemic potential*” in accordance with the Citizens’ Rights Directive.⁶⁷ Specifically, temporary border controls may, in accordance with the Schengen rules,⁶⁸ be introduced to prevent “*serious threat to the public policy or internal security of a Member State*”. In order to be lawful, such measures shall be necessary to achieve these legitimate objectives and proportionate.

At this stage, we note that there are a number of arguments that would support the proportionality of these restrictions but also certain indications that some of these measures would have gone beyond what is strictly necessary to protect public health. We briefly describe these two lines of arguments below.

First, in support of the lawfulness of the restrictions on the freedom of movement, we note the following:

- **The context of the measures:** as mentioned above,⁶⁹ the unprecedented nature of the crisis, its severity on public health, the scientific uncertainty on the disease, the lack of preparedness of the Member States as well as the need for swift action may have justified far-reaching protective measures. This is particularly relevant for the initial phase of the pandemic (March to May 2020) when most border controls and other restrictions on the freedom of movement were introduced. Subsequent restrictions would, in our view, be subject to a higher burden of proof given the increased level of preparedness, access to better medical treatments and vaccines, the existence of coordinated measures at the EU level and, in respect of the latest outbreak (2022), a less severe form of the disease.
- **Limited scope:** the restrictions in place were, in most cases, limited in time. For instance, a look at the 150 or so border controls notified during the pandemic shows that most lasted a few days to a month.⁷⁰ In less than a dozen cases, the border controls lasted longer (up to 6 months) but, in all but one,⁷¹ these were as much motivated by the pandemic as by other threats such as terrorism and organised crime. It is also important to note that, given the social and economic cost of the lockdown measures and border controls, it was in the interest of the Member States to minimise their scope and duration to what was strictly necessary from a public health perspective.⁷²
- **EU endorsement:** the European Commission being the Guardian of the Treaties did not challenge the lawfulness of the restrictions imposed during the initial phase of the pandemic. Rather the contrary, it praised these measures which it considered “*necessary to delay the spread of the epidemic and alleviate pressure on health care systems (flattening*

the curve)”.⁷³ The Commission did later question the restrictions imposed by several Member States in early 2021 and, in particular, their compliance with the EU coordination measures.⁷⁴ However, as far as we understand, it did not go as far as challenging the lawfulness of these measures. We note, in any case, that the EU recommendations in question are not binding on the Member States.

At the same time, a second line of arguments points at inconsistencies and arbitrariness for certain restrictions on the freedom of movement. Indeed, we have identified a few measures that do not seem *prima facie* to be motivated by the protection of public health. For instance, during the initial phase of the pandemic, France imposed a quarantine on travellers arriving from Spain in retaliation to a similar move by the Spanish authorities. Thus, this measure did not seem to be primarily motivated by the epidemiological situation in Spain.⁷⁵

Likewise, the border controls imposed by Germany towards Luxembourg in March 2020 seem to have been limited to identity checks rather than health checks, which raise the issue of their primary motivation.⁷⁶ Other authors have also raised concerns for arbitrary border controls and “*an inconsistent application of rules on the ground*”.⁷⁷

Again, the Board is not in a position to provide a comprehensive and definitive legal assessment of the restrictions introduced by the Member States during the pandemic. We can, however, preliminarily conclude that it is likely that most were within the margin of manoeuvre allowed by the Single Market rules. At the same time, it cannot be excluded that some arbitrary or disproportionate measures hid among the thousands lockdown measures and border controls.

2. The social and economic crisis

The health crisis and the national measures adopted to limit the spread of the coronavirus, especially the lockdowns, have had a tremendous negative impact on the economies of the Member States.⁷⁸ They have, in turn, triggered two types of measures: financial support to compensate businesses affected by the pandemic and the promotion of local goods and companies. Those are examined separately in this section.

2.1 State aids to compensate businesses affected by the crisis

As early as March 2020, the economic crisis called for public support to guarantee that companies that were otherwise viable would be able to cope with the various lockdown measures, border controls and ensuing supply chain disruptions. It was, at the same time, important to guarantee that financial support by the Member States would not distort competition in the Single Market. The balancing of these two interests was undertaken by the European Commission which adjusted the strict State aid regime in place in the EU to this new situation.⁷⁹

This regime prevents the Member States from granting financial support, regardless of its form, to undertakings in a way that distorts competition and intra-EU trade. This prohibition is not absolute and certain aid measures may be granted if they are motivated by legitimate interests; for instance, to support environmental projects, the economic development of areas with serious underemployment or to remedy damages caused by natural disasters. Subject to a prior notification regime, exemptions are granted by the Commission on a case-by-case basis.

At the early stage of the pandemic, the Commission adopted a more flexible screening mechanism, the State Aid Temporary Framework ('SATF'),⁸⁰ that provides for a fast-track review procedure and allows the Member States to benefit from crises-related exemptions while ensuring that public support would not distort the level playing field in the Single Market.

It is important to note that the Commission did not amend the material rules on State aids, i.e. the scope of the prohibition of aids. This prohibition is enshrined in the EU Treaties⁸¹ and cannot be unilaterally modified by an EU institution. Instead, the adjustments made by the Commission consisted in (i) clarifying the existing, but little used, exemption grounds applicable to the current crisis situation⁸² and (ii) simplifying the approval process for notified aids.

Between March 2020 and March 2022, approximately 900 aid measures were approved by the European Commission amounting to €3.18 trillion, see Table 2 below.⁸³ These are substantial amounts that can be put in relation to the €800 billion agreed upon in the summer of 2020 by the Member States as part of the EU recovery plan, NextGenerationEU,⁸⁴ and the US\$1.9 trillion (€1.6 trillion) stimulus bill proposed by the Biden administration in the spring of 2021.⁸⁵

Table 2 – Approved aid measures by Country (March 2020 - March 2022)

Country	Approved aids (€ billion)	Approved aids (share of total)	Approved aids (share of GDP)	Paid aids by 30 June 2021 (€ billion)
Austria	46.32	1.5%	11.6%	N.A.
Belgium	58.54	1.8%	12.4%	7.04
Bulgaria	2.33	0.1%	3.8%	1.20
Croatia	3.46	0.1%	6.4%	0.47
Cyprus	1.89	0.1%	8.6%	0.23
Czech Republic	34.18	1.1%	15.7%	6.32
Denmark	27.07	0.9%	8.8%	7.94
Estonia	2.33	0.1%	8.4%	0.67
Finland	7.83	0.2%	3.2%	3.01
France	463.07	14.6%	19.2%	187.63
Germany	1 606.07	50.6%	46.9%	135.88
Greece	17.88	0.6%	9.4%	11.17
Hungary	22.98	0.7%	16.1%	9.71
Ireland	3.84	0.1%	1.1%	1.40
Italy	516.69	16.3%	29.1%	168.78
Latvia	2.06	0.1%	6.7%	0.99
Lithuania	2.63	0.1%	5.4%	0.92
Luxembourg	3.67	0.1%	5.8%	0.74
Malta	1.37	0.0%	10.4%	0.73
Netherlands	45.00	1.4%	5.6%	21.23
Poland	70.78	2.2%	13.5%	30.53
Portugal	19.08	0.6%	9.1%	11.78
Romania	13.13	0.4%	5.9%	4.66
Slovakia	8.61	0.3%	9.1%	2.60
Slovenia	8.14	0.3%	16.9%	2.27
Spain	170.09	5.4%	13.7%	104.82
Sweden	16.83	0.5%	3.6%	5.86
Total EU	3 175.85	100.0%	22.9%	728.60

Source: European Commission

The unprecedented amounts of approved aids – over €3 trillion in a two-year period –⁸⁶ contrasts starkly with the general prohibition of State aids in the EU. From a Single Market perspective, this raises two issues:

- Is the financial support provided by the Member States in the wake of the pandemic lawful? and
- How does it impact the level playing field within the Single Market?

Before we address these issues, it is important to note that the available data only gives a fragmented picture of the situation and shall, therefore, be considered with caution. In particular, the following illustrates the lack of visibility on COVID-related aid measures.

Firstly, the COVID crisis is still going on, albeit with less intensity, and the Member States may notify additional aid measures to the Commission in the coming months. For instance, the SATF is in place until end June 2022. Yet, we also note that the pace of notifications of new aids has considerably slowed down in the last months.⁸⁷ This is likely due to a less severe phase of the pandemic and the lifting of most restrictions which, at least until Russia's invasion of Ukraine, allowed for a strong economic recovery.

Secondly, the volume of approved aids does not necessarily reflect the volume of aids that are (or will be) actually disbursed by the Member States. By June 2021, a fourth of the approved aids – around €730 billion – had been granted by the Member States.⁸⁸ Germany, which represents half of the approved aids (€1,600 billion) had only paid out 8.5% of that amount (€136 billion) by mid-2021. At this stage, we do not have data on disbursed aids past this period, but there are indicators that point to a slowdown in the disbursement of funds with the lifting of COVID-related restrictions.⁸⁹

Thirdly, we lack data on the beneficiaries of the disbursed aids. We note that the approved aid schemes take various forms, from direct subsidies to preferential loans, State guarantees or tax reliefs and are mostly horizontal, i.e. do not target at a specific sector or industry. Pending a detailed accounting of disbursed aids per beneficiary, it is difficult to assess possible distortions of competition within the Single Market.

For these reasons, our assessment below of the lawfulness of the State aids measures (Section 2.1.1) and their impact on the level playing field (Section 2.1.2) can only be piecemeal and preliminary.

