ANALYSIS

The EU Proposal for an Anti-Coercion Instrument

2022

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1 Introduction

The EU proposal on anti-coercion[1] is meant to give the EU possibilities to act against economic coercion from third countries.

According to the Commission's proposal, economic coercion refers to a situation where a third country is seeking to pressure the Union or a Member State into making a particular policy choice by applying, or threatening to apply, measures affecting trade or investment against the Union or a Member State. Noteworthy is that the coercion as such could be linked to any policy area, although the tool to respond is in the field of trade policy.

The purpose of this memo, commissioned by the Swedish Ministry for Foreign Affairs, is to get a better understanding of the proposed legislation. The National Board of Trade point out some of the most immediate problems and challenges and give recommendations on how to minimize the proposal's negative effects for international trade and trade policy.[2] This memo complements the comments we submitted to the Swedish Ministry for Foreign Affairs in 2021 regarding the Commission's roadmap for the mechanism to deter and counteract coercive action by non-EU countries.[3]

The Commission argues that measures that fall under the Commission's definition of economic coercion could under certain circumstances constitute a breach of customary international law and give parties the right to countermeasures (for a brief overview of relevant public international law, see the overview in the Appendix).[4] However, the principle of conferred powers means that the EU and its institutions can deploy the means existing under international law only when empowered to do so. There is currently no such framework specific to an anti-coercion response.[5] The EU Commission states that the objective of countering measures representing economic coercion could not be

[1] Proposal for a Regulation of the European Union and of the Council on the protection of the Union and its Member States from economic coercion by third countries, 8th of December, COM(2021) 775 final.
[2] We have however not analysed the proposal from a public international law perspective, or the hierarchy of legal sources between WTO and public international law.
[3] Registration number 2021/01885.
[4] The preamble (10), footnote 1 refers to the Articles 22 and 49-53 of the Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the United Nation´s International Law Commission at its fifty-third session, in 2001, and taken note of by the United Nations General Assembly in resolution 56/83.
[5] Impact Assessment Report, p. 22-23.

achieved efficiently by Member States acting on their own. This is due to the fact that Member States, under international law, are not entitled to respond to economic coercion directed against the EU. Member States, on the other hand, are not permitted to respond to economic coercion in the form of common commercial policy measures due to the exclusive competence of the Union.[6]

2 The proposal

The proposal for a regulation lays down rules and procedures in order for the EU to deter and counteract economic coercion from third countries. The Regulation is applicable when a third country seeks to prevent or obtain the cessation, modification or adoption of a particular act of the EU or its Member States, by applying or threatening to apply measures affecting trade or investment.[7]

According to the proposal, the Commission should first examine whether third-country measures are coercive, either on its own initiative or following information received from any source, including legal and natural persons or a Member State.[8] In case of such coercion, the Commission should adopt a decision and request from the third country that the economic coercion cease and, where appropriate, that any injury is repaired.[9]

The EU has access to a wide array of response measures (a form of countermeasures) in order to counter the economic coercion. These measures restrict trade or investments, and if necessary, suspend international obligations. The idea is that these measures should either take the form of measures adhering to the Union´s international obligations or measures constituting permitted countermeasures under international law.[10] Response measures are however a last resort, when negotiations and mediation do not lead to cessation and to reparation of the injury.

The response measures are adopted by the Commission through implementing acts and are selected on the basis of criteria, such as the effectiveness of the measures, the potential to provide relief to economic

[6] Preamble (8). See Article 207 of the Treaty on the Functioning of the European Union.
[7] Article 2.
[8] Article 3 and the preamble (13).
[9] Article 4.
[10] Preamble (10).

operators within the EU and avoidance of negative economic and other effects on the Union.[11] Response measures could also be directed at natural and legal persons, where such persons are connected or linked to the government of a particular third country.[12]

3 Analysis

3.1 Restricting trade for third country´s goods or services may harm the EU as well

The proposal includes a wide array of response measures for the EU to use in case of economic coercion. It includes suspension of tariff concessions, imposition of customs duties or additional charges on the importation or exportation of goods, restrictions on trade in goods, services or foreign direct investment, and possibilities to limit the access of third countries to the EU public procurement market. It also includes restrictions on the protection of intellectual property, financial services and access to Union capital markets. Furthermore, restrictions on registrations and authorisations under the chemical or the sanitary and phytosanitary legislation of the Union. If necessary, applicable international obligations or concessions may be suspended.[13]

