

ETUC Feedback on Commission Call for Evidence on Single Market Emergency Instrument

The European Trade Union Confederation (ETUC) wishes to share its feedback in response to the call for evidence launched by the European Commission as regards the impact assessment for a Single Market Emergency Instrument (SMEI).

ETUC is the cross-industry European level organisation of trade unions and represents 92 national confederations from 39 countries with 45 million members. The ETUC is a recognised social partner to the EU under the Treaties.

GENERAL PRINCIPLES AND OBSERVATIONS

The COVID-19 pandemic has underlined the high level of integration that already exists within the EU single market. At the same time, the outbreak of the virus also shed light on vulnerabilities in times of crisis, in particular in terms of cooperation and coordination. Likewise, the pandemic importantly demonstrated the need for **strong social protection, the importance of public services and the role of social partners**. However, the crisis also triggered an escalation of **violations of social, workers' and trade union rights**, including a lack of respect and enforcement of these rights.

Economic freedoms, including the free movement of persons, services and goods are indeed no absolute rights and can therefore be restricted – be it in times of crisis or normality – as long as the restrictions are legitimate, necessary, proportionate and non-discriminatory. Such assessments cannot be restricted only to reasons of public policy, public security and public health, but also need to give due regard to the respect for fundamental rights and in particular social rights. **Social rights cannot be undermined or put in opposition to economic freedoms** when seeking to ensure free movement within the EU.

Any kind of initiative put forward within the framework of the Single Market Enforcement Instrument **must not put restrictions on labour laws and social dialogue in times of crises**, e.g. as regards the right to organise, collective bargaining, working time or dismissal. Measures regarding the free movement of goods, services or persons must not in any way affect the **exercise of fundamental labour rights as recognised in Member States, including the right or freedom to strike** and other collective actions covered by the specific industrial relations systems in Member States. This principle is clearly affirmed in Article 2 of Regulation [2679/98](#) on the functioning of the internal market in relation to the free movement of goods ('Strawberry Regulation').

Collective labour rights such as the **freedom of assembly and of association** (Article 12) and the **right of collective bargaining and action** (Article 28) are guaranteed by the Charter of Fundamental Rights of the European Union. As confirmed by the European Court of Human Rights in its recent judgement of 15 March 2022 in case [21881/20](#) *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, a federal ordinance enacted during the early months of the COVID-19 pandemic prohibiting the organisation and participation in any public gathering violated the freedom of peaceful assembly under Article 11 of the European Convention on Human Rights. While by no means disregarding the threat posed by COVID-19 to society and to public health, the Court nevertheless found a violation of Article 11, in the

light of the importance of freedom of peaceful assembly in a democratic society, and in particular of the topics and values promoted by the applicant trade union and the blanket nature and significant length of the ban on public events falling within the sphere of trade unions activities.

As part of its [ETUC COVID Watch Briefing Notes](#) initiative, the ETUC during the pandemic outlined the European and international legal framework on [human rights](#) and [trade union rights](#), underlining their need to be respected also in times of crisis, while also identifying [national violations](#) taking place in the context of the pandemic.

Against this background, safeguarding the free flow of goods and services can never be done at the expense of the enjoyment and exercise of fundamental rights. Likewise, the **compliance and enforcement of labour laws must not be compromised**. The lessons learnt from the EU Digital COVID Certificate should pave the way also for improved cross-border enforcement of labour laws through the development of new [digital enforcement tools](#), as demanded by the ETUC. During the pandemic, however, adequate labour inspections often did not take place or were kept to a minimum, sometimes even at the recommendation of authorities, thereby turning a blind eye to violations and abuse. The free movement of goods and the safe provision of services were often seen as superior to the need to ensure decent working conditions and the health and safety of workers.

