



House of Commons  
European Scrutiny Committee

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**Tenth Report of Session  
2022–23**

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Documents considered by the Committee on 23 November 2022

*Report, together with formal minutes*

*Ordered by The House of Commons  
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## Notes

### Numbering of documents

Three separate numbering systems are used in this Report for European Union documents:

Numbers in brackets are the Committee's own reference numbers.

Numbers in the form "5467/05" are Council of Ministers reference numbers. This system is also used by UK Government Departments, by the House of Commons Vote Office and for proceedings in the House.

Numbers preceded by the letters COM or SEC or JOIN are Commission reference numbers.

Where only a Committee number is given, this usually indicates that no official text is available and the Government has submitted an "unnumbered Explanatory Memorandum" discussing what is likely to be included in the document or covering an unofficial text.

### Abbreviations used in the headnotes and footnotes

AFSJ	Area of Freedom Security and Justice
CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy
ECA	European Court of Auditors
ECB	European Central Bank
EEAS	European External Action Service
EM	Explanatory Memorandum (submitted by the Government to the Committee)*
EP	European Parliament
EU	European Union
JHA	Justice and Home Affairs
OJ	Official Journal of the European Communities
QMV	Qualified majority voting
SEM	Supplementary Explanatory Memorandum
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

### Euros

Where figures in euros have been converted to pounds sterling, this is normally at the market rate for the last working day of the previous month.

### Further information

Documents awaiting consideration by the Committee are listed in "Remaining Business": [www.parliament.uk/escom](http://www.parliament.uk/escom). The website also contains the Committee's Reports.

\*Explanatory Memoranda (EMs) can be downloaded from GOV.UK: <https://www.gov.uk/government/collections/explanatory-memoranda-on-eu-documents>. EMs can be searched by Council or Commission reference number. Letters from the Committee and those issued by Ministers can be found in the correspondence section of the Committee's website: <https://committees.parliament.uk/committee/69/european-scrutiny-committee/publications/3/correspondence/>.

Explanatory Memoranda and letters published before 31 March 2022 can be found on the National Archives website—<https://webarchive.nationalarchives.gov.uk/search/>—by restricting searches to <https://europeanmemoranda.cabinetoffice.gov.uk/>

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# 1 Northern Ireland Protocol: Ecodesign for sustainable products<sup>1</sup>

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## This EU document is politically important because:

- it will affect the UK under all scenarios, likely applying in some form under the Northern Ireland Protocol and introducing new sustainability requirements with which Great Britain exports to the EU will need to comply; and
- domestic policy in this area is being developed but may cause supply chain friction if the EU and UK act in isolation, particularly in areas such as textiles where the UK is currently pursuing a voluntary approach.

## Action

- Write to the Minister.
- Draw to the attention of the Environmental Audit Committee and the Northern Ireland Affairs Committee.

## Overview

1.1 We first considered the European Commission’s proposed new [Ecodesign for Sustainable Products Regulation](#) (ESPR)—aiming to reduce the negative environmental impacts of almost all physical products produced or sold in the EU—on 7 September 2022. We summarised the initiative in our subsequent document scrutiny [Report](#),<sup>2</sup> noting applicability of the legislation to Northern Ireland under the terms of the Northern Ireland Protocol, as well as emerging UK policy in this area. We therefore [wrote](#) to the Minister requesting further information on UK policy developments and on the implications of the EU’s initiative for the UK.

1.2 The Minister for Business, Energy and Corporate Responsibility (Lord Callanan) has [responded](#), as set out in detail below, explaining some of the emerging UK policy. The limited examples identified by the Minister include initiatives on labelling of packaging and on water efficiency labelling. Concerning ecodesign specifically, he says only that policy proposals that would make use of the Resource Efficiency Requirements (Ecodesign) Schedule 7 power in the Environment Act 2021 are not being actively developed but evidence is being gathered to inform future policy options.

1.3 The Minister acknowledges that the ESPR is likely to impose costs on UK businesses and consumers given its impact on supply chains but says that the full implications cannot be assessed until the detailed rules (EU delegated acts) have been adopted following agreement on the ESPR. Concerning applicability to Northern Ireland, the Government

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1 Proposal for a Regulation establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC; Council and COM number: 7854(22), [COM \(2022\)142](#); Legal base: Art 114 TFEU, QMV, Ordinary legislative procedure; Department: Business, Energy and Industrial Strategy; Devolved Administrations: Consulted; ESC number: 42103.

2 Seventh Report, HC 119–vi (2022–23), [chapter 1](#) (7 September 2022).

is still considering its view on whether the ESPR should apply automatically to Northern Ireland or whether it should be added to the Protocol following agreement by both the EU and UK in the Withdrawal Agreement Joint Committee.

1.4 We are disappointed with the Minister’s response, which accentuates the potential costs without recognising the potential benefits and does not fully reflect the UK’s environmental ambitions as set out in the Environment Act 2021. We have responded to the Minister, asking for specific information on the Government’s approach to ecodesign in textiles and asking how the Government is engaging with the EU on its initiative.

### Letter from Lord Callanan, dated 12 October 2022

1.5 Concerning emerging UK policy in this area, the Minister says that most of the resource efficiency policies covered by the ESPR are the responsibility of the Department for Environment, Food and Rural Affairs (Defra), which continues to scope options and build the evidence base to determine the most appropriate policies domestically.

1.6 The Minister notes that waste policy is devolved but that Schedules 6 and 7 of the Environment Act 2021 on Resource Efficiency Information and Resource Efficiency Requirements grant powers covering each of the four nations, which can be exercised by the relevant devolved administration, as well as by the Secretary of State.

1.7 The Resource Efficiency Information (eco-label/product passport) Schedule 6 power is being explored, says the Minister, by two areas of policy development: water efficiency labelling and packaging labelling. There is regular engagement with the devolved administrations, says the Minister, as policy options are developed and implemented.

1.8 In respect of packaging, following [joint consultations](#)<sup>3</sup> with the devolved administrations, the Government intends to introduce mandatory labelling on certain types of packaging to indicate if it can be recycled or not. The new requirements will be introduced in a UK-wide Statutory Instrument (SI) which currently is expected to be in force by early 2024.

1.9 With regard to water efficiency labelling, the Secretary of State for Environment, Food and Rural Affairs confirmed in a [Written Ministerial Statement](#) in July 2021 that the Government would proceed in developing policy to deliver a mandatory water efficiency label as part of a suite of policies to address current water demand, as the Government looks to manage future water resources and improve drought resilience. The Minister says that the Government has been working closely with the devolved administrations and recently published a [joint consultation](#)<sup>4</sup> on water efficiency labelling policy. Following evaluation of consultation responses, the UK Government and the devolved administrations will together consider the most appropriate route to deliver this policy. This may be a UK-wide SI or another combination of nations coming together to deliver an SI.

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3 Department for Environment, Food and Rural Affairs, ‘Extended Producer Responsibility for Packaging’, March 2021.

4 Department for Environment, Food and Rural Affairs, ‘Consultation on Mandatory Water Efficiency Labelling’, September 2022.

1.10 The Minister explains that specific policy proposals that would make use of the Resource Efficiency Requirements (Ecodesign) Schedule 7 power in the Environment Act 2021 are not being actively developed but the Government is gathering evidence to inform future policy options.

1.11 Turning to the implications of the ESPR for Northern Ireland specifically, the Government is considering whether it would be automatically applicable to Northern Ireland under the terms of the Protocol<sup>5</sup> or whether it should be added to the Protocol. If is the latter, then the ESPR would only apply in Northern Ireland if both parties agree it should be added to the Protocol via the Joint Committee process under Article 13(4) of the Protocol. If the two Parties do not agree on its addition to the Protocol, the Parties should “examine all further possibilities to maintain the good functioning of the Protocol and take any decision necessary to this effect.” If the situation remains unresolved, the EU may take remedial measures once the ESPR is implemented in the EU. The Government will continue to engage with the EU on whether the ESPR would be automatically applicable in Northern Ireland or not. The Minister confirms that the Commission takes the view that the ESPR is indeed automatically applicable.

1.12 The Minister emphasises that the ESPR’s practical impact on Northern Ireland and the rest of the UK will be heavily dependent on the delegated acts that are passed under it. Once the Commission publishes more information, including details of the delegated acts, the Government will have a better idea of the potential effect of the ESPR.

1.13 Responding to our question about the spill-over effects from the ESPR on UK business and consumers, the Minister confirms that UK manufacturers that place goods onto the EU market are required to adhere to relevant EU Regulations. He considers that the delegated acts, once in force, are likely to increase costs for any manufacturer supplying the EU market with relevant goods, including any UK manufacturer exporting those goods to the EU. Costs will, he says, consist of time spent understanding the new regulations and the direct costs associated with changes to the manufacturing process to meet the new regulations. These increased costs will also apply to products manufactured for the EU market but also placed on the UK market. This means, considers the Minister, that goods manufactured in third countries and placed in both the UK and EU market could become more expensive.