2.1.1 Lawfulness of the State aids measures

The aid regimes presented above are all approved by the European Commission. Given its exclusive competence to assess the compatibility of aids with the EU Treaties, these approvals mean that the aid measures are lawful, i.e. that the Commission considers that they compensate for the negative impact of the crisis in a manner that outweighs the possible distortion of competition in the Single Market.

In practice, the fast-track procedure for screening notified aids under the SATF,⁹⁰ the unprecedented volume of such measures and the high stakes of the crisis may not always allow for a thorough review by the Commission. Indeed, critics have been formulated against a too lax regime and the lack of transparency in the application of the SATF.⁹¹ For instance, A. Claici, L. Eymard and S. Vallée (2021) note that:⁹²

“The clearance decisions provide limited information regarding how schemes’ beneficiaries are selected. Because the schemes are largely horizontal, covering all sectors (except financial services), actual distribution could be expected to be demand-determined and directed to sectors that suffered the hardest blows. However, the disbursement of the funds is subject to numerous trade-offs, and one cannot rule out that the allocation of credit is also used strategically to support certain industries or to favour specific companies. Only granular data can help in observing the concrete implementation of the support schemes.”

They also highlight situations where approved aids may have contravened the Commission’s own guidelines under the SATF. For instance, with regard to the SATF prohibition to condition aids on the relocation of a production activity from another EEA country, they note that:

“the €5 billion of government loan guarantees for the automobile manufacturer Renault was conditioned on limiting the number of factory closures in France. Finance Minister Bruno Le Maire explicitly stated that the reshoring of the production of electric and hydrogen-fuelled vehicles and batteries was a condition for accessing help under the government’s automobile plan. Beneficiaries of the €15 billion aerospace plan were also required to think about ways to bring production and strategic, technological know-how back to France.”

If confirmed, these arguments could support an action for annulment before the General Court.⁹³ To the best of our knowledge, the only Commission approval decisions that are challenged before that court, until now, concern aid measures to individual airlines.⁹⁴ Most of these actions are still pending before the General Court. In a few cases the court

upheld the Commission's decisions which led in turn to appeals before the CJEU⁹⁵ and, in one case only, the General Court annulled the Commission's approval.⁹⁶

The limited case-law on COVID-related aids is not conclusive enough to assess the lawfulness of the Commission's approval decisions. In general, the Commission holds a broad margin of discretion in approving notified aid regimes. Unless it commits a manifest error in law, its decisions are seldom quashed.

Thus, at this stage, it is not possible for us to rebut the presumption that aids approved by the Commission are lawful.

Aside from the 900 approved measures, we have not identified any other COVID-related State aids. We note that it is unlikely that such measures would have been adopted without prior notification to the Commission given the sanction mechanisms in place under the EU's regime.⁹⁷ In any case, such measures, if they indeed exist, would not be made public and would therefore be difficult to detect at this stage.

2.1.2 Impact on the level playing field

Regardless of their legal status, the aid regimes approved by the Commission raise the issue of their impact on the level playing field in the EU. In particular, we note that the recourse to aid measures varies greatly between the Member States. In terms of value of approved aids, Germany (50.6%), Italy (16.3%) and France (14.6%) are, by far, the biggest aid providers ahead of Spain (5.4%) and Poland (2.2%).⁹⁸ The remaining 22 Member States account for 10% of the budgeted aids. Even if one considers disbursed aids, the disparities remain high between the Member States, with the four biggest countries accounting for 82% of the granted aids by mid-2021.⁹⁹

There is therefore a risk that businesses in certain Member States may benefit from stronger public support than their competitors in other Member States. It is, however, too early to draw definitive conclusions on such possible distortion of competition. Aside for detailed data on the aid beneficiaries which, as mentioned above, is missing, a level playing field assessment would also have to consider factors such as the impact of the COVID-crisis on each Member State.

With regard to this last aspect, the European Commission recently published some preliminary findings that seem to indicate that the national aid spending would be proportionate to the loss suffered by each country.¹⁰⁰ It notes in particular that it represents between 50% and 100% of the GDP loss in most Member States.¹⁰¹ On that basis, the Commission concludes that:

“The picture that emerges shows that State aid measures actually implemented by Member States are not disproportionate to the economic damage suffered during the crisis, nor do there appear to be Member States that would have completely outspent the others. This is reassuring as it addresses potential concerns as regards the level playing field.” (p.3).

If anything, the few Member States that have spent more than their GDP losses are not to be found among the biggest aid contributors, but are countries that, together, account for less than 10% of the total aid expenditure. Remarkably, this small group of countries – half a dozen in total – includes three of the ‘Frugal Four’: Denmark, the Netherlands and Sweden.¹⁰²

Rightly so, the Commission is cautious with drawing too far-reaching conclusions though. In our view, it is important to first understand which industries and businesses benefited from public spendings and in which proportion. One concern, in that respect, is the lack of safeguards to avoid the use of horizontal aid schemes to support strategic sectors or specific companies. For this reason, we agree with many commentators on the need to limit the use of the SATF and not prolong it beyond what is strictly necessary.¹⁰³

2.2 Promotion of goods and businesses affected by the pandemic

Aside from financial support, we have identified several non-tariff measures in a few Member States that aim at promoting goods and businesses affected by the pandemic. In this section, we examine separately quantitative restrictions (Section 2.2.1), preferential procurements (Section 2.2.2) and soft law interventions (Section 2.2.3).

2.2.1 Preferential regimes

Several Member States – including Austria, Bulgaria, the Czech Republic and Greece – have called on their population to buy national agricultural products.¹⁰⁴ However, these calls have not all materialized and, at the time of writing, we have only identified a handful non-tariff barriers whereby some Member States aim at shielding their industries from intra-EU competition.

- According to a media report,¹⁰⁵ the French Government would have persuaded the major supermarket chains (Carrefour, Leclerc, etc.) to switch almost all their supplies to local producers. The details of this measure, in particular the means used by the French government and the scope of such move, are however unclear at this stage.
- Similarly, the Austrian government announced in May 2020, plans for a ‘regional bonus’ for food whereby local foods would be granted certain advantages to strengthen the sectors hit by the coronavirus crisis.¹⁰⁶ It is unclear if and how this measure was actually implemented.
- Bulgaria forced retailers to favour local products through of a system of quotas.¹⁰⁷ This measure triggered a rapid and strong response from the European Commission which, to the best of our knowledge, resulted in its withdrawal.
- According to EuroCommerce,¹⁰⁸ the Czech government proposed to impose quotas on food products whereby, as of 2022, stores with an area of over 400 square meters would have to offer at least 55 percent of selected Czech food. This would have applied to hundreds of basic foods such as meat and milk. Over the years, the share was expected to increase by three percent per year to the final level of 73 percent in 2027. This proposal seems, however, to have been rejected by the Czech parliament.¹⁰⁹
- Hungary notified to the Commission its plan to restrict the export of raw materials and products of strategic importance for security of supply in the construction sector as a means to relaunch the economy after the pandemic.¹¹⁰ The European Commission and several Member States found that such plan would breach the EU rules on free movement of goods. As a result, the Commission launched an infringement proceeding against Hungary in September 2021. As far as we understand the case is pending at the time of writing.¹¹¹
- Slovenia notified export restrictions regarding certain agricultural product, foodstuff or animal in March 2020.¹¹² As far as we understand, the proposal was withdrawn in July 2020 after pressure from the European Commission.

A few preliminary conclusions may be drawn from these cases.

Firstly, most measures presented here are discriminatory and we fail to see how they could be justified under EU law as they relate to the protection of economic interests.¹¹³ Thus, their compliance with the Single Market rules is doubtful. This likely explains the swift and strong reactions of the European Commission and of some Member States. It also

explains why several of these measures merely amounted to stillborn initiatives. In our view, this shows that the compliance mechanisms of the Single Market are strong enough to stop such manifest violations of the EU rules on free movement.¹¹⁴

Secondly, it seems that most of these measures were envisaged or introduced in the early phases of the crisis. It is possible that the swift reactions of the Commission mentioned above were a strong enough signal to discourage Member States from introducing subsequent discriminatory barriers.

Finally, a few isolated measures by half a dozen Member States do not necessarily make for a trend. Although it is tempting to draw far-reaching conclusions given the manifest violations of the EU rules presented here; it is important to relativise – without trivialising – their significance for the functioning of the Single Market.¹¹⁵

Again, it is important to nuance these preliminary conclusions and consider that it is possible that less manifest, and thereby less identifiable, restrictions may have been introduced by the Member States in the wake of the pandemic.

2.2.2 Public procurement

Some Member States may be tempted to use public procurement to favour local products or companies that have been particularly affected by the crisis. We have, indeed, identified a few such occurrences since the pandemic started. For instance, the European Commission mentions that some Member States give preference to national food producers in public procurement, and that “*such tendencies have intensified during the COVID-19 crisis*”.¹¹⁶

As far as we understand, the Commission is referring to the following national schemes:

- In April 2021, the Czech Republic introduced the possibility for contracting authorities to restrict tendering procedures for the supply of food to “*local or regional foods from the short supply chain*”.¹¹⁷ It seems that Czech officials pointed out that the wording “local and regional” does not necessarily refer to domestic products and that, as a result, this rule may not necessarily be discriminatory.¹¹⁸
- The Austrian Action Plan for Sustainable Procurement presented in July 2021 includes a recommendation to procure food products regionally, if possible, up to 100 percent.¹¹⁹ In addition, the Action Plan’s recommendation to procure seasonal fruits and vegetables makes explicit reference to the Austrian climate for the seasonal calendar.¹²⁰
- In May 2021, Portugal introduced regional and local preferences in its public procurement legislation. Although we lack details on this case, we note that the Commission decided to launch an infringement proceeding against Portugal as a result.¹²¹

A few preliminary conclusions may be drawn from these cases.