As described by the European Transport Workers' Federation's [assessment](#) of the Commission Communication on the Green Lanes: *"The communication goes against the efforts of the Member States to contain the pandemic and address its impacts. There is also no regard for the safety of drivers who are keeping Europe moving and are key in fighting off this pandemic."* In its dedicated [recommendations](#), the ETF noted that *"the EC calls for drivers to be rushed through borders with minimal health checks, to be confined in their vehicles for 30 days (in-vehicle sleeping and even eating is strongly recommended by the European Commission), which sends a bad signal regarding the care and respect shown by the EU legislator to the EU citizens in general and in particular to professional drivers. The latter, together with the medical staff, are key in fighting off this pandemic [...] The Communication gives the green light to the transportation of all goods, as opposed to goods of strict necessity. But this approach proves once again ineffective and inconsistent. Transport of all goods will cause more waiting times at borders rather than reduce them as more vehicles will be stuck in the waiting lines."*

Likewise, when it comes to initiatives aimed at providing clarifications and possibilities for joint action in the area of public procurement, **the general principles of public procurement must be assured at all times**. These principles are not limited only to non-discrimination, transparency and proportionality, but in accordance with Article 18(2) of Directive [2014/24/EU](#) on public procurement also requires compliance *"with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X."* As affirmed by the Court of Justice of the European Union in case [C-395/18 Tim SpA v. Consip SpA](#) of 30 January 2020, *"it follows that such a requirement constitutes, in the general scheme of that directive, a cardinal value with which the Member States must ensure compliance pursuant to the wording of Article 18(2) of that directive."* The ETUC demands on public procurement are further outlined in the [ETUC Resolution for a More Sustainable and Inclusive Competition Policy](#).

PROTECTING MOBILE AND CROSS-BORDER WORKERS

The ETUC has closely monitored the **impact of the COVID-19 pandemic on mobile and cross-border workers** in the EU single market. The ETUC COVID Watch Briefing Notes on [Frontier](#), [Seasonal](#) and [Posted](#) workers outline the challenges faced by these groups of workers during the public health crisis, including as a result of border restrictions. In addition, the ETUC has drafted [comments on the Commission's Guidelines on Free Movement of Workers during the COVID-19 Outbreak](#), [comments on the Communication on a phased and coordinated approach for restoring freedom of movement](#), as well as [comments on the Guidelines on Seasonal Workers](#). Building on these lessons learnt, the ETUC has developed further policy demands in its [ETUC Resolution on Fair Labour Mobility and Migration](#).

During the pandemic, **social dialogue and social partner organisations at all levels** have played an important role in providing workers and employers with relevant information, sharing good practices and helping authorities to identify concerns. Bipartite and tripartite initiatives were undertaken in many Member States to jointly develop COVID-19 protocols and guidelines, whereas social partners in some cases were not consulted at all on the emergency measures put in place despite their implications for sectors and labour markets. Against this background, the ETUC regrets that the Commission did not consult EU-level social partners on its Guidelines developed already in the spring of 2020.

The **closure of borders** as a result of Member States' public health measures were often implemented without consideration to the specific needs and challenges faced by cross-border workers, in particular **frontier, posted, seasonal and transport workers** who were unable to carry out their work remotely e.g. through digital means. In other words, workers who depend on their freedom of movement to make a living were left behind as a result of having exercised their economic freedoms under EU law, either finding themselves unable to reach their workplaces, to return home or to request of access support measures remotely. To remedy such risks, special attention must be given to cross-border regions and the free movement of workers when implementing any kind of restrictions to the freedom movements. In this sense, the Single Market Emergency Instrument must also ensure coherence and complementarity with the update of the Schengen Border Code.

Many of the challenges experienced by mobile and cross-border workers during the pandemic stemmed from the **lack of coordination and cooperation** between Member States, national and local authorities. The approaches adopted by Member States often failed to take into account the needs of different types of workers and sectors. The understanding of what workers and sectors qualify as essential (for the purpose of exemptions from border restrictions) differed between Member States, in the same way as e.g. conditions for what characterises a frontier workers (in terms of frequency of cross-border commuting). In some cases, the specificities of certain types of work were neglected by both home and the host Member States. E.g. in some Member States emergency support was only available for frontier workers who had an employer with a legal personality, not for those with a physical person as their employer, which is often the case for domestic workers. Some self-employed persons were excluded from both unemployment benefits and national temporary emergency schemes, on the one hand in the Member State of activity because they were not residents, and on the other hand in the Member State of residence, because they were not economically active there.

The different strategies implemented by Member States also gave rise to **problems of mutual recognition** for cross-border and mobile workers. Some Member States required COVID-19 certificates not only to enter the country but also the workplace, whereby e.g. workers who had

received shots in Member States administering Sputnik, Sinovax and Johnson&Johnson struggled with validation. Likewise, mobile and cross-border workers experienced arbitrary treatment in terms of access to sick pay in the home or host Member State because of inability to work during a quarantine either imposed by the host Member State before starting to work or by the home Member State upon return back from work.