All these response measures risk affect trade and investments into the EU. To the extent EU companies are dependent on goods, services or suppliers from the third country in question, it also risks harming businesses and the EU economy. Companies´ value chains are often regional or global, which makes them vulnerable to restrictions in relation to third country goods, services, or suppliers. Imports of goods and input goods is common, and also important in order to be able to export. Tariffs and higher prices on goods, blocking foreign direct investments or the supply of services will likely have consequences for many EU companies as well. In a broader perspective, it may affect consumers as well through reduced competition and potential effects on prices as well as availability of goods and services. For example, measures limiting the access of third country companies, goods or services to the EU public procurement market reduces competition and may affect consumers through higher prices. It may also affect EU suppliers or suppliers from other third countries than the targeted, who

[11] Articles 4, 7, 8 and 9.
[12] Article 8.
[13] Annex 1 of the proposal.

offer third country goods or services. Restrictions regarding registration or exploitation of intellectual property rights could severely affect the investment and innovation climate in EU since it is about incentives for innovation and ownership of intangible assets. In sum, the draft proposal risks adding more insecurity and less predictability to the business environment.

Moreover, the proposal and possible response measure could also have consequences for the EU as an entity governed by the rule of law and for foreign policy, for instance in the form of escalating countermeasures.

3.2 Risk of escalation and countermeasures

Even though it may exist a possibility to impose countermeasures under international law, it is worth noting that there is a risk that other parties develop similar instruments and use similar arguments for measures towards the EU. Although the firsthand option is negotiation rather than response measures, once response measures are implemented, there is a risk of countermeasures and escalation of the conflict. This is especially the case since the proposed instrument seems to be applicable to trade measures that doesn´t necessarily breach WTO-rules, e.g. Trade Defence Instruments, border or food safety checks.[14]

3.3 WTO compatibility and related issues

As regards WTO compatibility, the draft proposal states that any action shall be consistent with the Union's obligations under international law and conducted in the context of the principles and objectives of the Union's external action.[15] Although WTO and other international trade commitments could be seen as included in the notion "international law", it is not clear that this is the purpose here.

Response measures according to the instrument could either take the form of measures adhering to the Union´s international obligations, or measures constituting permitted countermeasures under international law.

Annex 1 of the proposal states that the EU is ready to suspend applicable international obligations or commitments, if deemed necessary. When suspending international obligations, it could possibly breach international obligations such as WTO rules and commitments, FTAs,

[14] See the EU´s pressrelease: EU strengthens protection against economic coercion (europa.eu)
[15] Article 1.

International Investment Treaties (IIAs/BITs) or other international treaties.

It can be questioned whether the instrument as such is in line with WTO rules in other respects as well. The instrument empowers the EU to be able to act and suspend concessions unilaterally, without any ruling on the matter and without the authorization of the Dispute Settlement Body. The essence of the multilateral trading system is that the WTO Dispute Settlement System should be used for interpreting the agreements and for settling disputes between members. Normally, suspension of international obligations is only legal under the WTO rules if a panel has determined that there has been a breach of WTO rules or commitments, and this is a temporary response to another member´s breach of WTO rules or commitments. This would require that the complainant party (in this case the EU) has been authorized by the Dispute Settlement Body to respond this way. There are also rules on how to respond, for example in which areas and according to which agreements. In addition, the range of response measures in the proposed instrument is broader than permitted under the WTO´s Dispute Settlement Understanding (DSU).

That being said, when assessing the WTO compatibility, the proposal as a whole, including the Commission´s discretion and all the administrative and institutional elements surrounding it, are relevant.[16] In some agreements, there could also be special or additional rules that are applicable in addition to, or instead of, these rules. And this is also without prejudice of the right to impose anti-dumping, anti-subsidy (countervailing duties) or safeguard measures, which does not require authorization.