Firstly, it is unclear whether these measures were specifically introduced to address the pandemic. Although they coincide with the COVID crisis, we have not found any express reference to the need to support products or businesses affected by it. Correlation does not imply causation and one should therefore be cautious in labelling these procurement measures as COVID-related restrictions.

Secondly, even if assuming such causality, it is unclear whether these few examples are merely anecdotal or do, indeed, constitute the tip of the iceberg of a more widespread misuse of the public procurement instrument to assist domestic industries affected by the pandemic. At this stage, we lack evidence of such general trend.

In our view, one argument that speaks for these cases being rather isolated occurrences is that the promotion of local goods or businesses would run counter the EU legislation on public procurement.¹²² These EU rules are based on the principles of non-discrimination, equal treatment, transparency, proportionality, and mutual recognition which are hardly reconcilable with the support to local industry. Thus, such discriminatory schemes run the risks of being challenged before courts, as in Portugal's case.

That said, such a risk primarily concerns national schemes which are more visible and can easily be detected by the European Commission. It is more difficult to have a clear picture of the thousands procurements taking place in the EU, especially those at local and regional levels which would likely fall under the EU's radar. In that respect, the Swedish Competition Authority ('SCA') noted in the early stage of the crisis, that some Swedish municipalities had invoked the on-going crisis to justify the promotion of local businesses in their procurements.¹²³ Likewise, punctual case-studies reveal that municipalities in Portugal and Greece involved local suppliers in their procurements as a means to support them.¹²⁴

2.2.3 Soft law measures

The last category of instruments examined here are so-called "soft law" or non-binding measures. Those can take different forms, such as recommendations to travel locally, encouragement to consume local products or promoting local companies. Although less effective than binding measures, such calls may have a negative impact on the functioning of the Single Market and, as such, are subject to EU scrutiny.¹²⁵

At this stage, we have identified a few such measures, mostly in support of the local agri-food sector:

- According to a media report,¹²⁶ the Polish government named and shamed 15 domestic processors for importing milk from other EU countries, instead of buying it from Polish farmers. It also planned to set up a State-owned food holding company that would enter the local retail market to support a "*consciously buy Polish products campaign*".¹²⁷
- According to media reports,¹²⁸ France's Agriculture Minister would have called for food patriotism, exhorting citizens to boost French farmers' competitiveness by buying French strawberries and tomatoes over Spanish ones, even though they were pricier.
- As mentioned above, similar calls for food patriotism have been heard in Bulgaria, the Czech Republic and Greece.¹²⁹ In Austria, the Government launched the initiative 'Austria eats regionally' in late 2020 to promote local food products.¹³⁰ Sweden's Agriculture Minister also encouraged consumers to buy local foodstuffs.¹³¹
- According to the SCA, a Swedish municipality would have encouraged local procurement entities to buy local products.

Typically, these kinds of soft law measures are not easy to detect and often fall under the EU's radar. Their lawfulness may also be difficult to ascertain as they call for complex effect-based analyses. We do see the need to be vigilant and to keep looking for similar measures; not the least because they give a good indication of the protectionist narrative in certain Member States.

It is important to note, however, that most of the measures that we have identified date back to the early stages of the pandemic. We have seen very few such measures in 2021 and none in 2022 which may indicate a progressive return to normalcy.

3. Managing future crises

From the mad cow disease to Brexit, the history of the Single Market is dotted with crises. The last years have been particularly dramatic: against the backdrop of climate change, the EU has been going through a sovereign debt crisis, the massive influx of refugees, a pandemic and now, Russia's war on Ukraine.

From a Single Market perspective, this succession of crises raises at least two questions which are, in part, intertwined:

- How can the Single Market contribute to the resolution of upcoming crises? and
- How can the functioning of the Single Market be strengthened in times of crisis?

The first question may be difficult for the Board to address in detail as it presupposes a know-how in the management of a broad range of crises which falls outside our core competences.

For instance, the management of a pandemic calls primarily for an expertise in epidemiology and public health administration which, in turn, triggers solutions in terms of medical responses and logistics and, ultimately relies on the freedom of movement (such as the green lanes initiative). On the other hand, a national security threat may, in the end, require the activation of the mutual defence clause¹³² or of different Single Market mechanisms such as the sharing of sensitive information between Member States or the joint procurement of security-related products. Similarly, a natural disaster may call for a third type of EU response, such as raising environmental protection standards by way of harmonising legislation.

Thus, it is the specific features of each crisis that would determine how the Single Market can best be put in use. In the absence of a one-size-fits-all solution, we can merely recall that, in general terms, the main contribution of the Single Market to the management and resolution of crises is to provide an area of peace, stability, solidarity, cooperation, and sustainable growth.

For this reason, we focus our attention, in this paper, on the second question, i.e. the strengthening of the Single Market in times of crisis.¹³³ To address this issue, we draw, first, some lessons from the pandemic (Section 3.1) and discuss, then, the design of future crisis management mechanisms (Section 3.2).

3.1 Lessons from the pandemic

As a preliminary remark, we note that it is not so much the pandemic as such than the unilateral countermeasures introduced by the Member States that have affected the functioning of the Single Market negatively.¹³⁴ In order to mitigate this impact, the EU has at its disposal a variety of tools, see Box 4.

Box 4 – The EU Toolbox

National measures that restrict the freedom of movement are subject to a number of EU requirements and/or EU policy responses:

First, these national measures must be public and **transparent**. In many cases, a notification regime obliges the Member States to inform the European Commission, the other Member States and, sometimes, the general public about their measures.

Second, they must **comply with the EU rules** on free movement and competition. In some cases, the notification regimes mentioned above allow for a pre-screening of the national measures in question. More generally, an ex-post control, combined with sanction mechanisms can remove unlawful restrictions.

Third, the EU may **coordinate the national measures**, hence avoiding the risk of fragmentation. Depending on the competence of the EU, this can either be done by way of legally binding legislation or non-binding recommendations. The EU may also replace the national measures by European ones by way of **harmonising legislation**. Again, the margin of manoeuvre of the EU will largely depend on this competence to intervene in a particular area. Finally, the EU may, by **non-legislative means**, mobilise resources to alleviate threats in the Member States and, hence, remove the 'raison d'être' of national countermeasures.

We examine below how this toolbox was used during the pandemic.

3.1.1 Transparency requirements

The pandemic resulted in thousands of unilateral countermeasures at national, regional and local levels. These have been amended regularly, sometimes on a daily basis, which is challenging from a transparency perspective.

We note that the legal notification requirements imposed by the EU on the Member States, were basically complied with, at least on paper. In practice, however, the picture is more mixed:¹³⁵

- Export restrictions notified under the Single Market Transparency Directive during the initial phase of the pandemic were, in most cases, barely described and explained. For instance, basic information, such as the duration of the measures, was sometimes missing. This makes it difficult to conduct an in-depth analysis of these restrictions.
- Only a small number of services restrictions were notified under the Services Directive – 52 out of hundreds such measures. It shall be noted, however, that the lack of transparency in the services sectors is not specific to the pandemic. Notification rates under the Services Directive are notoriously poor since this procedure was put in place some fifteen years ago.
- We understand that State aids were likely notified as they should to the European Commission. These notifications are not public, and we can therefore not assess the quality of the information submitted. As mentioned above, however, the large number of notifications resulted in an information overload that made it likely difficult for the Commission to conduct a detailed and qualitative analysis of these measures.

These shortcomings resulted in a lack of visibility, especially during the initial phase of the pandemic. Past this period, the European Commission set tools such as the website [Re-open EU](#) that provides a digest of national health and travel measures to facilitate

transparency.¹³⁶ The Board's mapping exercise illustrates, at the same time, the difficulties in getting a detailed, accurate and complete picture of the trade restrictions affecting the Single Market.

3.1.2 Compliance with EU law

Our preliminary legal assessment of COVID-related restrictions shows that, in most cases, these measures were likely in line with the EU rules.¹³⁷ In short, our review distinguishes between three types of national measures:

Firstly, the bulk of these measures (export restrictions, lockdowns and border controls) are concerned with the protection of public health. Obviously, such unilaterally imposed restrictions are damaging to the freedom of movement. However, given the limited EU competence in the field of public health, the Member States enjoy a broad margin of manoeuvre to protect this legitimate objective. And save for a few measures, we find it likely that nationwide COVID-related restrictions would fall within this margin of appreciation.

Yet, it is important to nuance this finding with reference to the limited information available on the content, rationale and concrete impact of each measure. It is also likely that measures that are justified by the protection of public health were applied in individual cases in an arbitrary manner. There are, for instance, indications of border controls that vary from one checkpoint to the other, random requisition of batches of PPEs by local authorities or unnecessary long control of trucks at the border.

For time reasons, we have not further deepened our analysis on these problems of application of national rules. As discussed below (Section 3.2.2), these specific issues should, however, be dealt with to strengthen the Single Market.

Secondly, in a dozen or so cases, some Member States attempted to restrict intra-EU trade to protect their own goods or businesses. These discriminatory measures took the form of quotas, preferential procurement regimes or calls for food patriotism and were, in most cases, swiftly withdrawn after pressure from the European Commission.