1.14 There are likely to be spill-over effects for UK companies in the supply chain for goods that fall under the ESPR. Article 5 sets out the general framework for the adoption of ecodesign requirements, and Article 5(6) includes the option for the Commission to put requirements on supply chain actors to cooperate with manufacturers, notified bodies and competent national authorities for the verification of products’ compliance with ecodesign requirements.

1.15 The Minister notes too that the UK’s Office for Product Safety and Standards has been made aware of the ESPR given requirements in the legislation for market surveillance, including in third countries.

1.16 Finally, we asked the Minister about the process leading up to deposit of the ESPR in Parliament. Despite the fact that the initiative replaces legislation included in the Protocol,

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5 Automatic application is provided for by Article 13(3) of the Protocol. This is where a new EU act amends or replaces one listed in the Annexes to the Protocol.

the Government did not deposit the document until informed by the Commission that the proposal had been published and would—in the Commission’s view—apply to Northern Ireland. The Government confirms that waiting to be informed by the Commission is standard practice.

## Our assessment

1.17 We are disappointed by the Government response, which suggests a lack of ambition in this area despite the powers available under the Environment Act 2021. The Minister expresses concerns about the costs for UK businesses and consumers but fails to recognise the potential environmental benefits.

1.18 To seek more specific answers from the Government we will focus on one of the sectors identified by the Commission as requiring urgent attention, which is that of textiles, including clothing, carpets and mattresses. Sustainable clothing is an area of interest to consumers and one identified almost four years ago by the Environmental Audit Committee in its Report, ‘[Fixing Fashion: clothing consumption and sustainability](#)’.<sup>6</sup> Recent progress in the UK has been of a voluntary nature, principally the [Textiles 2030](#) initiative<sup>7</sup> led by WRAP (Waste and Resources Action Programme), with similar objectives to those that the European Commission is pursuing through regulation.

1.19 The Commission’s proposal would apply the provisions of ESPR to textiles, meaning that textiles placed on the market would be subject to specific ecodesign requirements including durability, environmental impact and energy use. We will therefore seek information from the Government on its approach to ecodesign for textiles and whether the Government considers it worthwhile to engage with the Commission and other EU policy-makers as the legislation proceeds through the decision-making process in Brussels. It may be, for example, that some of the Textiles 2030 work could usefully inform the textiles ecodesign standards set by the EU. There is otherwise a risk that the positive work undertaken in that initiative could be undermined by a different set of standards, affecting UK businesses that are part of global supply chains.

1.20 We accept the Minister’s contention that it is difficult at this stage to discern the full implications for the UK as these will depend on the content of the subsequent delegated acts. That said, the Commission and Member States will already be thinking about those details and so early engagement would be advisable given the potential implications for UK businesses and consumers. We will therefore ask for clarification from the Government on what engagement there has been between the UK and the EU on this proposal, including whether it has been restricted to considerations of applicability under the Northern Ireland Protocol or if wider interests have been discussed.

1.21 Turning to the process of deposit, the Government’s commitment is to submit Explanatory Memoranda on EU proposals which amend or replace existing EU legislation that falls under the scope of the NI Protocol. The commitment is not in fact conditional on the proposals being notified to the Government by the Commission. While we therefore dispute the Minister’s response, this matter goes beyond scrutiny of the ESPR and so we will not pursue it in this strand of correspondence.

6 Environmental Audit Committee, Sixteenth Report of Session 2017–19, HC 1952 (5 February 2019).

7 WRAP, ‘[Textiles 2030](#)’ [Accessed 17 November 2022].



## Action

1.22 We have written to the Minister as set out below.

1.23 We are drawing this document to the attention of the Environmental Audit Committee and the Northern Ireland Affairs Committee.

### ***Letter from the Chair to the Minister for Business, Energy and Corporate Responsibility (Lord Callanan)***

We considered your letter of 12 October 2022 on the above document at our meeting of 23 November 2022.

We are disappointed by your response, which suggests a lack of ambition in this area despite the powers available under the Environment Act 2021. While you acknowledge the impact on UK business, expressing concerns about the costs for UK businesses and consumers, you fail to recognise the potential environmental benefits.

One of the sectors that the Commission intends to address urgently is textiles, including clothing, carpets and mattresses. You will be aware that sustainable clothing is an area of interest to consumers and it was identified several years ago by the Environmental Audit Committee. The Government's approach in this area has favoured voluntary action over regulatory action, with the recent Textiles 2030 initiative led by WRAP being the highest profile example.

The Commission's proposal would apply the provisions of ESPR to textiles, meaning that textiles placed on the market would be subject to specific ecodesign requirements including durability, environmental impact and energy use. There is an obvious risk that any ecodesign standards set by the EU are not in line with the work being pursued through Textiles 2030 but that the EU standards would become the default through the supply chain given their regulatory nature. What is the Government's approach to ecodesign for textiles? Given the voluntary work underway in the UK in this area, would you consider it worthwhile to engage with EU decision-makers to share respective work on textiles ecodesign and potentially inform the standards being developed by the EU?

We accept your contention that it is difficult at this stage to discern the full implications for the UK as these will depend on the content of the subsequent delegated acts. That said, the Commission and Member States will already be thinking about those details and so early engagement would be advisable given the potential implications for UK businesses and consumers. Could you clarify, please, what engagement there has been between the UK and the EU on this proposal, including whether it has been restricted to considerations of applicability under the Northern Ireland Protocol or if wider interests have been discussed?

On the process of deposit, the Government's commitment is to submit Explanatory Memoranda on EU proposals which amend or replace existing legislation that falls under the scope of the NI Protocol. The commitment is not in fact conditional on the proposals being notified to the Government by the Commission. This proposal repeals, and arguably replaces, existing legislation that falls under the scope of the NI Protocol

and should therefore have been deposited regardless of notification from the Commission. This matter goes beyond scrutiny of the ESPR and so we will not pursue it in this strand of correspondence.

We look forward to a response to our queries by 18 January 2023.

## 2 The EU’s Single Market Emergency Instrument: securing supply chains during times of crisis<sup>8</sup>

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### This EU document is legally/politically important because:

- The Single Market Emergency Instrument is a proposed new statutory framework for the EU to address severe disruption of international supply chains, for example due to events like Covid-19. EU interventions in world markets to secure supplies of strategically important goods and services, for example through joint procurement, priority orders or stockpiling, could impact trade flows and the UK’s ability to secure supplies during times of crisis.
- In addition, the Instrument would allow for certain elements of the EU’s usual product safety requirements and procedures for goods such as PPE and fertilisers to be temporarily by-passed during a crisis, to make it easier for manufacturers to bring them to the market and reduce shortages. These provisions of the new EU law would apply in Northern Ireland under the terms of the Protocol on Northern Ireland.

### Action

- Write to the Parliamentary Under Secretary of State for Business, Energy and Industrial Strategy (Kevin Hollinrake MP) to seek further information about the potential implications of the Single Market Emergency Instrument for the UK.
- Draw the EU’s proposed Single Market Emergency Instrument to the attention of the Business, Energy and Industrial Strategy Committee and the International Trade Committee.

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8 The Single Market Emergency Instrument package consists of three separate legislative proposals:  
 (a) Proposal for a Regulation of the European Parliament and of the Council establishing a Single Market emergency instrument and repealing Council Regulation No (EC) 2679/98; COM number: COM(2022) 459; Legal base: Articles 21, 45 and 114 TFEU; Department: Business, Energy and Industrial Strategy; Devolved Administrations: Consulted; ESC number: 42122.  
 (b) Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2016/424, (EU) 2016/425, (EU) 2016/426, (EU) 2019/1009 and (EU) No 305/2011 as regards emergency procedures for the conformity assessment, adoption of common specifications and market surveillance due to a Single Market emergency; COM number: COM(2022) 461; Legal base: Articles 91 and 114 TFEU; Department: Business, Energy and Industrial Strategy; Devolved Administrations: Consulted; ESC number: 42123.  
 (c) Proposal for a Directive of the European Parliament and of the Council amending Directives 2000/14/EC, 2006/42/EC, 2010/35/EU, 2013/29/EU, 2014/28/EU, 2014/29/EU, 2014/30/EU, 2014/31/EU, 2014/32/EU, 2014/33/EU, 2014/34/EU, 2014/35/EU, 2014/53/EU and 2014/68/EU as regard emergency procedures for the conformity assessment, adoption of common specifications and market surveillance due to a Single Market emergency; COM number: COM(2022) 462; Legal base: Article 114 TFEU; Department: Business, Energy and Industrial Strategy; Devolved Administrations: Consulted; ESC number: 42124

## Overview

2.1 The Covid-19 pandemic and Russia’s unprovoked attack on Ukraine, as well as countries’ policy responses to both events, had profound effects on international supply chains. The pandemic, in particular, triggered significant restrictions on trade and transport links between countries, while the conflict in Ukraine disrupted energy and commodity flows. In the EU, these developments have raised particular concerns about the disruption man-made and natural events can inflict on the free flow of goods, services and people within its Single Market, not least because individual Member States undertook a myriad of uncoordinated national responses that added to disruption of supply chains and daily life, such as entry restrictions at borders, export restrictions on PPE, and competing public procurement exercises for the same goods. The UK of course was also affected despite its withdrawal from the EU, notably getting involved in a dispute with the EU about export restrictions on Covid-19 vaccines in early 2021.