In terms of **access to information**, workers experienced difficulties in accessing up to date information about the rules and requirements in place, due to the lack of dedicated information structures. Especially on free movement there was a lack of targeted information in languages that the workers in question could understand. The fact that rules about border restrictions also tended to change with very short notice constituted an additional challenge not only for workers and employers, but also for social partner organisations providing information on the ground.

During the pandemic, trade unions such as the Interregional Trade Union Councils ([IRTUC](#)) played a particularly important role in providing mobile and cross-border workers with the necessary information, advice and support, while often struggling to reach the workers or in some cases even being prevented from talking to them (e.g. in the case of private chartered flights for seasonal workers without any information about their rights prior to departure). Against this background, there is a clear need for dedicated and permanent funding from the EU budget to **trade union information networks**, to ensure that workers who exercise their freedom of movement under EU law are accompanied and equipped with the necessary support and advice they need.

The COVID-19 pandemic not only gave rise to new challenges for mobile and cross-border workers, but also shed light on and aggravated existing problems, in particular linked to issues such as **fair working conditions, health and safety, decent accommodation, safe transport**, etc. Violations and abuse of workers' rights linked to e.g. subcontracting, intermediaries, letterbox companies and undeclared work were also exacerbated. In other words, this crisis must be a wake-up call to ensure the better protection of these workers, who are very **vulnerable but essential**. While labour mobility represents one element in addressing skills gaps and labour shortages, however, the outbreak of the pandemic also underscores its limits as a short-term solution to more long-term challenges. Building social cohesion and resilience of the EU internal market goes far beyond free movement, including e.g. just transitions and investments in quality job creation. Above all, the fundamental values of social progress and sustainable development enshrined in the Treaties require strong social rights, decent working conditions and equal opportunities across all regions of the EU.

SUSTAINABLE SUPPLY CHAINS AND EU STRATEGIC AUTONOMY

The consequences of the COVID-19 pandemic and recent geopolitical developments, including the Russia's invasion of Ukraine, have shown on the one hand the **importance for the European Union of sustainable and diversified supply chains** and on the other hand the **weaknesses of the externalisation of production**, not only when it comes to essential goods and services but also in terms of the adverse impacts of high economic and technologic dependence to autocratic countries. To this end, strategic storage systems for increased availability is key, particularly when it comes to critical raw materials. Likewise, improving the resilience of industries requires initiatives such as diversification of supply and demand, identification of strategic supply chains and monitoring to anticipate shortages.

The interdependencies and the extreme globalisation have exacerbated the offshoring of strategic industrial production outside Europe, leading to loss of **strategic industrial capacity**.

Furthermore, the externalization of the costs as a business strategy has fuelled social dumping. Growing geopolitical instability and aggressive military behaviours also add to the challenges of managing the green and digital just transitions. Against this background, crisis preparedness and response must aim at improved communication and coordination between Member States. At the same time, however, it must be made sure that such measures do not in any way negatively impact **workers, employment and working conditions**. Likewise, those measure should not contradict the **climate and environmental objectives** set by the European Green Deal.

EU strategic autonomy should be seen as a key feature of the EU internal market to deliver on **EU values to strengthen social and economic integration in full compliance with the international and European obligations**, in particular as regards human and workers' rights, on the basis of the effective exercise of **democratic rights of trade union and workers representatives**. These considerations are further developed in the [ETUC Position on the New Industrial Strategy for Europe](#).

To this end, the Single Market Emergency Instrument should support the EU strategic autonomy agenda, contributing to the **creation of sustainable quality jobs** in the EU, with enhanced democracy at work, where **good and inclusive governance** is associated with more resilience. The EU strategic autonomy agenda should **trigger public and private investment in education, knowledge production as well as investment in paid apprenticeship, training, reskilling, and upskilling for the EU workforce**. It should pave the way for **sustainable supply chains with quality jobs, tackling social and environmental dumping**. To this end strong **antidumping regulations** and more action against unfair foreign trade practices should also be put in place.

Finally, the EU strategic autonomy agenda should foresee a **strong role for public services and ensure quality public infrastructures**, whereby the European union and its Member States also need to have the ability to secure revenues and to adopt ambitious public budgets.