Thus, a finding of our mapping exercise is that the EU compliance mechanisms worked relatively well to prevent, or at least remove, the most obvious violations of the Single Market rules. Experiences from the pandemic shows that it is difficult for a Member State to introduce nationwide discriminatory measures that are motivated by economic interests such as the promotion of local goods or businesses.

Again, one shall exert caution here since our review of intra-EU trade restrictions is limited to the most visible measures such as those adopted at the national level or that are otherwise described in the media. Hence, it cannot be excluded that discriminatory measures in the form of e.g., preferential procurements would have taken place at the regional or municipal levels.

Thirdly, the financial support provided by the Member States to their industries is approved by the European Commission and, as such, is presumed to be lawful. Given the number of aid measures, their complexity and the limited time for the Commission to review them, it cannot be excluded that some of its decisions be subsequently invalidated by the CJEU. It is, however, too early to assess whether some Member States would have taken advantage of the situation to grant unlawful aids.

3.1.3 EU response

In the course of the pandemic, the EU adopted a wide range of coordination measures (such as the introduction of green lanes, of the EU Digital COVID Certificate or the guidelines on the free movement of critical workers)¹³⁸ as well as harmonisation or other legis-

lative measures (e.g., harmonised standards for PPEs¹³⁰ and export restrictions towards third countries). In addition, the EU made use of non-legislative measures, such as the joint procurements of health-related products, to mitigate the risk of unilateral counter-measures at national level.

Although our mapping exercise does not exhaustively cover these EU measures, we note that they contributed to the withdrawal of national restrictions or, at least, to reducing frictions on the freedom of movement.¹⁴⁰ The limit of certain of these measures was, however, visible in a few instances, such as when the European Commission objected to the introduction of border controls that were not in line with the EU coordination approach (February 2021).

At the same time, the limited EU competence in the field of public health and the largely non-binding nature of the EU response made it difficult to avoid such tensions. At this stage, we can merely note that these were circumscribed to a few situations and did not concern more than a handful Member States at a time. All in all, several observers insisted the key role of the European Commission in facilitating the freedom of movement during the pandemic, but also noted its relative tardiness in the early stage of the crisis.¹⁴¹

In our view, beyond providing practical solutions to concrete problems, the EU response sends a strong signal that cooperation is more efficient to address crises than unilateral (and sometimes conflicting) initiatives by individual Member States. It is a reminder that the Single Market, with its idea that the sum is greater than its parts, is a means to overcome the prisoner's dilemma¹⁴² and defuse the temptation of an 'everyone for themselves' approach.

3.1.4 Conclusions

In our view, two types of conclusions may be drawn from the management of the pandemic and its impact on the Single Market.

On a general level: a resilient Single Market

On a general level, we find that the Single Market demonstrated resilience in maintaining the freedom of movement – and, remarkably so, the free flow of foodstuffs and other essential consumer goods in a time of hoarding as well the free movement of critical (essential) workers.

This is not playing down the negative impact of health protection measures on the functioning of the Single Market. Obviously, these measures have had an unprecedented damaging effect on the freedom of movement. However, assessing the resilience of the Single Market cannot be reduced to comparing its performance during the pandemic with a no-crisis scenario. A more relevant evaluation should, in our view, focus on the possible outcomes of alternative crisis management models.

The current model is based on the allocation of competences between the EU and the Member States which leaves a broad margin of manoeuvre to the latter in the field of public health. In short, the legal architecture of the Single Market is sufficiently flexible to allow for a high level of disruption if that is justified by the protection of public health. In fact, accommodating far-reaching national restrictions on the freedom of movement to protect the health and life of EU citizens is crucial for the legitimacy and functioning of the Single Market.

Indeed, let us imagine the reverse situation where the EU rules would have prevented the Member States from adopting restrictive measures to fight the pandemic. This would have posed a serious threat on the life of EU citizens – that is a threat worse than the one that we experienced since the Union would not have had the power to compensate for the lack

of action by the Member States. It could also have resulted in widespread breaches of Union law as the Member States would have likely been inclined to set aside Single Market rules that endanger the health and life of their citizens. The cost of such alternative scenario would, therefore, have been significantly higher both on our societies as a whole and on the functioning of the Single Market.

At the same time, it is important to nuance this schematic presentation. As illustrated by the export restrictions on certain health-related products, an ‘everyone for themselves’ approach could have had a very damaging impact on health protection if it were pushed to its limits. Indeed, selfish attitudes by some Member States can be detrimental to others and, if they become the rule, risk being dangerous for all.

One of the main reasons why this extreme scenario did not unfold is that the Single Market provides a safety valve that infuses solidarity into the management of the crisis by the Member States. The various cooperation mechanisms put in place by the European Commission mitigates the most severe aspects of the national restrictions on the freedom of movement.

But, beyond that, the very existence of the Single Market is a reminder to the Member States that it is in their interest to work together to solve crisis situations. In that respect, its contribution is to offer a natural platform for problem resolution and thereby to defuse any widespread temptation for national protectionist responses. Hence, given the current allocation of competences between the EU and the Member States, the Single Market allows the full, almost unimpeded, use of the latter’s capabilities to address the pandemic but also provides a strong incentive to find common solutions.

For this reason, we do not see the need for a high-level (constitutional) reform of the functioning of the Single Market to strengthen its resilience in times of crisis. As discussed below, we do, however, advocate a series of technical improvements.

On a technical level: room for improvements

On a more technical level, our review of the national COVID-related measures identifies several shortcomings that should, in our view, be addressed to strengthen the functioning of the Single Market in times of crisis.

Firstly, the management of the pandemic reveals that more needs to be done to increase transparency. It is particularly important for the functioning of the Single Market that all parties (decision makers and private parties alike) have access to real time, accurate and exhaustive information on the restrictions put in place by the Member States.

Secondly, even if health protection restrictions are tolerated under the Single Market rules, it is important to remain vigilant and prevent Member States from adopting poorly motivated restrictions, applying national countermeasures in an arbitrary manner or taking advantage of the situation to pursue a protectionist agenda. This can partly be addressed by increasing transparency but it also calls for a strengthening of the current compliance mechanisms to cope with the volume and complexity of national restrictions.

Finally, additional crisis mechanisms may be considered, but their shape and efficiency will vary depending on the EU’s competence and the type of crisis envisaged. A prerequisite for such initiative is, therefore, to provide an in-depth analysis of relevant crisis scenario.

These three areas are examined more in detail in the next section.

3.2 Designing a Single Market crisis management mechanism

Based on our mapping exercise, we discuss three means to strengthen the Single Market in times of crisis: increasing transparency (Section 3.2.1), better enforcement (Section 3.2.2) and stronger cooperation mechanisms (Section 3.2.3). We conclude this paper with a discussion of the European Commission's initiative for a Single Market Emergency Instrument ('SMEI') (Section 3.2.4).

3.2.1 Increased transparency

In times of crisis, which is usually characterised by dramatic, rapid and sometimes confusing changes, transparency is particularly important to support adequate responses by policy makers. It is also central to safeguard the legitimate expectations of businesses, citizens, and other stakeholders.

Already at the onset of the pandemic, the Board advocated a strengthening of existing notification mechanisms.¹⁴³ In particular, we argued that the Single Market Transparency Directive shall oblige the Member States to provide a detailed description of their technical requirements (including a comprehensive EU law analysis) as well as a follow up on the notified measures (update on withdrawn or terminated requirements). We also recommended to clarify the obligations of the Member States in notifying services requirements under the Services Directive. Finally, we discussed the possibility to introduce a similar notification obligation in respect of measures that restrict the freedom of movement of persons, for instance under the Citizens' Rights Directive.

At the same time, we are conscious that solely relying on the existing notification requirements, even improved ones, may not provide real time, accurate and exhaustive information on all national countermeasures. It may therefore be appropriate to consider the need for a horizontal information mechanism that would cover any type of restriction on the Single Market and would be limited to well-delineated crisis situations. To avoid any overlap, such horizontal mechanism shall exclude measures that are already subject to existing notification procedures.

This horizontal mechanism could, for instance, take the form of a general notification obligation, in line with the catch-all regime in place in respect of obstacles to the free movement of goods.¹⁴⁴ It could also result in the designation of a national crisis body that would be entrusted with the collection and analysis of relevant data in its country, along the line of the EU's initiative on food security crisis preparedness.¹⁴⁵ Finally, it could rely on a dedicated digital platform for the exchange and spreading of information on Single Market barriers, similar to the Internal Market Information System or the Single Digital Gateway.¹⁴⁶

3.2.2 Better enforcement

Since its inception, some thirty years ago, the Single Market has been affected by a huge compliance deficit. The cost of non-compliance for goods and services alone is estimated at €700 billion, which is the equivalent of the 'Next Generation EU' recovery package.¹⁴⁷ Compliance problems are prone to be exacerbated in times of crisis.

Indeed, although we find it likely that most COVID-related measures adopted at national level are in line with Single Market rules, we also underline the compliance risks posed by their application on the ground. This risk is particularly high in times of crisis which sees a vast number of last-minute measures that are not always clear for the national administration in charge of their application.

These problems of application of national rules are difficult to detect and often fall under the EU's radar. It is therefore almost impossible for the European Commission to identify and solve such problems, especially if they take place at the local level.¹⁴⁸ Likewise, we find it challenging for a high-level discussion group such as SMET¹⁴⁹ to effectively address concrete problems of application of countermeasures on the ground.