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[16] Dispute Settlement Understanding, Art 3(7), 22 and 23. See also Article XVI:4 of the WTO Agreement which can be seen to confirm that legislation as such falls within the scope of possible WTO violations. For the relevant jurisprudence concerning Article 23 DSU, se dsu_art23_jur.pdf (wto.org) . The EC has also been the complainant in a dispute concerning this aspect in *United States – Section 301-310 of the Trade Act of 1974* (1999). WT/DS152/R. The dispute concerned the United States Trade Act and the consistency with DSU, Article 23. The law empowers the USTR to act unilaterally in certain cases. The Panel set out that it is for the WTO, through the DSU process, and not an individual WTO Member, to determine that a measure is inconsistent with WTO obligations. Parties also have to follow the DSU Art. 22 procedures for determining the level of suspension of concessions or other obligations. However, the panel found that the United States had lawfully removed this threat by the "aggregate effect of the internal "Statement of Administrative Action" ('SAA')" and a statement before the Panel that it would render determinations under Section 304 in conformity with its WTO obligations. In this regard, the Panel added the caveat, however, that should the United States repudiate or remove in any way its undertakings contained in the SAA and confirmed in statements before the Panel, then, the finding of conformity would no longer be warranted.

Neither the Impact Assessment Report, nor the proposal clarifies any detailed assessment of the compatibility with WTO law or the relationship between WTO rules and public international law in a way that properly address these issues. However, the Commission argues that the proposal would be in line with international law, e.g. how the EU's Member States have the right to respond under international law through countermeasures (for an overview, see the Appendix to this analysis). The Commission suggests that the right to take countermeasures under international law exists irrespective of the legal regime of the WTO.[17]

Since multilateral trade rules exist and WTO is the forum for trade disputes, this raises questions in relation to the principle of Lex Specialis. This principle is recognized in Article 55 of the International Law Commission´s (ILC) document "Responsibility of States for Internationally Wrongful Acts" (2001). Article 55 reads that the articles in the report are not applicable where, and to the extent that, the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State, are governed by special rules of international law.

3.3.1 Dispute settlement under the WTO

In most cases, measures that can be targeted by EU countermeasures are likely to be both coercive, as defined in the proposal, and represent a breach of substantial commitments under the WTO Agreement. In the latter case, this may be challenged in the WTO dispute settlement system.

The EU´s main instrument to challenge another country´s trade and investment restrictions is in the WTO. In case of potential inconsistency with WTO rules, the defendant party may however be entitled to make a case under the security exception or the general exceptions under the agreements (see below). The same would be true for the EU (as a defendant party) in cases where another party complains about the inconsistency with WTO rules.

However, the WTO is normally not the place to solve disputes, where legal arguments are based on customary international law.[18] Although a party could raise arguments whether the WTO is the right forum and

[17] Impact Assessment Report, p. 22-23.
[18] Impact Assessment Report, p. 15, 16, 22, 23. See also Appellate Body Report in *Mexico - Soft Drinks (*2006), para. 56. Cf. D. Palmeter and P. C. Mavroidis, *The WTO Legal System: SOURCES OF LAW*, The American Journal of International Law Vol. 92, No. 3 (Jul., 1998), pp. 398-413, p. 406-407, who states that besides the customary rules of interpretation, not any part of customary international law have found their way meaningfully into WTO dispute settlement.

have jurisdiction to adjudicate on the matter, we find it likely that a panel would answer in an affirmative way, since we are not aware of any case where a panel has rejected a case.[19] The opinion of the Commission in this case is not clear. They seem to be of the opinion that it is uncertain whether WTO rules of FTAs could be invoked to oppose EU response measures, as long as those are in line with customary international law.[20]

3.3.2 Possibilities to invoke the exceptions in WTO agreements

If the question of WTO compatibility of a coercive measure or a response measure would come up in the WTO, states have the possibility to invoke the *security exception* which exist in many of the WTO agreements, but also in investment law.[21] It is however not clear whether the exceptions could justify inconsistency with the procedural rules of the DSU as regards authorization before suspension of obligations.