2.2 The European Commission has now reviewed the EU’s ad hoc efforts since 2020 to coordinate an EU-wide response to these supply chain disruptions. While the EU has some statutory contingency planning frameworks for specific areas, such as the agricultural and financial markets, it lacks a centralised structure for coordination of contingency planning and adopting emergency measures where a crisis affects other areas of the EU economy. In September 2022, the Commission therefore [proposed](#) the creation of a “Single Market Emergency Instrument” (SMEI) which could be used to plan for, and address, future emergencies that disrupt supply chains at EU-level. The Instrument would apply where other existing frameworks are not sufficient or relevant; notably, medicines and medical devices are largely excluded from its scope as EU laws for those sectors have their own contingency provisions.

2.3 The Instrument itself would operate broadly according to a ‘traffic light’ model:

- By default, the SMEI’s status would be the ‘green’ Contingency Planning mode. This would be based on new “crisis protocols” for cooperation and exchange of information between EU Member States and the Commission during a crisis.
- If there was a clear risk of supply chain disruption for “strategic” goods and services, the Instrument’s ‘amber’ Vigilance mode could be activated, during which granular supply chain monitoring would take place across the EU, with the possibility of pre-emptive stockpiling on a national level where necessary.<sup>9</sup>
- As a last resort, where there is actual and severe economic disruption, the EU Member States could invoke the ‘red’ Emergency mode. Among other things, this would allow the European Commission to demand commercial data from relevant businesses. It could also negotiate priority orders of “crisis-relevant” goods and services for use by EU Member States through joint procurement, such as personal protective equipment, overriding the suppliers’ earlier contractual obligations to other customers. During an official “emergency”, EU countries would also face new restrictions on their national policy response with respect to restricting trade and transport links with other Member States (but not with

9 The instrument would not give the EU the power to stockpile centrally. Only as a last resort, where a particular Member State’s failure to build up reserves “gravely imperils the [EU’s] preparedness”, could the European Commission require it to stockpile a particular quantity by a specific deadline. Doing so would require the support of a majority of Member States.

non-EU countries like the UK).<sup>10</sup> In this mode, the SMEI would also allow for exemptions from some of the EU’s normal product safety requirements for goods such as fertilisers or PPE if necessary to prevent shortages.

2.4 While the UK of course left the EU on 31 January 2020, the SMEI is still of relevance here. First, the specific legal elements of the Instrument that create new contingency procedures in EU product safety laws, to enable certain goods to be brought to the market more quickly during a crisis, *will* apply in Northern Ireland automatically under the terms of the [Protocol on Ireland/Northern Ireland](#).<sup>11</sup> This is also relevant in the context of the absence of border controls on goods crossing the land border with Ireland during any future crises. In addition, actions taken by the EU to address potential or actual shortages of goods or services relevant during a particular crisis could affect international supply chains, including those that involve the UK. This might affect the UK, especially if it were also trying to secure its own supplies of similar goods and services—such as PPE—at the same time.

2.5 In light of this, we have considered the potential ramifications of the EU’s SMEI for the UK in more detail in the remainder of this chapter. It should be noted that the SMEI is part of a broader EU policy package relating to its ‘strategic autonomy’, which includes initiatives to make its own domestic supply chains in areas such as hydrogen, batteries and semi-conductors more resilient, and therefore less vulnerable to external shocks. Those issues are beyond the scope of this Report.

## The EU’s proposed Single Market Emergency Instrument

### *Background to the European Commission proposals*

2.6 The global economy has undergone a number of profound shocks in recent years, including the Covid-19 pandemic and the ramifications of Russia’s unprovoked attack on Ukraine. Within the European Union, as elsewhere, the impact of these events on supply chains has raised concerns about the effects of such external crises, both natural and man-made, on supply chains and the wider economy.

2.7 In particular, the EU lacked a comprehensive mechanism for centralised coordination of measures to cushion the impact of those events on its “Single Market”: the legal framework that aims to facilitate the free and unimpeded flow of people, goods, services and capital between its 27 Member States.<sup>12</sup> In particular, when Covid-19 hit there was no comprehensive structure or forum for contingency planning at EU-level at the necessary

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10 However, the SMEI itself would not be the basis for any export restrictions of specific goods from the EU to non-EU countries like the UK, since—as the EU demonstrated during the Covid-19 crisis—it already has legal tools to impose such measures under existing EU trade law. Restrictions on exports to non-EU countries are already possible under an existing [2015 EU Regulation](#) on common rules for exports. The Commission used that Regulation in January 2021 when it [imposed an advance notification requirement](#) on exports of Covid-19 vaccines from the EU to countries outside the bloc (and considered triggering the Article 16 safeguards under the Northern Ireland Protocol before deciding against the idea).

11 Department for Business, Energy and Industrial Strategy, [Explanatory Memorandum](#) on European Commission proposal COM(2022) 459 (21 October 2022), p. 1.

12 The EEA EFTA countries Norway, Iceland and Liechtenstein are also de facto part of the Single Market, as is Switzerland to a lesser extent.

technical level, such as forecasting collective needs or stockpiling of particular goods.<sup>13</sup> As a result, individual Member States undertook a myriad of uncoordinated national responses that added to disruption of supply chains and daily life, such as entry restrictions at borders, export restrictions on PPE, and competing public procurement exercises for the same goods.<sup>14</sup>

2.8 In addition to shortcomings in national responses, the European Commission also identified issues with the EU’s legal framework and policy response during Covid-19. In particular, many EU product safety laws lacked emergency provisions. This meant that, even in the midst of the pandemic, it was not legally possible to speed up the usual safety assessment procedures applicable to new suppliers of goods such as face coverings.<sup>15</sup> The joint procurement of Covid-19 vaccines by the EU’s Member States via the Commission also faced problems: in early 2021 there were severe shortages from two manufacturers compared to anticipated delivery schedules, which triggered more stringent contractual obligations in the EU’s subsequent agreements with suppliers.<sup>16</sup> The pressure to secure supplies of the vaccine also led the European Commission to briefly and controversially propose triggering the Northern Ireland Protocol’s Article 16 “safeguard mechanism” to apply EU export controls on vaccines going from the EU to Northern Ireland, before the idea was dropped under political pressure from Ireland and the UK.<sup>17</sup>

2.9 As early as October 2020, still in the midst of the pandemic, EU leaders meeting in the European Council [concluded](#) that the EU “should draw the lessons from the COVID-19 pandemic and address remaining fragmentation, barriers and weaknesses of the Single Market in facing emergency situations”.<sup>18</sup> A number of economic sectors regulated by EU law—in particular the agricultural<sup>19</sup> and financial markets<sup>20</sup>—already have specific ‘emergency’ provisions that aim to facilitate a coordinated EU when a crisis does occur.<sup>21</sup> Similarly, the Commission has wide latitude to relax EU State aid restrictions in response

13 The EU has an “[integrated political crisis response mechanism](#)” (IPCR), which is used to “facilitate information sharing and political coordination among the Member States in responding to complex crises”. However, the European Commission argues this is “not sufficient” for a Single Market crisis because it “does not allow for technical level discussion, analysis and fact-finding” and “needs to be requested to [convene] by any Member State” rather than functioning as a permanent structure.

14 [According to the European Commission](#), “19 Member States introduced different types of export restrictions and other restrictions distorting the Single Market for goods [during Covid]. Examples of such measures included suspension of exports of agricultural and food products and export bans for COVID-related material including personal protective equipment. A new intra-EU export restriction on agricultural products of strategic importance was introduced by Hungary in the context of Russia’s invasion of Ukraine”. See: European Commission Impact Assessment SWD(2022) 289, p. 7.

15 The relevant EU legislative framework for product safety, and how it would be amended by the Single Market Emergency Instrument, is explored in more detail in paragraphs 24 to 32 of this chapter.

16 European Court of Auditors, “[Special report 19/2022: EU COVID-19 vaccine procurement](#)” (12 September 2022), p. 5: “When the EU was confronted with severe supply shortfalls in the first half of 2021, it became clear that most contracts did not include specific provisions to address supply disruptions.”

17 Institute for Government, “Northern Ireland Protocol: Article 16” (3 November 2021)

18 European Council, “Special meeting of the European Council 1 and 2 October 2020—conclusions” (2 October 2020).

19 See Regulation (EU) 1308/2013 on the common organisation of markets in agricultural products.

20 Such as the Bank Recovery and Resolution Directive (BRRD).

21 In addition, the European Commission has also deployed ‘soft law’ measures to establish contingency frameworks at EU-level for specific sectors, notably for [food security](#) and [transport](#).



to economic disruption.<sup>22</sup> In other areas, such as public health,<sup>23</sup> immigration controls,<sup>24</sup> energy supplies,<sup>25</sup> and supplies of industrial semi-conductors,<sup>26</sup> the European Commission has made post-pandemic proposals to better equip the EU against future crises.