In our view, reducing the compliance deficit during normal times builds the norms and disciplines that help maintain free movement and secure the supply of goods and services in times of crisis. Given the limits of solely relying on the Commission's monitoring role, it is crucial that the Member States take greater responsibility in the enforcement of Single Market rules.¹⁵⁰ Proposals in that direction would contribute, in an effective manner, to remove unjustified obstacles to the freedom of movement, especially in times of crisis. We therefore recommend integrating an ambitious enforcement dimension along these lines in any future crisis management proposal.

3.2.3 Stronger cooperation mechanisms

The Commission may consider additional initiatives to strengthen the functioning of the Single Market in times of crises. Measures such as the green lane initiative, the Digital COVID Certificate or the guidelines on the free movement of critical workers have been successful in removing obstacles to the freedom of movement during the pandemic. As such, they should be included in the EU's emergency response mechanism.

At the same time, these measures are specific to the pandemic and may not be adequate to address other types of crises.¹⁵¹

To give an example, a cyber-attack may trigger national countermeasures in the form of barriers to data flows (e.g. data localisation requirements). This would, in turn, call for a tailor-made EU response to remove such barriers (for instance, an equivalence mechanism for data storage facilities). Likewise, a bank run may lead to national restrictions on the free movement of capital which would have to be addressed differently by the Union (e.g. in term of prudential requirements). An armed conflict affecting one or several Member States would possibly impact physical infrastructures and thereby the free movement of persons and goods, prompting such EU responses as the establishment of dedicated transport corridors. As a last example, a threat on the rule of law could affect the horizontal functions of the Single Market such as its governance or its compliance mechanisms and would likely require an institutional type of intervention at the EU level.

These examples illustrate the need for an in-depth analysis of relevant crisis scenario¹⁵² and their possible impact on the freedom of movement as a prerequisite for launching additional Single Market emergency initiatives.

Such preparatory work should also consider, for each type of crisis, the allocation of powers between the EU and the Member States as it gives an indication of the Single Market's risk exposure.

For instance, public health being primarily a national competence, the Member States enjoy a large margin of manoeuvre to adopt unilateral measures which, as such would pose a stronger risk of disruption on the functioning of the Single Market. Conversely, the higher level of harmonisation in the field of environmental protection reduces the risk of a fragmented response in the case of a natural disaster. Similarly, economic crises would likely trigger a strong EU involvement, as the Member States' autonomy to provide financial support or otherwise compensate businesses in difficulty is limited.

In our view, it is only once these issues have been analysed that a concrete proposal for additional emergency initiatives may be examined. The examples presented above also illustrate the need for flexible mechanisms, able to adapt to a variety of crisis scenarios. The risk of an unfounded or a too rigid approach is not only to adopt costly and inefficient mechanisms but also to create a false sense of security that would aggravate any damage caused by a future crisis.

3.2.4 The Commission's SMEI initiative

In its updated Industrial Strategy,¹⁵³ the European Commission announced plans for a new Single Market Emergency Instrument ("SMEI"). In the absence of a concrete proposal, the shape of this new tool is still unclear, but a look at the latest Commission communications on that topic gives some indications of what could be envisaged.

As a preliminary remark, the Board shares the view that lessons must be drawn from the pandemic to strengthen the Single Market. We are concerned, however, with the seemingly ambiguous objective of the Commission's initiative. On the one hand, it aims *"to ensure the free movement of persons, goods and services"* but, on the other hand, its ambition seems *"to leverage the power of the Single Market to better solve crises"*.¹⁵⁴

As discussed in introduction to Section 3, these are two distinct issues that trigger separate responses. They also belong to separate policy areas – the Single Market and the Industrial Strategy – each with their own priorities that are not necessarily aligned with each other.¹⁵⁵ In our view, there is a risk of confusion and ineffectiveness in attempting to solve several problems with one single action. This is particularly true given the absence of a one-size-fits-all solution to the question of how to use the Single Market to solve upcoming crises. As mentioned above, the risk with poorly thought through initiatives is also to create a false sense of security that may prove counterproductive once a crisis strikes.

We therefore recommend that the SMEI only focuses on means to strengthen the Single Market and, in line with our proposals above,¹⁵⁶ aims at (i) increasing transparency, (ii) a better enforcement of EU rules in the Member States, and (iii) developing stronger cooperation mechanisms.

Any other approach by the Commission, e.g. focusing on strategic autonomy,¹⁵⁷ should, at minimum, keep as a priority the functioning of the Single Market in times of crisis by integrating these three dimensions. In order to be relevant, such approach should also clearly identify the problems to be addressed by the SMEI and take the following into account.

First, any SMEI-proposal shall be evidence-based and rely on experiences from the pandemic¹⁵⁸ as well as an in-depth analysis of different crisis scenarios and policy responses at both national and EU levels. In the previous section, we sketch a few examples of various crises (from cyber-attacks to bank runs, military conflicts, or threats to the rule of law) and, for each of them, mention possible EU countermeasures. These examples illustrate the variety of situations that may fall under the SMEI and the types of tools that may be relevant to address them. They also show the need for a flexible emergency instrument that can easily be adjusted to unforeseen developments. The latter point is particularly important given the unavoidable degree of uncertainty associated with any forecasting exercise.

Second, such SMEI-proposal shall maintain the openness of the Single Market and refrain from introducing trade barriers towards third countries. In normal times, the benefits of an open Single Market are obvious.¹⁵⁹ This is all the more valid in times of crisis. As demonstrated during the pandemic, the supply of critical goods such as PPEs and vaccines from third countries proved vital to maintain in order to manage the crisis. In a previous

study,¹⁶⁰ the Board showed the importance of multilateral or plurilateral agreements to improve supply-chain flexibility for EU firms. We noted that “[not putting] *all our eggs in the same geographic basket* [...] *in turn contributes to the open strategic autonomy objective*”.¹⁶¹ These conclusions shall also guide the design of a new emergency instrument.

Third, coherence of the SMEI with other EU initiatives in the field of crisis management shall be ensured. We note in that respect that, in the last years, the EU launched several such institutional mechanisms, for instance SMET, HERA or the EU Civil Protection Mechanism.¹⁶² Recently, the European Commission adopted a ‘Contingency Plan for Transport’ to strengthen the resilience of EU transport in times of crisis (May 2022).¹⁶³ This followed a contingency plan for food supply and food security in times of crisis (November 2021).¹⁶⁴ Some forms of contingency measures in case of severe energy supply disruption are also included in the Commission’s latest ‘REPowerEU Plan’ (May 2022).¹⁶⁵ To avoid overlaps and ensure a coherent approach, it is crucial to clarify how the SMEI would fit in the EU’s crisis preparedness toolbox.

Finally, the SMEI shall avoid imposing an unnecessary burden on businesses that are already hard-pressed in times of crisis. Thus, the focus on strategic autonomy shall, in our view, not result in burdensome ex-ante reporting obligations on companies operating in identified strategic supply chains unless thoroughly motivated. Similar caution shall be observed when devising public interventions impacting existing supply chains and business models. Therefore, any SMEI-obligations imposed on companies shall undergo a proportionality test in accordance with the EU Treaties.¹⁶⁶

In conclusion, the SMEI should be based on a dynamic strategy that uses the freedom of movement in the Single Market as well as our external openness to boost resilience while avoiding the pitfalls of bureaucratisation.

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RTL “[Coronavirus : Didier Guillaume “appelle au patriotisme alimentaire”](#)” (13 May 2020).

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S. Stefanova-Behlert and M. Menghi (2021), “[The impact of Covid-19 on posted workers: the new ‘posting framework’](#)” (Fondation Robert Schuman, European Issues No 591, 13 April 2021).

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The Guardian “[EU tells six countries to lift Covid border restrictions](#)” (23 February 2021).

The Local “[Sweden ‘in violation’ of EU law for failing to issue Covid passes to thousands of foreign residents - The Local](#)” (21 August 2021).