2.10 However, the Commission in 2021 also [confirmed](#) that it was drafting a piece of ‘horizontal’ EU legislation to prevent a rerun of the policy failures during the pandemic, saying these highlighted “structural shortcomings hampering the EU’s ability to effectively respond to emergency situations in a coordinated manner”.<sup>27</sup> This “Single Market Emergency Instrument” would be of a general nature, so it could be used to coordinate and structure the EU’s collective response to a variety of possible future events, including “natural disasters, technological disasters, geopolitical threats, migration crises, terrorist attacks, financial crises, another pandemic, or a crisis of a completely unpredictable nature”.<sup>28</sup> The SMEI is part of a broader EU policy package relating to its ‘strategic autonomy’ which includes initiatives to make its own domestic supply chains in areas such as hydrogen, batteries and semi-conductors more resilient, and therefore less vulnerable to external shocks during a crisis.

### ***The draft legislation to establish the Single Market Emergency Instrument***

2.11 On 19 September 2022, after [various consultations](#), the Commission published its [formal legislative proposals](#) to establish the Single Market Emergency Instrument (“SMEI” or “the Instrument”) in EU law. It [described](#) it as a statutory “crisis governance framework” to minimise uncoordinated national measures that hamper free movement of goods, services and people within the EU that may arise during a future crisis and, secondly, to avoid “shortages of crisis-relevant goods and services” across all or parts of the European Union’s Single Market.<sup>29</sup> The package of draft legislation consists of a [main Regulation](#) to formally establish the Instrument, as well as a supplementary [Regulation](#) and [Directive](#) relating specifically to new derogations from normal EU product safety rules during times of crisis (discussed in more detail below).

2.12 The most important features of the Instrument as proposed by the European Commission—still subject to amendment by the European Parliament and the Council of Ministers<sup>30</sup>—are summarised in the following paragraphs. The SMEI would consist of three modes in an approximation of a traffic light system<sup>31</sup>—“Contingency”, “Vigilance” and “Emergency”—that each would allow for the EU to take different measures to prepare

22 European Scrutiny Committee, Seventh Report of Session 2019–21 (HC 229–iv), [chapter 2](#).

23 See the [proposed EU Regulation](#) on “serious cross-border threats to health” (COM(2020) 727, 11 November 2020).

24 See the proposal to amend the [Schengen Borders Code](#) (COM(2021) 891, 14 December 2021).

25 European Commission, “[REPowerEU: Joint European Action for more affordable, secure and sustainable energy](#)” (8 March 2022).

26 See the proposed [European Chips Act](#) (COM(2022) 46, 8 February 2022);

27 European Commission, “[Crisis-proofing the Single Market: equipping Europe with a robust toolbox to preserve free movement and availability of relevant goods and services](#)” (19 September 2022).

28 European Commission Impact Assessment SWD(2022) 289, p. 8.

29 European Commission press release, “[Crisis-proofing the Single Market: equipping Europe with a robust toolbox to preserve free movement and availability of relevant goods and services](#)” (19 September 2022). The European Commission has suggested the Single Market Emergency Instrument may be incorporated into the EEA Agreement, in which case Norway, Iceland and Liechtenstein would be treated as being part of the EU for the purposes of the SMEI.

30 See paragraph 21 of this chapter for more information on the legislative process.

31 The SMEI is not strictly a traffic light system, because multiple modes of the Instrument can be active in respect of the same crisis at the same time.

for and mitigate the impact of future crises through coordinated action at EU-level. Underpinning all three ‘modes’ of the Instrument would be a new permanent “Advisory Group”. In this forum, representatives of all 27 EU Member States and the Commission would provide non-binding recommendations relevant to the implementation of the Instrument. Those areas where the EU has, or is planning, specific sectoral contingency arrangements as referred to above would be mostly ‘carved out’ from the Instrument (the “*lex specialis*” principle).<sup>32</sup>

### The “Contingency planning” mode

2.13 The ‘green’ mode of the Instrument (if seen as a traffic light) is “contingency planning”, focussed primarily on pre-emptive coordination between EU Member States in anticipation of unknown future crises. This would be in effect permanently, with the European Commission given a statutory power to establish “crisis protocols” that would set out the framework for cooperation and exchange of information between EU Member States and the Commission during a crisis.<sup>33</sup> This would aim to address the Commission’s concerns that there is no comprehensive structure for EU countries to undertake coordinated preparations to pre-emptively mitigate the potential impact of future crises on the EU economy.<sup>34</sup> In its Impact Assessment, the Commission also refers to similar mechanisms operated by partner countries, including the Global Supply Chains Directorate in the UK’s Department for International Trade and the UK-Australia “supply chain resilience capability building initiative”.<sup>35</sup>

2.14 The SMEI proposal also foresees an “ad hoc early warning” system, requiring Member States to alert each other and the European Commission of any “significant incidents” that *could* disrupt the Single Market and might require an escalation of the EU’s response under the Instrument.<sup>36</sup>

### The “Vigilance” mode

2.15 The ‘amber’ mode of the SMEI is “Vigilance”, which could be used if there is a “threat of significant disruption of the supply of goods and services of strategic importance” within the EU.<sup>37</sup> This mode would need to be formally activated by the European Commission

32 However, elements of the SMEI’s “Emergency” mode would apply to pharmaceuticals, medical devices and medical countermeasures even though they are otherwise excluded from the Instrument because of the “*lex specialis*” principle.

33 Article 6 of the proposed SMEI Regulation. The “crisis protocols” would be set out in a “Delegated Act”, a type of EU Statutory Instrument. This type of legal act could be rejected by either the European Parliament or a Qualified Majority of Member States in the EU Council of Ministers, in which case it would not take effect.

34 European Commission Impact Assessment SWD(2022) 289, p. 7. The SMEI would also repeal and replace a 1998 European law—nicknamed the ‘Strawberry Regulation’—that requires EU countries to exchange information on “physical obstacle[s]” to trade and “take all necessary and proportionate measures so that the free movement of goods is resumed” (Council Regulation 2679/98 on the functioning of the internal market in relation to the free movement of goods among the Member States). It is known as the “Strawberry Regulation” because it was adopted in response to actions by French farmers to prevent the import of agricultural products (such as strawberries) from other EU countries. See: [Judgement of the European Court of Justice in case C-265/95 \(Commission v France\)](#), 9 December 1997.

35 European Commission Impact Assessment SWD(2022) 289, p. 133.

36 Under Article 5 of the proposed SMEI Regulation, each Member State would need to designate a “central liaison office” as the primary point of contact for matters relating to Single Market emergencies.

37 The “vigilance” mode would have to be activated by means of an Implementing Act, a type of EU Statutory Instrument. The Implementing Act could only take effect if supported by a Qualified Majority of EU Member States in a “Single Market Emergency Instrument Committee”.



with the support of a majority of EU Member States, including a list of the “goods and services” in “strategically important areas” whose supplies in the EU are at risk of being disrupted. Once “Vigilance” mode is activated, a number of coordination mechanisms would take effect:

- EU Member States would be required to monitor supply chains relevant to the strategic goods and services, and request information from businesses in their jurisdiction that operate within them. This information would be exchanged confidentially via the EU.<sup>38</sup> In respect of strategic goods identified as being at risk, the Commission could also request information from the Member States about issues such as national stock levels and potential for further purchases;
- for specific relevant goods, the Commission could also recommend EU countries build up national reserves, and set non-binding targets and deadlines. Only as a last resort, where a particular Member State’s failure to build up reserves “gravely imperils the [EU’s] preparedness”, could the Commission *require* it to stockpile a particular quantity by a specific deadline. Doing so would require the support of a majority of Member States;<sup>39</sup> and
- the Instrument would create a new statutory basis for joint procurement of “goods and services of strategic importance” identified by the European Commission when the “Vigilance” mode was activated. This means two or more Member States could, voluntarily, ask the Commission to procure such goods or services on their behalf.

### *The “Emergency” mode*

2.16 Finally, the Instrument’s ‘red’ mode is “Emergency”. This would provide the most wide-ranging scope for EU-level action. It would apply in cases where a crisis has a “wide-ranging impact” that severely disrupts free movement or the functioning of supply chains within the EU that are “indispensable” for “vital societal or economic activities”. This mode could only be activated for six months at a time by the EU’s Council of Ministers, making it a political decision.<sup>40</sup> To make this element of the SMEI workable, the Commission would also need to establish a statutory list of “crisis-relevant goods and services” (namely, those necessary to respond to the emergency, or addressing its impacts) to which the Instrument would apply.

2.17 In the “Emergency” mode, the Instrument would automatically impose a number of restrictions on individual Member States when using national policy levers to address the impact of the crisis that triggered the use of the SMEI. In addition to some high-level

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38 Article 11 of the proposed SMEI Regulation.

39 Article 12 of the proposed SMEI Regulation.

40 A formal Decision of the Council activating the “Emergency” mode would have to be approved by a Qualified Majority of Member States. The proposed Regulation in Article 13 provides a non-exhaustive list of criteria to guide the Council in deciding whether an “emergency” exists for the purposes of the SMEI. Although the “Emergency” mode can only be activated for six months at a time, there is the possibility of indefinite six-month extensions. It is possible, but not necessary, for the Commission to have activated the “Vigilance” mode before proceeding to “Emergency” in respect of the same crisis. Equally, both modes can be active simultaneously.

principles around transparency<sup>41</sup> and time limitations of such crisis measures,<sup>42</sup> the SMEI Regulation would ban some domestic measures altogether. For example, it would prohibit export bans *between Member States* of the specific listed “crisis-relevant goods and services” or of intermediary goods and services that might affect their supply chains.<sup>43</sup> Similarly, the proposal seeks to prevent unnecessary restrictions on intra-EU travel for individuals involved in the research, production, provision or manufacture of crisis-relevant goods and services.<sup>44</sup> Notably, these restrictions on national responses during an “Emergency” would also apply to pharmaceuticals and medical devices, which are otherwise excluded from the scope of the SMEI—such as stockpiling efforts or priority orders—because the EU is separately [drafting a dedicated contingency framework](#) for those sectors.<sup>45</sup>

2.18 The Instrument itself would not impose any restrictions on measures that EU Member States may want to take vis-à-vis non-EU countries (like the UK) with respect to trade or transport links during a crisis. However, other areas of EU law—in particular trade law—could still be relevant in such cases.<sup>46</sup> For example, restrictions on exports to non-EU countries are already possible under an existing [2015 EU Regulation](#) on common rules for exports.<sup>47</sup> The Commission used that Regulation in January 2021 when it [imposed an advance notification requirement](#) on exports of Covid-19 vaccines from the EU to countries outside the bloc (and considered triggering the Article 16 safeguards under the Northern Ireland Protocol before deciding against the idea).<sup>48</sup>

2.19 In addition to partially regulating (and limiting) Member States’ *national* contingency measures when the “Emergency” mode has been activated, the SMEI as proposed would also enable the Commission to take certain centralised steps to establish a “coherent, multi-sectoral, cross-border” EU response.<sup>49</sup> These would complement national crisis measures, as well as those taken under other EU legal instruments (for example in the field of State aid).<sup>50</sup> These could include the following:

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- 41 Member States would have to notify crisis-relevant draft measures restricting free movement of goods, services and people to the European Commission, which would then assess their compliance with EU law.
- 42 For example, Article 16 of the proposed SMEI Regulation requires Member States’ national measures to be limited in time, take into account border regions and avoid “undue burdens”.
- 43 Article 17 of the proposed SMEI Regulation.
- 44 In “Emergency” mode, the Instrument would also discourage—but not ban—some other national policy responses that could disrupt the free flow of people, goods and services between EU countries. In particular, the Commission wants to avoid unilateral measures where a sub-set of Member States is treated more or less favourably than others (for example in relation to import or export restrictions). For example, Article 17(2) requires Member States to refrain from certain measures “unless to do so is inherent to the nature of the crisis”, for example selectively refusing goods from a specific EU country or limiting the operation of freight transport.
- 45 European Commission document [COM \(2020\) 727](#), “Proposal for a Regulation of the European Parliament and of the Council on serious cross-border threats to health”. See also: European Scrutiny Committee, Forty-second Report of Session 2019–21 (HC 229–xxxvi), [chapter 3](#).
- 46 The European Commission has suggested the SMEI may be incorporated into the EEA Agreement, in which case Norway, Iceland and Liechtenstein would be treated as being part of the EU for the purposes of these provisions.
- 47 [Regulation \(EU\) 2015/479](#) of the European Parliament and of the Council of 11 March 2015 on common rules for exports.
- 48 [Commission Implementing Regulation \(EU\) 2021/111](#) of 29 January 2021 making the exportation of certain products subject to the production of an export authorisation.
- 49 Such Commission measures would have to be made by means of Implementing Acts, meaning they would require the support of a majority of Member States.
- 50 For example, the Instrument [would not cover emergency derogations from normal EU State aid rules](#) because “they belong to the realm of EU exclusive competence”, meaning the European Commission would take action separately using other legal means—as it has done in response to Covid-19 and Russia’s attack on Ukraine.

- First, the European Commission could *require* businesses in the relevant supply chains to supply information confidentially<sup>51</sup> to the EU on their production capacities and expected output, stocks, contracts and purchases (both in the EU and outside of it).<sup>52 53</sup>
- Second, the Commission could formally request a business to “accept and prioritise certain orders for the production or supply of crisis-relevant goods”, such as PPE.<sup>54</sup> Such “Priority Rated Orders” (PROs) would be subject to a “comply or explain” approach: the company would either have to accept the PRO, or explain why it is not “possible or appropriate” to do so.<sup>55</sup> If the business accepts a priority order at this stage, “that obligation shall take precedence over any performance obligation under private or public law” within the EU.<sup>56</sup> If the company refuses the request to prioritise supplies to the EU, its explanation could be published (which could cause reputational risks). The Commission could impose significant financial penalties on companies that fail to fulfil a PRO they accepted.<sup>57</sup> That provision is likely to have been inspired by the Covid-19 supply shortfalls the EU experienced in 2021.<sup>58</sup> Companies based in the EU and operating within the supply chain for “crisis-relevant goods” would also be under an obligation to disclose any PROs to which they are subject in a non-EU country, like the UK.
- Third, the Commission could invoke new contingency procedures under EU sectoral legislation governing products,<sup>59</sup> such as fertilisers or PPE to allow for exemptions from normal product safety and assessment procedures if there is a shortage.<sup>60</sup> This would place certain easements introduced during the Covid-19 pandemic on a statutory footing<sup>61</sup> and would aim to allow products to be brought onto the EU market more quickly than would otherwise be possible. All of the

51 Article 25 of the proposed SMEI Regulation would require both Member States and the Commission to “ensure the protection of trade and business secrets and other sensitive and confidential information acquired and generated in application of this Regulation”.

52 Such requests for information to relevant businesses would first be made on a voluntary basis before the Commission could decide to proceed to making them legally-binding.

53 The Instrument as proposed would not allow the European Commission to build up its own strategic reserves of crisis-related goods in an emergency (although, as noted in paragraph 16, in “Vigilance” mode it could theoretically require specific EU Member States to stockpile particular goods as a last resort). The Commission could recommend any existing stockpiles in the EU are redistributed “in a targeted way” to make “the most efficient use of reserves”, but it cannot direct EU countries to comply. Similarly, it could issue non-binding recommendations on the re-organisation of supply chains to address the risk of shortages. See Article 32 of the proposed SMEI Regulation.

54 Before the Commission makes a formal request of this nature, it has to ‘invite’ the business to accept a PRO.

55 However, the draft legislation proposed by the Commission stops short of giving the EU the power to mandate a company accept a PRO: it remains free to refuse, albeit with the proviso that the company has to provide “a reasoned explanation setting out duly justified reasons why it is not possible or appropriate”.

56 Although such a provision would of course only be valid within the EU’s jurisdiction, this could present conflict of law problems which we discuss further elsewhere in this chapter.

57 Article 27(4) of the proposed SMEI Regulation.

58 See for example: Politico.EU, “[EU and AstraZeneca settle court case over vaccine supply](#)” (3 September 2021).

59 The EU sectoral frameworks to be amended by the SMEI are so-called “harmonised products”. These separate pieces of legislation share a common approach under which EU law sets out harmonised rules regarding the design, manufacture, conformity assessment and placing on the market of such products, in particular as regards essential safety and environmental requirements. Individual EU Member States cannot derogate from these rules, even in a case of emergency, unless the respective framework provides for such a possibility. The SMEI would legislate for such a possibility for 19 product groups listed in the Annex to this chapter.

60 See paragraphs 24 to 33 of this chapter for more detailed analysis of the SMEI’s product safety provisions.

61 Department for Business, Energy and Industrial Strategy, [Explanatory Memorandum](#) on European Commission proposal COM(2022) 459 (21 October 2022), p. 2.

19 EU product laws that would have such contingency provisions added remain directly applicable in Northern Ireland under the terms of the Northern Ireland Protocol. We therefore discuss the specific details of this element of the SMEI further in paragraphs 23 to 32.

- Fourth, as in the “Vigilance” mode, the Instrument would allow the Commission to manage the joint procurement of “crisis-relevant goods and services” during an emergency. No Member State would be *obliged* to procure crisis supplies jointly via the EU, but where they have chosen to join the centralised process, they would be prohibited from attempting to procure the same goods or services in parallel via domestic tenders. In addition, even where EU countries are not participating in a joint procurement exercise, they would be required to exchange information with other Member States on their acquisition of crisis-relevant goods and services. This is meant to prevent them “competing against each other in securing the availability of such products in separate and uncoordinated public procurement procedures”.<sup>62</sup>

### **Next steps in the legislative process**

2.20 The three European Commission proposals that would constitute the legal framework for the Single Market Emergency Instrument are currently draft legislation only: to become EU law, it must be approved by the European Parliament and by the EU’s Member States in the Council of Ministers. These institutions can amend the draft legislation as they see fit and must jointly agree on the final legal texts before they can be formally adopted and become law. The timetable for that legislative process, and consequently the entry into force of the Instrument, is unclear at this stage. It is likely the negotiations will last well into 2023. The European Commission wants to carry out a review of the SMEI five years after it takes effect.