D. Utrilla and A. Shabbir (2021) (eds) “EU Law in Times of Pandemic” (2021).

Footnotes

- 1 National Board of Trade (2020b).
- 2 Export restrictions are notified under the Single Market Transparency Directive ([2015/1535/EU](#)) and collated in the TRIS-database.
- 3 Some of these requirements are notified under the Services Directive ([2006/123/EC](#)). In addition, the European Commission regularly updates a map of lockdown measures (see [Re-open EU \(europa.eu\)](#)).
- 4 See the database for notified barriers under Schengen rules and the SOLVIT database.
- 5 State aids measures are notified to the European Commission and are published on its website (see [Factsheet - List of Member State Measures approved under Articles 107 \(2\)b, 107\(3\)b and 107\(3\)c TFEU and under the State Aid Temporary Framework](#)).
- 6 See for instance D. Utrilla and A. Shabbir (2021) and the (non-exhausted) list of think tank reports on the COVID-crisis that is regularly published by the [General Secretariat of the European Council](#).
- 7 As an example, there are, to date, around 900 national State aids that have been notified to the European Commission. In total, we estimate that thousands of measures have been adopted by the Member States in order to address the COVID-crisis. There is, thus, an information overload that hampers a thorough assessment of each measure.
- 8 The management of the COVID crisis is surrounded by uncertainty on the scientific aspects of the pandemic resulting in trial and errors approaches by the Member States for which we do not yet have enough distance and hindsight to conduct thorough assessments.
- 9 European Commission (2021b).
- 10 The EU Treaties define the Single Market (actually the 'internal market' but these notions are interchangeable) as an "area without internal frontiers in which free movement of goods, persons, services and capital is ensured" (Article 26(2) TFEU).
- 11 Directive ([2015/1535/EU](#)) laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services.
- 12 Note that we have not included all product requirements notified under the Single Market Transparency Directive. Some, although motivated by the need to limit the spread of COVID, are too remote from the scope of the present mapping exercise. That is for instance the case of the restrictions on the sale of fireworks in the Netherlands, Belgium and Hungary around the New Year that were motivated by the need to limit public gatherings (see [2021/795/NL](#), [2020/751/B](#) [2020/817/HU](#)). Note also that restrictions on the free movement of goods that were motivated on other grounds than the protection of public health are examined below under Section 2.2.1.
- 13 European Commission (2020f).
- 14 National Board of Trade (2020b), p. 8.
- 15 B. Hoekman, M. Fiorini and A. Yildirim (2020).
- 16 National Board of Trade (2020a), p.14.
- 17 National Board of Trade (2020b), p.9.
- 18 Ibid. An important factor in that respect was the export control regime introduced by the EU towards third countries in the early stage of the pandemic, see Commission Implementing Regulation ([2020/402/EU](#)) making the exportation of certain products subject to the production of an export authorisation (14 March 2020).
- 19 National Board of Trade (2020b), p. 16-23.
- 20 In accordance with Article 168 TFEU. See for instance U. Neergaard and S. de Vries (2020) and D. Edward, R. Lane and L. Mancano (2020).
- 21 Case 104/75 *de Peijper*.
- 22 In accordance with Articles 35 and 36 TFEU. As an example, the Belgian Constitutional Court annulled in October 2019 (i.e. right before the pandemic) an export ban on medicines which was found to be in breach of the EU rules on free movement of goods. In particular, the Belgian Court held that the ban was not sufficiently motivated, and that proof of actual and sufficiently serious shortages was lacking. See for instance W. Devroe and N. Colpaert (2020).
- 23 See for instance the judgment of the CJEU in case C-180/96 *UK v. Commission*, at para. 99.
- 24 The approach of the European Commission, as we understand it, has been rather conciliatory with regard to most export restrictions on health-related products. European Commission (2020f) first questions the lawfulness of "total export bans for medicines [which] are not in line with the Treaty" but seems, then, to recant, or at least nuance, that view a few paragraphs later: "Whilst it is understandable that countries wish to ensure the availability of essential medicines nationally, export bans are detrimental to the availability of medicines for European patients even when they are legally justifiable" (underlined here). It is also our understanding that the Commission held informal discussions with the Member States considering the introduction of export restrictions in order to limit the scope of these measures.
- 25 See the joined procurements for gloves and coveralls (28 February 2020), eye and respiratory protection (17 March), laboratory equipment (19 March) as well as ventilators (17 June).
- 26 See case [2020/451/RQ](#). We do not know whether this measure was implemented in the end.
- 27 The Belgian authorities motivated the export ban on flu vaccines by the limited number of doses available locally and the price difference with other countries which entailed a risk of export to more lucrative markets and, in term, a risk of an overburden of the health system with seasonal flu cases (see case [2020/650/B](#)). As

- for the Bulgarian export bans on certain medical products for the treatment of COVID-19, it was supported by data that showed a shortage of supply of these medical products (see cases [2021/145/BG](#) and [2021/565/BG](#)).
- 28 OECD (2013) and R. Piermartini (2004).
- 29 See, for instance, Kreuger (1974).
- 30 R. Piermartini (2004).
- 31 See Section 3.
- 32 The European Commission provides historic data in an excel sheet with over 200,000 entries, see the file "Downloadable historical data" [here](#).
- 33 At the time of writing, the EU is experiencing the end of its sixth outbreak of COVID-19 (with variations between the Member States). The first one was between March and May 2020; the second in the Autumn 2020 (with peaks in October/November), the third in the winter and early spring 2021 (with peaks in March/April), the fourth outbreak started already in the late summer 2021 in some Member States, the fifth one in December 2021 with the Delta-variant of the virus which was replaced with the Omicron-variant in early 2022.
- 34 National Board of Trade (2020b).
- 35 Council Recommendation ([2020/1475/EU](#)) on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (13 October 2020). The Recommendation was replaced on 25 January 2022 by Council Recommendation ([2022/197/EU](#)).
- 36 See Regulation ([2021/953/EU](#)) on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic (14 June 2021).
- 37 European Commission (2022b).
- 38 EU Law Live "[Specific Member States told by Commission to align more closely with EU COVID-19 Travel Recommendation](#)" (23 February 2021). See also Politico "[Berlin bats away EU concern over 'painful' coronavirus border curbs](#)" (15 February 2021).
- 39 The Guardian "[EU tells six countries to lift Covid border restrictions](#)" (23 February 2021).
- 40 Politico "[France extends COVID-19 booster shot to all adults – The third dose will be included as a requirement to keep a valid vaccine passport](#)" (25 November 2021).
- 41 Euronews "[Portugal has re-imposed COVID-19 travel restrictions. Could other EU nations do the same?](#)" (29 November 2021), Bloomberg "[Omicron Divides Europe Over Plan to Simplify Travel Rules](#)" (14 December 2021), Le Soir "[Au sommet européen, la crainte qu'omicron ne rime pas avec libre circulation](#)" (15 December 2021) and Swedish Government (2021).
- 42 In average three out of four EU citizens had received at least one vaccination dose by 21 April 2022 and more than half already had a booster, see ECDC "[COVID-19 Vaccine Tracker](#)".
- 43 European Commission (2022b).
- 44 See for instance Bloomberg "[Denmark Declares Covid No Longer Poses Threat to Society](#)" (26 January 2022).
- 45 Schengenvisa info news "[Italy, Spain & Portugal Keep Travel Restrictions in Place Over Easter Holidays](#)" (15 April 2022).
- 46 See for instance Sveriges Television "[Tusentals fullvaccinerade får inte bevis: 'Diskrimineras'](#)" (15 December 2021), or The Local "[Sweden 'in violation' of EU law for failing to issue Covid passes to thousands of foreign residents - The Local](#)" (21 August 2021).
- 47 The Swedish E-Health Agency (2021).
- 48 National Board of Trade (2022a), p. 59-60.
- 49 We also note that the Nordic Co-operation recently identified 121 COVID-related barriers many of them related to difficulties for frontier workers to travel to their workplace, see Nordic Cooperation (2022).
- 50 A complete list of these border control measures is available at the European Commission's website at: https://ec.europa.eu/home-affairs/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en.
- 51 Ibid. The measure in question concerns France and is in place until 31 October 2022. Note however that it is partly motivated by continuous terrorist threats.
- 52 Eurostat (2022).
- 53 H. Graupner "[Traffic chaos at German-Polish border a threat to local supply chain?](#)" (DW, 19 March 2020).
- 54 European Commission (2020h).
- 55 S. Stefanova-Behlert and M. Menghi (2021).
- 56 National Board of Trade, Ref. 2020/00532-2.
- 57 L. Geyer, S. Danaj and A. Scoppetta (2021).
- 58 Under the Services Directive, national requirements on services shall be notified to the European Commission. Although hundreds of measures were introduced by the Member States, during the pandemic, 52 only were notified by eight Member States in this two year-period (DK: 1; FR: 8; HU: 12; IE: 8; LV: 12; PT: 4; SE: 6 and SK: 1). The lack of transparency is discussed under Section 3.1.1 below.
- 59 See for instance IMCO (2021), p. 69.
- 60 On the impact of flight restrictions on the trade in goods, see D. Botero Garcia, A. Reshef & C. Umana-Dajud (2021).
- 61 Svenska Dagbladet "[Scania stoppar produktionen i Europa](#)" (18 March 2020) and Ny Teknik "[Så påverkas svenska fordonstillverkarna av coronasmittan](#)" (18 March 2020).
- 62 National Board of Trade (2020b), p. 8.
- 63 European Commission (2020a), (2020c) and (2020f).
- 64 IMCO (2021), p. 70.
- 65 Ibid. See also National Board of Trade (2020a) and European Commission (2021d). European Commission (2020a), (2020c) and (2020f).

- 66 See under Section 1.1 above our preliminary legal assessment in respect of the export restrictions on health-related products. See also D. Edward, R. Lane and L. Mancano (2020).
- 67 Directive (2004/38/EC) on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Article 29.
- 68 Regulation (2016/399/EU) on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), Articles 25-28.
- 69 Section 1.1.
- 70 See the European Commission's website "[Temporary Reintroduction of Border Control](#)".
- 71 The exception concerns border controls introduced by Hungary on all land and air borders between 12 May and 11 November 2020.
- 72 At the same time, it cannot be totally excluded that other motivations may have come into play, such as the need for some governments to show decisiveness at all cost to reassure an anxious society.
- 73 European Commission (2020g), p.3. It adds that these measures *"allowed to buy precious time to prepare Member States' health care systems, procuring essential products [...], and to launch work on vaccine development and possible treatments. The prevailing scientific view indicates that these measures are essential, and indeed, the available data shows that a combination of stringent containment measures achieves reductions in transmission and mortality rates."*
- 74 See above under Section 1.2.1.
- 75 Rfi.fr "[France to quarantine travellers from Spain in tit-for-tat Covid measure](#)" (15 May 2020). Similarly, we found that the no-travel recommendations provided by the Swedish government were not always motivated by the epidemiological situation in other Member States but by the fact that certain countries had blacklisted travellers from Sweden.
- 76 For a critical analysis of these border controls, see J. Gerkrath (2021).
- 77 See Sergio Carrera and Ngo Chun Luk (2020).
- 78 In 2020, growth contracted by around 6½% in the EU and the euro area, see European Commission (2021a).
- 79 Aside from an adjustment of the State aids regime, it was necessary to activate the general escape clause of the Stability and Growth Pact, to allow for substantial increases in public spending, see European Commission (2020b).
- 80 European Commission "[Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak](#)" (19 March 2020, C(2020)1863). The regime has been amended six times to date and shall expire on 30 June 2022.
- 81 Articles 107 and 108 TFEU.
- 82 In short, the SATF clarifies the extent of the exemption for aids *"to remedy a serious disturbance in the economy of a Member State"* set in Article 107(3)(b) TFEU. The Commission also clarified two other exemption grounds for aids *"to make good the damage caused by natural disasters or exceptional occurrences"* under Article 107(2)(b) TFEU and aids *"to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest"* under Article 107(3)(c) TFEU.
- 83 European Commission (2022a). Note that most (but not all) of the 900 measures presented in Table 2 were approved under the SATF. An exhaustive list of State aid approval decisions is available on the Commission's website at: [Factsheet - List of Member State Measures approved under Articles 107\(2\)b, 107\(3\)b and 107\(3\)c TFEU and under the State Aid Temporary Framework](#).
- 84 See European Commission website on the [Recovery plan for Europe](#).
- 85 See BBC "Covid stimulus: Biden signs \$1.9tn relief bill into law" (11 March 2021).
- 86 As a comparison, State aid expenditures for 2018 and 2019 amounted to €256 billion, see the State aid scoreboards for 2018 and 2019 on the Commission's [website](#).
- 87 The total amount of aids approved by the Commission between October 2021 and March 2022, was €85 billion; less than 3% of the total amount of aids since March 2020.
- 88 European Commission (2022a).
- 89 In particular, the Commission notes that *"Member States that were most affected by the first wave of the pandemic show a general slowdown in the disbursement of funds from December 2020 to June 2021 (France, Germany, the Netherlands and Denmark), with the exception of Italy and Spain that have largely increased their spending in the first half of 2021."* (ibid).
- 90 As an example, the Commission approved France's €300 billion guarantee scheme in four working days while standard State aid reviews can take up to several months, see A. Claici, L. Eymard and S. Vallée (2021).
- 91 According to media report, some Member States, including Sweden, the Netherlands and Finland were opposed to the extension of the SATF beyond 2021, see Financial Times "[Brussels signals extension of looser Covid-era state aid rules](#)" (19 October 2021).
- 92 A. Claici, L. Eymard and S. Vallée (2021).
- 93 Under EU law, Commission decisions on State aids may be challenged before the General Court and its rulings may, in turn, be appealed before the CJEU.
- 94 Ryanair and other low-cost carriers filed legal complaints against the Commission's approval of State aid measures to airlines (cases T-398/21, T-499/21, T-743/21, T-494/21, T-216/21, T-444/21, T-340/21, T-333/21, T-268/21, T-238/21, T-111/21, T-665/20, T-34/21 and T-87/21). See also S. Jungermann and D. Bunsen (2021).
- 95 For instance, Sweden's and Denmark's aids to SAS as well as Finland's aid to Finnair were considered lawful by the General Court in separate rulings that are now appealed before the CJEU, see cases C-591/21 P *Ryanair v Commission*; C-441/21 P *Ryanair v Commission* C-320/21 P *SAS Sweden*; C-321/21 P *SAS Denmark* and C-353/21 P *Finnair*.

- 96 Case T-665/20 *Ryanair v Commission*. In its ruling, the General Court annulled the Commission decision approving the aid granted by Germany to the airline Condor which it found insufficiently motivated. The effect of this annulment was, however, suspended pending the adoption of a new, duly motivated approval decision by the Commission.
- 97 In particular, the obligation for the aid recipient to reimburse the full amount of an unlawful aid measure with interest.
- 98 The five Member States that account for 90% of the budgeted aids in the EU are the same ones that pushed early on for an EU industrial policy.
- 99 France (25.7%), Italy (23.2%), Germany (18.6%) and Spain (14.4%).
- 100 European Commission (2022a).
- 101 According to the Commission *"In most of the Member States [...], State aid spending represents more than 50% of the GDP loss. Other countries, i.e. Denmark, Sweden, Bulgaria, the Netherlands and Poland [...] provided an amount of State aid approximately equal to their GDP loss. Only few Member States provided less than 50% of their GDP loss in State aid. This is the case in Greece, Czechia and Estonia [...] where State aid expenditure represents between 25% and 50% of GDP loss) and Croatia, Cyprus and Belgium [...] with less than 25%). Luxembourg and Lithuania are exceptions as they registered a GDP growth in 2020."* (p.2).
- 102 Data for Austria, the fourth Frugal Four, is not available.
- 103 For instance, Banque de France (2021) and I. Agnolucci (2022).
- 104 Euractiv ["Commission warns against shift towards protectionism in agri-food sector"](#) (23 April 2020), see Section 2.2.3 below.
- 105 Politico ["Coronavirus reheats Europe's food nationalism"](#) (15 May 2020).
- 106 Kronen Zeitung ["Regionale Produkte sollen Steuervorteile bekommen"](#) (12 May 2020).
- 107 European Commission ["Infringement Package – Commission asks BULGARIA to remove discriminatory measures obliging retailers to favour domestic food products"](#) (October 2020).
- 108 EuroCommerce (2021).
- 109 Euronews ["Czech MPs reject proposed quota for locally-produced food in supermarkets"](#) (14 April 2021).
- 110 See notification [2021/410/HU](#) under the Single Market Transparency Directive.
- 111 See the Commission's [Reasoned opinion](#) (second stage in infringement proceedings), dated April 2022.
- 112 See notification [2020/181/SI](#) under the Single Market Transparency Directive.
- 113 The relevant EU provisions are Articles 34 to 36 TFEU.
- 114 Obviously, disguised restrictions such as non-discriminatory measures or measures that are indirectly discriminatory are more difficult to identify and, hence, to remove.
- 115 At the same time, we note that, prior to the COVID-19 crisis, food protectionism was already present in some Member States, in particular with regard to country-of-origin labelling, see National Board of Trade (2020d). In our view, it is in this broader context and timescale rather than the specific period of the pandemic, that the possible emergence of such trend should be examined.
- 116 European Commission (2021c), p.9.
- 117 Section 37(a) of the Food and Tobacco Products Act, see J. Málek, and K. Roučková (2021).
- 118 Opinion of the expert group of the Ministry of Regional Development on public procurement regarding the purchase of food in public contracts (6 November 2021, available [here](#)).
- 119 Austrian Government (2021), p.29.
- 120 Ibid.
- 121 See European Commission [September infringement package](#) (23 September 2021).
- 122 Directive [\(2014/23/EU\)](#) on the award of concession contracts, Directive [\(2014/24/EU\)](#) on public procurement and Directive [\(2014/25/EU\)](#) on procurement by entities operating in the water, energy, transport and postal services sectors.
- 123 The SCA mentioned the case of a municipality encouraging its public purchasers to buy locally and another one promoting the local tourism industry (informal contacts, April 2020).
- 124 Tea Paulović, (2021).
- 125 See for instance the rulings of the CJEU in cases 249/81 *Buy Irish*, 222/82 *Apple and Pear* and C-470/03 *Lehtinen*. See also National Board of Trade (2020c).
- 126 Politico ["Coronavirus reheats Europe's food nationalism"](#) (15 May 2020).
- 127 Deutsche Welle ["Polish government lays out patriotic food plans"](#) (6 July 2021).
- 128 France24 ["France issues call to 'buy French' as coronavirus erodes single market"](#) (28 March 2020), RTL ["Coronavirus : Didier Guillaume 'appelle au patriotisme alimentaire'"](#) (13 May 2020).
- 129 Euractiv ["Commission warns against shift towards protectionism in agri-food sector"](#) (23 April 2020).
- 130 See F. Brodkorb-Kettenbach (2020). It is within the scope of this initiative that the Austrian Government adopted the recommendation to procure local food products (Section 2.2.2).
- 131 Aftonbladet ["Stöd bönderna i krisen – handla svensk mat"](#) (28 mars 2020).
- 132 In accordance with Article 42 (7) TEU.
- 133 As mentioned, both questions are intertwined. For instance, the joint procurement of PPEs by the EU could, at the same time, address the shortages in those products (i.e., contribute to solving the crisis) and remove the incitement for the export restrictions imposed by some Member States (i.e., smoothing free movement). It is, therefore, not possible to make complete abstraction of crisis-related policies in discussing means to strengthen the Single Market.
- 134 Again, it is important to consider the narrow definition of the 'Single Market' which applies for the purpose of this paper, see Box 1 above.
- 135 Note that we cannot review all the notification regimes activated during the pandemic, for instance the border controls that are subject to the Schengen Border Code.