### **Potential implications of the EU Single Market Emergency Instrument for the UK**

2.21 The UK has of course left the EU. As such it will not, generally speaking, be bound by the provisions of the SMEI (such as the proposed restrictions on EU Member States’ national response to a particular crisis), nor participate in the Advisory Group that makes recommendations to the European Commission on ways to tackle a particular emergency.

2.22 However, this does not mean the Instrument will have no impact on the UK. First, the specific legal elements of the Instrument that create new contingency procedures in EU product safety laws, to enable certain goods to be brought to the market more quickly during a crisis, *will* apply in Northern Ireland automatically under the terms of the Protocol on Ireland/Northern Ireland. The then-Secretary of State for Business, Energy and Industrial Strategy (Rt Hon. Jacob Rees-Mogg MP) confirmed this to the Committee in October 2022.<sup>63</sup> In addition, actions taken by the EU to address potential or actual shortages of goods or services relevant during a particular crisis could affect international supply chains. This might affect the UK, especially if it were also trying to secure its own supplies of similar goods and services at the same time. We have looked at both aspects

62 European Commission Impact Assessment [SWD\(2022\) 289](#), p. 71.

63 Department for Business, Energy and Industrial Strategy, [Explanatory Memorandum](#) on European Commission proposal COM(2022) 459 (21 October 2022), p. 1.

of the Commission proposals in turn below, with the proviso that the EU itself is still deliberating the substance of the SMEI (meaning any analysis of its potential implications for the UK is necessarily of a preliminary nature at this stage).

### ***The Single Market Emergency Instrument and the Northern Ireland Protocol***

2.23 The [Protocol on Northern Ireland](#) in the [Withdrawal Agreement](#), ratified by the UK and EU in January 2020, aims to maintain the pre-Brexit absence of customs and regulatory controls on the land border with Ireland even after the UK’s withdrawal. Broadly speaking, it does so by requiring Northern Ireland to continue applying EU rules on the production, trade and sale of goods, meaning products on the market in Northern Ireland also meet all the requirements to move freely into Ireland and the wider EU. As such, Northern Ireland de facto participates in the EU’s Single Market for goods and Customs Union, while the rest of the UK no longer does so.<sup>64</sup> As we discuss further below, the Government has argued the Protocol “is not meeting its original objectives” and has published proposals for fundamental changes to its nature and operation, as well as introducing a [Bill](#) in June 2022 to make such changes unilaterally in UK law if the EU does not agree to a treaty change.

2.24 Under the Protocol, EU laws which still apply in Northern Ireland are listed in its Annexes, and any ‘amendments or replacements’ to those laws adopted by the EU automatically take effect in Northern Ireland too.<sup>65</sup> This is relevant in the context of the provisions of the proposed SMEI that relate to product safety rules during a crisis (see paragraph 21 above): all 19 pieces of EU product legislation which would be amended (to create new contingency measures to enable “crisis-relevant goods” to be brought onto the EU market more quickly) continue to apply in Northern Ireland under the Protocol.<sup>66</sup> The amendments to be made by the SMEI would therefore also apply automatically in Northern Ireland.<sup>67</sup>

2.25 The EU product safety laws affected by the SMEI (which we have listed in the Annex to this chapter) cover, among other things, personal protective equipment, fertilisers, construction products and machinery. All product groups affected are so-called “[harmonised products](#)”:<sup>68</sup> for these, the EU legal frameworks typically set out “essential requirements”—particularly in terms of safety and environmental performance. They also establish requirements around “conformity assessment”, in particular whether manufacturers must have their products assessed by an independent “notified body” to verify whether they meet the relevant requirements under EU law. Individual EU Member States cannot derogate from these rules, even in a case of emergency, unless the relevant EU law provides for this. The Single Market Emergency Instrument would legislate for

64 By extension of the application of EU laws on goods in Northern Ireland, customs and regulatory formalities apply to goods entering Northern Ireland from outside the EU—including from Great Britain—instead.

65 As per Article 13(3) of the Protocol.

66 See in particular European Commission documents [COM\(2022\) 461](#) and [COM\(2022\) 462](#), as well as Article 26 of European Commission document [COM\(2022\) 459](#).

67 Department for Business, Energy and Industrial Strategy, [Explanatory Memorandum](#) on European Commission proposal COM(2022) 459 (21 October 2022), p. 1.

68 This “principles-based” approach to harmonised EU legislation for product safety with “essential requirements” is called the “New Legislative Framework”. It replaced the ‘old’ approach where EU law set more prescriptive, detailed requirements for particular goods.



such a possibility for the 19 product groups listed in the Commission proposals. This would place similar *ad hoc* easements created during the Covid-19 pandemic for PPE in particular on a statutory footing.<sup>69</sup>

2.26 More specifically, the SMEI will insert a number of new processes to facilitate market access during a crisis into EU product safety legislation. Notably, the Instrument would allow individual Member States to authorise relevant goods to be put on their national market even if they have not undergone an external product safety conformity assessment by an independent “notified body” that would normally be mandatory. Before providing such authorisation, the relevant public authority would have to be satisfied that the product still complies with all the substantive “applicable essential requirements” under EU law. Trading standards authorities would have to ensure that goods placed on the market in this way remain within their Member State. For this reason, they could not bear the “CE” mark, which would normally indicate the manufacturer had complied with the usual EU product safety processes (and certifying the product can be sold throughout the Single Market).

2.27 In addition, the EU countries would have the flexibility to allow manufacturers of relevant goods to rely on a wider range of technical product safety standards to demonstrate compliance with EU rules. The Instrument would also give powers to the European Commission to adopt detailed “specifications” for crisis-relevant goods, to complement existing technical standards. These could be voluntary or mandatory. Lastly, “notified bodies” (the companies that carry out independent assessments of the conformity of a particular product with the applicable EU rules on behalf of the manufacturer) could be required to prioritise the assessment of “crisis-relevant” goods.<sup>70</sup>

2.28 The new emergency provisions to streamline the market access process for placing goods on the EU market would be subject to various safeguards. In the words of the Minister in his Explanatory Memorandum, these derogations “lie dormant unless they are need[ed]”. In particular, they could only be used when the EU’s Council of Ministers had formally activated the SMEI’s “Emergency” mode. Even then, it would not be automatic: for each product group, it would require a further formal decision by the European Commission, specifying the particular types of goods within that category for which the contingency measures are being invoked. This would require the support of a majority of the Member States.<sup>71</sup> Once the “Emergency” mode is deactivated, authorisations granted by EU countries for the sale of products without the usual external conformity assessments (see above) would automatically expire. Manufacturers would therefore have to ensure they obtain such an assessment or withdraw the product from the market at that point.

2.29 In practice, these provisions would be applicable under the Protocol. Based on the Minister’s Explanatory Memorandum, and our own assessment of the relevant aspects of the SMEI, this would in particular mean the following:

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69 See Commission Recommendation (EU) 2020/403 of 13 March 2020 on conformity assessment and market surveillance procedures within the context of the COVID-19 threat.

70 Similarly, Member States’ market surveillance (trading standards) authorities would have to prioritise activities relating to crisis-relevant goods, to ensure to the extent possible they meet safety regulations.

71 Such a decision would need to be made by means of an Implementing Act, which requires the support of a qualified majority of EU Member States in the envisaged “Single Market Emergency Instrument Committee”. On “duly justified imperative grounds of urgency”, the Commission could adopt such an Implementing Act before it has been approved by the Member States, but it would need to seek the Committee’s ex-post approval within two weeks.

- In respect of Northern Ireland, the UK would have the same flexibilities as EU Member States to derogate from the usual product safety procedures for relevant goods if an “Emergency” is formally declared under the SMEI. However, the UK would not be *required* to suspend the normal conformity assessment procedures for the Northern Irish market if it did not consider this necessary.
- Conversely, if the UK wanted to go *further* in introducing emergency market access procedures for goods during a crisis than permitted by the Instrument, it may not be able to do so in Northern Ireland (where EU product safety law remains directly applicable). Here, the Government’s proposals under the Northern Ireland Protocol Bill would be relevant (see below);
- It is unclear if there might be a future risk of goods put on the market in the EU without following usual product safety procedures, and which do not meet UK requirements, entering the UK unchecked via the land border with Ireland. As noted, the intention is for goods put on the market of an EU Member State under the emergency market access provisions to remain in that country, and not circulate freely throughout the Single Market. Whether this is achieved in practice is difficult to predict, given the absence of customs controls between EU countries (and between Ireland and Northern Ireland). Goods on the market in Northern Ireland (whether lawfully or unlawfully) can also enter the rest of the UK as there are minimal controls on such trade.
- In respect of Northern Ireland, the UK would have to apply any mandatory technical safety requirements for particular crisis-relevant goods as adopted by the European Commission under the SMEI.