- 136 At the same time, the website's disclaimer makes it clear that the information provided is not necessarily exhaustive, nor fully accurate.
- 137 See Sections 1.1.2 (in respect of the export restrictions), 1.2.4 (lockdown measures and border controls), 2.1.1 (State aids) and 2.2 (preferential regimes).
- 138 See European Commission (2020d).
- 139 Commission Implementing Decision ([2020/668/EU](#)) on the harmonised standards for personal protective equipment.
- 140 For a review of the EU response, see for instance D. Edward, R. Lane and L. Mancano (2020).
- 141 For instance, see European Parliament (2020), D. Edward, R. Lane and L. Mancano (2020) and U. Neergaard and S. de Vries (2020).
- 142 See for instance, A. Mulaney (2020).
- 143 National Board of Trade (2020b), p.27.
- 144 Regulation ([2679/98/EC](#)) on the functioning of the internal market in relation to the free movement of goods among the Member States. Note that the functioning of this particular regulation is subject to criticism (including from the Board, see reg. nr. 2019/00128-3) which shall be taken into account in designing a horizontal crisis notification regime.
- 145 See European Commission (2021d) on the European Food Security Crisis preparedness and response Mechanism ('EFSCM').
- 146 Regulation ([1024/2012/EU](#)) on administrative cooperation through the Internal Market Information System and Regulation ([2018/1724/EU](#)) establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services.
- 147 European Commission (2020e).
- 148 There are approximately 100,000 national, regional and local authorities in the EU (Eurostat (2020)), all of which are responsible for the daily application of Single Market rules in the member States.
- 149 See the Commission's [website](#) on the Single Market Enforcement Task Force ('SMET').
- 150 National Board of Trade (2022b).
- 151 They may even need adjustments to address subsequent health crises if those present different characteristics such as higher mortality or contamination rates or the existence (or not) of effective treatment or vaccination.
- 152 For instance, military threat, health crisis, terrorism, supply crisis, cyber-attack, financial or economic crisis, natural disaster, refugee crisis or threat on the rule of law.
- 153 European Commission (2021b).
- 154 European Commission (2022c), p.1.
- 155 For instance, the former assumes that national intervention may harm competition on the Single Market whereas the latter relies on a certain level of public intervention to deal with issues such as strategic dependencies.
- 156 Sections 3.2.1 to 3.2.3.
- 157 The inclusion of the SMEI initiative in the Industrial Strategy seems to indicate the Commission's preference for an approach focusing on the use of the Single Market to solve crisis.
- 158 In particular, the coordination mechanisms devised by the European Commission such as the green lanes, the Digital COVID Certificate and the guidelines on the free movement of critical workers.
- 159 For instance, L. Cernat (2020) showing that EU import openness generated a 7.8% gain in real income (amounting to €1.2 trillion) compared to a situation in which no import would take place.
- 160 National Board of Trade (2020a).
- 161 Ibid. p.1.
- 162 See the Commission's websites on the [Single Market Enforcement Taskforce](#) ('SMET'), [European Health Emergency Preparedness and Response Authority](#) ('HERA') and the [EU Civil Protection Mechanism](#).
- 163 European Commission (2022e).
- 164 European Commission (2021d).
- 165 European Commission (2022d).
- 166 Article 5 TEU.

Sammanfattning på svenska

Summary in Swedish

Covidkrisen påverkar den inre marknadens funktion på olika sätt. Avbrutna försörjningskedjor, exportrestriktioner för hälsorelaterade produkter och gränskontroller är några nationella åtgärder som under coronakrisen påverkade tre av fyra friheter på den inre marknaden mycket negativt. Dessutom kan det enorma ekonomiska stödet till företag i form av statligt stöd (upp till 3,18 biljoner euro) samt åtgärder som syftar till att främja lokala varor eller företag ha bidragit till att snedvrida konkurrensen på den inre marknaden.

Ändå visar vår kartläggning av dessa nationella åtgärder att den inre marknaden var resiliert när det gäller att upprätthålla den fria rörligheten – och, anmärkningsvärt nog, det fria flödet av livsmedel och andra viktiga konsumtionsvaror.

Med vissa förbehåll finner vi att huvuddelen av de motåtgärder som påverkar den fria rörligheten är motiverade av skyddet av folkhälsan. De är sannolikt i de flesta fall i linje med EU-rätten. Trots alla deras störningar är den inre marknadens rättsliga struktur alltså tillräckligt flexibel för att rymma sådana långtgående restriktioner. Med tanke på krisens karaktär och EU:s begränsade kompetens inom hälso-skyddsområdet är det faktiskt viktigt att inte inskränka medlemsstaternas möjligheter att hantera pandemin.

Samtidigt spelar den inre marknaden en nyckelroll (om än en diskret sådan) för att mildra krisens negativa inverkan på den fria rörligheten. Det gör det på två sätt.

För det första är nationella restriktioner som inte är motiverade av folkhälsan förbjudna. Ett fåtal medlemsstater försökte införa nationella åtgärder i syfte att skydda sina egna varor eller företag (i form av kvoter, förmånliga upphandlings-system eller uppmaningar till matpatriotism). Men de drogs i de flesta fall snabbt tillbaka efter påtryckningar från EU-kommissionen eller andra intressenter.

För det andra är den gemensamma inre marknaden ett starkt incitament att hitta gemensamma lösningar. Det motverkar därmed alla frestelser till överdrivna och ensidiga åtgärder från medlemsstaternas sida. Dessutom erbjuder de olika EU-initiativen som exempelvis de gröna fälten till det digitala covid-certifikatet praktiska lösningar på konkreta hinder för den fria rörligheten. EU i sig är en naturlig plattform för problemlösning och visar att den inre marknaden, med sin idé att summan är större än dess delar, är ett sätt att övervinna en "alla för sig själva"-strategi.

Men även om den inre marknaden visat sig vara resiliert i stort, visar vår undersökning av de nationella åtgärderna också behovet av förbättringar för att stärka den ytterligare i kristider:

- **Ökad öppenhet:** För att den inre marknaden ska fungera är det i kristider särskilt viktigt att alla parter har tillgång till korrekt och uttömmande information i realtid om de restriktioner som införs av medlemsstaterna. Vi rekommenderar därför att de befintliga anmälningsprocedurerna för varor, tjänster och personer stärks. Vi föreslår också att man överväger en horisontell informationsmekanism anpassad till krissituationer.

- Bättre efterlevnad: Den inre marknaden lider redan av ett stort efterlevnadsunderskott och risken för överträdelser av EU-rätten förvärras i kristider. Förbättrad efterlevnad under normala förhållanden är därför avgörande för att bygga upp de normer och den disciplin som behövs för att upprätthålla den fria rörligheten och säkra tillgången på varor och tjänster i nödsituationer. Europeiska kommissionen har inte möjlighet att övervaka alla efterlevnadsproblem i alla medlemsländer. Det är därför avgörande att medlemsstaterna tar ett större ansvar när det gäller efterlevnaden av den inre marknadens regler. Förslag i den riktningen skulle på ett effektivt och betydelsefullt sätt bidra till att stärka den inre marknaden, särskilt i kristider. Vi rekommenderar därför att man integrerar en ambitiös efterlevnadsdimension i den riktningen i alla framtida krishanteringsförslag.
- Starkare samarbetsmekanismer: ytterligare krismekanismer kan övervägas. Men deras utformning kan variera beroende på vilken typ av kris som uppstår och EU:s kompetens i varje sådan situation. Därför är det viktigt att förslag på sådana mekanismer utgår från en djupgående analys av relevant krisscenario.

Slutligen noterar vi EU-kommissionens plan på ett krisinstrument för den inre marknaden ("SMEI"). Även om inget konkret förslag har presenterats ännu, har vi förstått att SMEI skulle fokusera på medel för att stärka den inre marknaden i kristider, men också på hur den inre marknaden skulle kunna bidra till att lösa sådana kriser.

Vi är oroad över det till synes tvetydiga målet med detta initiativ. Det tycks sträcka sig över två distinkta, inte alltid samordnade, politikområden (den inre marknaden och industristrategin). Risken med ett sådant mångsidigt policyverktyg är att det blir ineffektivt. Dåligt genomtänkta initiativ riskerar också att skapa en falsk trygghet som kan visa sig kontraproduktiv när en kris slår till.

I vilket fall som helst rekommenderar vi att alla SMEI-förslag fokuserar på att stärka den inre marknaden genom att integrera de tre dimensionerna som nämns ovan: Ökad transparens, bättre efterlevnad och starkare samarbetsmekanismer. Dessutom ska den: (i) utgå från erfarenheter från pandemin (särskilt de olika samordningsmekanismer som lanserats av kommissionen) och en djupgående analys av de krisscenarier som den försöker ta itu med, (ii) inte undergräva den inre marknadens öppenhet gentemot tredjeländer, (iii) ta hänsyn till övriga krishanteringsinitiativ, och (iv) inte lägga en onödig börda på företagen.

Med andra ord bör SMEI baseras på en dynamisk strategi som använder den fria rörligheten på den inre marknaden såväl som vår externa öppenhet för att öka motståndskraften, samtidigt som man undviker byråkratiseringens fallgropar.

The National Board of Trade Sweden is the government agency for international trade, the EU internal market and trade policy. Our mission is to facilitate free and open trade with transparent rules as well as free movement in the EU internal market.

Our goal is a well-functioning internal market, an external EU trade policy based on free trade and an open and strong multilateral trading system.

We provide the Swedish Government with analyses, reports and policy recommendations. We also participate in international meetings and negotiations.

The National Board of Trade, via SOLVIT, helps businesses and citizens encountering obstacles to free movement. We also host several networks with business organisations and authorities which aim to facilitate trade.

As an expert agency in trade policy issues, we also provide assistance to developing countries through trade-related development cooperation. One example is Open Trade Gate Sweden, a one-stop information centre assisting exporters from developing countries in their trade with Sweden and the EU.

Our analyses and reports aim to increase the knowledge on the importance of trade for the international economy and for the global sustainable development. Publications issued by the National Board of Trade only reflect the views of the Board.

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