2.30 In his Explanatory Memorandum, the Minister seeks to provide assurances about the impact the EU’s emergency market access provisions would have on the UK internal market. He argues that, if the EU’s emergency measures are ever activated, “no significant trading implications between Great Britain and Northern Ireland are expected”, adding that “these [EU] proposals [...] will not affect the UK”.

2.31 We have also considered the implications of the Government’s Northern Ireland Protocol Bill in this context. In particular, the Government has proposed a unique ‘dual regulatory’ approach for Northern Ireland, under which “goods can be placed on the market in NI if they meet either UK rules, EU rules, or both”. However, the Bill itself does not set how this would work in practice, so there is uncertainty about its operation. This could mean that, if UK amends the way that it implements the Protocol as a matter of UK law as proposed by the Bill, this could allow products to be placed on the Northern Irish market that do not meet EU product safety requirements, including where they go beyond the derogations that might be permitted under the SMEI during a crisis. The Minister’s Memorandum explains that UK product safety law does not *currently* have emergency provisions similar to those contained in the EU’s SMEI. It adds that they are being “considered” as part of the Government’s [on-going review](#) of the UK Product Safety Framework.

2.32 None of the other provisions of the Single Market Emergency Instrument as summarised in paragraphs 15 to 21 above would apply in Northern Ireland under the

Protocol. However, as we discuss further below, the EU’s actions under the Single Market Emergency Instrument more generally could impact on Northern Ireland and the rest of the UK even if it has no direct legal effect under the Protocol.

### *The Single Market Emergency Instrument and international supply chains*

2.33 As discussed, one of the main objectives of the EU SMEI is to provide the “necessary means to ensure the continued functioning of the Single Market [...] and its strategic supply chains” and “the availability of crisis relevant goods and services”.

2.34 Naturally, if a shortage of a particular good or service occurs, an attempt by policy-makers in one market—such as the EU—to shore up their domestic supplies could have the effect of further reducing their availability in other markets, like the UK. Indeed, the relevance of the Instrument to the UK in that regard is illustrated by the impact that the EU’s policy response during the Covid-19 crisis had. Its approach to securing large quantities of vaccines risked impeding such supplies into the UK from Europe (which the EU made subject to an export notification requirement), and further increased tensions in relation to the Northern Ireland Protocol after the European Commission proposed to activate the Article 16 safeguard measures to extend that export notification requirement to vaccines sent from the EU to Northern Ireland.

2.35 During any future crises and shortages, political pressures may generate more such tensions between the EU and the UK. In the context of the SMEI for example, more organised collective procurement by the EU of goods and services during a crisis could affect their availability globally. Any concerted effort to build up stockpiles in the EU could have the same effect: the European Commission itself has [conceded](#) that “depending on the volume of the new reserves, [this] could affect both international trade flows and prices in the world market”.<sup>72</sup> Similarly, the fact that the Instrument could limit the options open to EU countries to impose intra-EU restrictions on trade during a crisis could also increase the likelihood of such restrictions between Member States and “third countries” like the UK. For example, if exports of a particular crisis-relevant good to another EU country cannot lawfully be restricted, there might be more pressure in EU capitals to restrict exports to destinations outside the bloc instead in order to limit decreases in the available stocks. As noted the EU already has powers, outside of the SMEI, to impose EU-wide export restrictions on specific goods which might be coordinated with action taken under the Instrument.

2.36 The proposed new power for the European Commission to formally ask businesses to accept PROs of crisis-relevant goods (other than medical supplies) could become particularly relevant in this context. Such action by the EU could affect international supply chains and therefore such businesses’ other customers, if production capacity is not sufficient to meet all market demand.<sup>73</sup> In such a scenario, the EU’s large market size could influence companies’ commercial decisions about where they direct their output during a crisis (including whether to accept priority orders in other countries), especially vis-à-vis smaller markets like the UK. Refusing an EU request for a priority order could jeopardise a company’s commercial operations and reputation in this larger market, where such orders are also likely to generate more profits. The fact that the SMEI would also purport for an

72 European Commission Impact Assessment [SWD\(2022\) 289](#), p. 63.

73 *Idem*, p. 61. The Commission has noted that PROs “will have a strong impact on the companies concerned”, as they would need to ‘cancel or delay’ other orders.



EU priority order to “take precedence over any performance obligation under private or public law” might give rise to conflict-of-law disputes, given other jurisdictions like the UK would not recognise this precedence in their domestic law.<sup>74</sup>

2.37 It is also noteworthy in this context that the SMEI as proposed foresees no possibility for the UK to be invited even on an ad hoc basis to the Commission’s Advisory Group or the SMEI Committee. Therefore, the UK will not be ‘in the room’ to register specific concerns when potentially significant decisions that might directly affect it are taken by the EU. While in the context of PROs the Commission proposal would give “parties demonstrably affected” the “opportunity to state their position”, it does not need to take any concerns thus articulated into account. It is of course also possible that any steps taken to *calm* economic turbulence in the EU under the SMEI might also be beneficial for the UK given its continued economic and geographic proximity to the Single Market.

## Conclusions and action

2.38 The European Scrutiny Committee included the (then upcoming) proposals for the SMEI in its [Nineteenth Report of Session 2021–22](#), in which we considered the European Commission’s legislative Work Programme for 2022. In that Report, we marked the SMEI as relevant for the UK and under the Northern Ireland Protocol, noting that the Instrument could “lead to reconfiguration of supply chains in and through the EU during difficult times” in ways that might affect the UK as well.<sup>75</sup>

2.39 Having now assessed the proposals in more detail, we stand by that initial assessment as discussed above. However, the practical ramifications of the SMEI are by definition impossible to foresee, as the Instrument is to be used to coordinate an EU-level response to emergencies whose nature cannot be accurately predicted in advance and its precise legal parameters are still subject to discussions in Brussels. The types of goods and services for which the EU’s putative new supply chain contingency measures might be invoked would also depend on the particular context in each case. We note that medicines and medical devices, which were obviously of primary interest during the pandemic, are largely excluded from the Instrument’s scope because the EU is legislating separately for contingency measures in those sectors. However, most other types of goods and services could be affected by EU actions under the SMEI. In a crisis of an international nature it is not unimaginable that the EU and the UK might be relying on the same supply chains and therefore any EU intervention to redirect their output could reduce supplies available to the UK. This was already clearly demonstrated by the scramble to secure adequate PPE supplies during the Covid-19 pandemic and the dispute over exports of vaccines from the EU to Great Britain.

2.40 In the future, therefore, a more coordinated intervention in supply chains by the EU through the mechanisms of the SMEI, whether it be through priority orders, stockpiling or joint procurement, may put the UK at a potential disadvantage. The UK in turn might be able to act more quickly to adopt crisis measures as it is now outside the EU (although of course individual EU Member States can still do so as well, albeit within the parameters of the SMEI and other EU laws).

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74 Alternatively, companies could seek to pre-empt such problems by including contractual provisions relating specifically to the interaction between prior obligations and subsequent priority orders.

75 European Scrutiny Committee, [Nineteenth Report of Session 2021–22](#) (HC 121–xviii), [chapter 1](#) (9 March 2022).

2.41 We have also noted that the emergency market access provisions could also have particular ramifications for the UK under the Northern Ireland Protocol in a way that would not apply to other non-EU countries. They create the possibility of divergence in the applicable product safety standards for a variety of goods during an emergency situation. The option for EU Member States like Ireland to temporarily suspend some product safety processes under the SMEI could also raise questions about the quality of goods such as PPE entering Northern Ireland, and the UK more generally, via the land border with Ireland where there are no customs controls.

2.42 In light of the above, we retain an interest in the SMEI proposals. We have written to the Department for Business, Energy and Industrial Strategy to seek further information from the Minister about the potential implications of the Instrument for the UK. In the meantime, we draw the EU’s proposed SMEI to the attention of the Business, Energy and Industrial Strategy Committee and the International Trade Committee.

### Table of EU sectoral legislation to be included in the Single Market Emergency Instrument

The table below lists the EU Single Market Regulations and Directives that would be amended by the SMEI to allow for derogations from the usual product safety requirements and assessments when the “Emergency” mode of the Instrument has been activated. All of these pieces of EU legislation continue to apply directly in Northern Ireland under the terms of the Protocol on Ireland/Northern Ireland.<sup>76</sup> Where a piece of EU legislation is currently subject to a proposal for amendment or replacement, this is indicated in a footnote.

Single Market legislation		Sector
1	<a href="#">Regulation (EU) 2016/424</a>	Cableway installations
2	<a href="#">Regulation (EU) 2016/425</a>	Personal protective equipment
3	<a href="#">Regulation (EU) 2016/426</a>	Gas appliances
4	<a href="#">Regulation (EU) 2019/1009</a>	Fertilisers
5	<a href="#">Regulation (EU) 305/2011/77</a>	Construction products
6	<a href="#">Directive 2000/14/EC</a>	Outdoor equipment (noise emissions)
7	<a href="#">Directive 2006/42/EC</a> <sup>78</sup>	Machinery products

<sup>76</sup> While [Regulation 2019/1009](#) on fertilisers is not explicitly listed in the Protocol on Ireland/Northern Ireland, it replaced Regulation 2003/2003 which is listed in the Protocol. The Government has [accepted](#) the replacement Regulation applies under the Protocol. See: Explanatory Memorandum submitted by the Department for Food, Environment and Rural Affairs on European Commission document C(2022)1437 (20 June 2022).

<sup>77</sup> The European Commission has [proposed](#) to significantly amend the Construction Products Regulation. See: European Scrutiny Committee, Fourth report of Session 2022–23 (HC 119–iv), [chapter 1](#) (28 June 2022).

<sup>78</sup> The European Commission has [proposed](#) to replace the Directive with a new EU Machinery Regulation. See: European Scrutiny Committee, Fourth report of Session 2021–22 (HC 121–iv), [chapter 1](#) (29 June 2021).

Single Market legislation		Sector
8	<a href="#">Directive 2010/35/EU</a>	Transportable pressure equipment
9	<a href="#">Directive 2013/29/EU</a>	Pyrotechnic articles
10	<a href="#">Directive 2014/28/EU</a>	Explosives for civil uses
11	<a href="#">Directive 2014/29/EU</a>	Pressure vessels
12	<a href="#">Directive 2014/30/EU</a>	Electromagnetic compatibility
13	<a href="#">Directive 2014/31/EU</a>	Non-automatic weighing instruments
14	<a href="#">Directive 2014/32/EU</a>	Measuring instruments
15	<a href="#">Directive 2014/33/EU</a>	Lifts
16	<a href="#">Directive 2014/34/EU</a>	Equipment and protective systems intended for use in potentially explosive atmospheres
17	<a href="#">Directive 2014/35/EU</a>	Electrical equipment
18	<a href="#">Directive 2014/53/EU</a>	Radio equipment
19	<a href="#">Directive 2014/68/EU</a>	Pressure equipment

### ***Letter from the Chair to the Parliamentary Under Secretary of State (Kevin Hollinrake MP)***

I am writing to thank you for your predecessors' Explanatory Memorandum on the European Commission's proposals to establish a Single Market Emergency Instrument (SMEI), which aims to equip the EU with new tools to address significant supply chain disruptions.<sup>79</sup>

We note the negotiations on the Instrument's legal text are at an early stage. However, as we will set out in more detail in our Tenth Report of Session 2022–23, we are concerned that any market interventions by the EU through the Instrument could have the side-effect of disrupting vital supply chains into other jurisdictions, like the UK. The Commission in its Impact Assessment concedes that EU actions under the Instrument “could affect both international trade flows and prices in the world market”. It might also require suppliers to “cancel or delay” other orders, as the SMEI purports for EU priority orders of goods like PPE to take precedence over “any performance obligation under private or public law”.<sup>80</sup> The potential for conflicting UK and EU interests in such scenarios was starkly illustrated during the pandemic, when suppliers of such vaccines had apparently contradictory obligations to the EU and the UK that resulted in litigation.

79 European Commission documents COM(2022) 459, COM(2022) 461 and COM(2022) 462.

80 European Commission Impact Assessment [SWD\(2022\) 289](#), p. 63.

Additionally, as your Department's Explanatory Memorandum noted, the provisions of the SMEI relating to product safety during an emergency would apply automatically in Northern Ireland under the Northern Ireland Protocol. We are grateful for your predecessor's assurance that these contingency measures should have "no significant trading implications between Great Britain and Northern Ireland" and would "not affect the UK".

In light of the above, the Committee would be grateful if the Minister could write to us with some supplementary information. In particular, we would welcome clarifications on the following points:

- What assessment has the Government made of the potential ramifications of the SMEI for the UK's own preparedness and access to vital goods and services during disruption of important international supply chains?
- Article 27(3) of the proposed SMEI Regulation purports to give priority orders placed by the EU with a supplier of "crisis-relevant goods" "precedence over any performance obligation under private or public law". What is the Government's assessment of that legal approach, given it might impact on orders of such goods placed by or from the UK during an emergency?
- Given that the provisions of the Instrument relating to product safety will apply directly in Northern Ireland under the Protocol, does the Government have any concerns about the way they were drafted by the European Commission? Is it minded to suggest any changes to the relevant legal texts in that regard?
- When is the Government announcing the next steps in its own product safety review? Is this likely to include exemptions from the usual product safety requirements and procedures during a crisis similar to the ones included in the EU's SMEI?

We look forward to receiving your reply before the Christmas recess.

### 3 Documents not considered to be legally and/or politically important

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#### Department of Health and Social Care

(42106) Commission Delegated Regulation (EU) 2022/860 of 01.06.2022 amending Annex III to Regulation (EC) No 1925/2006 of the European Parliament and of the Council as regards monacolins from red yeast rice.  
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COM(22) 3493

(42120) Commission Delegated Regulation (EU) 2022/2182 of 30.08.2022 amending Commission Delegated Regulation (EU) 2017/1798 as regards the lipid and magnesium requirements for total diet replacement for weight control.  
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COM(22) 6107

#### Food Standards Agency

(42128) Commission Regulation (EU) No 2022/1616 of 15 September 2022 on recycled plastic materials and articles intended to come into contact with foods, and repealing Commission Regulation (EC) No 282/2008.  
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COM(22) 6146

## Annex

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*Documents drawn to the attention of select committees:*

(‘SNC’ indicates that scrutiny (of the document) is not completed; ‘SC’ indicates that scrutiny of the document is completed)

**Business, Energy and Industrial Strategy Committee:** The EU’s Single Market Emergency Instrument: securing supply chains during times of crisis

**Environmental Audit Committee:** Northern Ireland Protocol: Ecodesign for sustainable products

**International Trade Committee:** The EU’s Single Market Emergency Instrument: securing supply chains during times of crisis

**Northern Ireland Affairs Committee:** Northern Ireland Protocol: Ecodesign for sustainable products

# Formal Minutes

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**Wednesday 23 November 2022**

## **Members present:**

Sir William Cash, in the Chair

Mr Marcus Fysh

Mr David Jones

Craig Mackinlay

Gavin Robinson

Greg Smith

## **Document scrutiny**

Draft Report, proposed by the Chair, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 3 agreed to.

*Resolved*, That the Report be the Tenth Report of the Committee to the House.

*Ordered*, That the Chair make the Report to the House.

## **Adjournment**

Adjourned till Wednesday 30 November 2022 at 1.45 pm

## Standing Order and membership

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The European Scrutiny Committee is appointed under Standing Order No.143 to examine European Union documents and—

- a) to report its opinion on the legal and political importance of each such document and, where it considers appropriate, to report also on the reasons for its opinion and on any matters of principle, policy or law which may be affected;
- b) to make recommendations for the further consideration of any such document pursuant to Standing Order No. 119 (European Committees); and
- c) to consider any issue arising upon any such document or group of documents, or related matters.

The expression “European Union document” covers—

- i) any proposal under the Community Treaties for legislation by the Council or the Council acting jointly with the European Parliament;
- ii) any document which is published for submission to the European Council, the Council or the European Central Bank;
- iii) any proposal for a common strategy, a joint action or a common position under Title V of the Treaty on European Union which is prepared for submission to the Council or to the European Council;
- iv) any proposal for a common position, framework decision, decision or a convention under Title VI of the Treaty on European Union which is prepared for submission to the Council;
- v) any document (not falling within (ii), (iii) or (iv) above) which is published by one Union institution for or with a view to submission to another Union institution and which does not relate exclusively to consideration of any proposal for legislation;
- vi) any other document relating to European Union matters deposited in the House by a Minister of the Crown.

The Committee’s powers are set out in Standing Order No. 143.



**Current membership**

[Sir William Cash MP](#) (*Conservative, Stone*) (Chair)

[Tahir Ali MP](#) (*Labour, Birmingham, Hall Green*)

[John Baron MP](#) (*Conservative, Basildon and Billericay*)

[Jon Cruddas MP](#) (*Labour, Dagenham and Rainham*)

[Geraint Davies MP](#) (*Labour, Swansea West*)

[Allan Dorans MP](#) (*Scottish National Party, Ayr Carrick and Cumnock*)

[Richard Drax MP](#) (*Conservative, South Dorset*)

[Margaret Ferrier MP](#) (*Independent, Rutherglen and Hamilton West*)

[Mr Marcus Fysh MP](#) (*Conservative, Yeovil*)

[Dame Margaret Hodge MP](#) (*Labour, Barking*)

[Adam Holloway MP](#) (*Conservative, Gravesham*)

[Mr David Jones MP](#) (*Conservative, Clwyd West*)

[Stephen Kinnock MP](#) (*Labour, Aberavon*)

[Craig Mackinlay MP](#) (*Conservative, South Thanet*)

[Gavin Robinson MP](#) (*Democratic Unionist Party, Belfast East*)

[Greg Smith MP](#) (*Conservative, Buckingham*)