Article XXI – essential security interests

To take the example of the GATT, Article XXI(b) gives WTO Members the possibility to adopt measures in conflict with the substantial rules of the GATT, if necessary for the protection of its "essential security interests". It concerns measures that are adopted in time of war or other emergency in international relations. In the first panel report that addressed the issue[22], the panel held that the WTO Member invoking the provision has a relatively large margin of discretion to decide what constitutes "time of war or other emergency in international relations". It cannot however be excluded that a coercive measure against the EU or

[19] See for example *Russia - Measures Concerning Traffic in Transit,* WT/DS512/R, para 7.27, where Russia argued that the Panel had no jurisdiction to judge on the invocation of the security exemption. Ukraine argued that it was up to the Panel to rule on the application, and that the burden of proof lay on Russia to fulfil the requirements of the exemption. The Panel stated that it had jurisdiction to hear the dispute. It is however worth noting that this dispute concerned an existing rule in the WTO (the security exception).

[20] The Commission asserts that it is uncertain whether WTO rules and FTAs can be invoked for opposing EU response measures, see Impact Assessment Report, p. 41-42.

[21] For example, Article XXI(b) of the General Agreement on Tariffs and Trade 1994 (GATT), Article XIV bis in the General Agreement on Trade in Services (GATS), Article III of the Agreement on Government Procurement, and Article 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (Trips). Pursuant to Article III of the Agreement on Trade-Related Investment Measures (TRIMs) all exceptions under the GATT shall apply, as appropriate, to the provisions of the TRIMs. In the Agreement on Technical Barriers to Trade (TBT Agreement), there is no general security exception, but in the preamble, it is mentioned that no country should be prevented from taking measures necessary for the protection of its essential security interest. Article 2.2. of the TBT agreement, which states that technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, mentions for example national security requirements as a legitimate objective.

[22] Panel Report, *Russia – Measures Concerning Traffic in Transit* (2019).

one of its Member States may amount to such a situation that constitutes "time of war or other emergency". Also, it is not unlikely that a panel would interpret this exception in the light of customary international law.[23]

Although the scope for taking measures deemed necessary to protect "essential security interests" seems relatively wide-ranging, they should not be abused or used unnecessarily. According to the two Panel decisions dealing with this, the measures taken by the state are required to be necessary for the protection of an essential security interest and taken during "war or other emergency". The provisions must be applied in good faith, which above all means that the measures taken must be able to protect the essential security interests in a reasonable way.[24] Hence, there needs to be a link between the interest and the challenged measures.

Article XX(a) - public morals

The legal framework of the WTO, also contain other possible provisions that could be invoked to justify a response measure by the EU in protecting its interests and sovereignty. For example, the exception regarding public morals pursuant to Article XX(a), GATT, or the exception for public morals, public order and safety in GATS, Article XIV. Especially the exception for public morals could be relevant. This exception has been interpreted quite broadly in disputes.[25] In comparison to the exception regarding essential security interests, this article includes the additional requirement that the measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries or a disguised restriction on international trade. With regard to measures taken in order to protect public moral, a panel has stated that the term public moral is broad, it "denotes standards of right and wrong conduct maintained by or on behalf of a community or nation".[26] Furthermore, the panel stated that

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[23] Panel Report, *Russia – Measures Concerning Traffic in Transit (2019)*, para. 7.76 and footnote 153.

[24] *Panel report in Russia – Measures Concerning Traffic in Transit (2019), and the panel report in Saudi Arabia – Measures concerning the protection of intellectual property rights, WT/DS567/R, 16 June 2020.*

[25] Panel report in *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (2009), WT/DS363/R, para. 7.759.

[26] Panel report in *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (2009), para. 7.759, with reference to the panel report in *US – Gambling*, para. 6.465 and the Appellate Body report in *US – Gambling*, para. 299.

"the content of these concepts for Members can vary depending upon a range of factors, including prevailing social, cultural, ethical and religious values."[27]

Finally, even if coercive measures and response measures are allowed under various exceptions under WTO law, other WTO Members may see this as contrary to the spirit of the WTO Agreement and the rules-based multilateral trading order. As such they could still face legal challenges (for instance under a so-called non-violation complaint).

3.4 Consistency with other international commitments

The proposal is not clear on the consistency with the EU´s bilateral free trade agreements (FTAs) and investment agreements. On the one hand it states that any action should be consistent with the Union´s obligations under international law[28], on the other hand it is stated in Annex 1 that suspension of international obligations or concessions in several areas are possible when initiating response measures. The EU´s free trade agreements cover many areas. In general, they go beyond the commitments in the WTO. They normally also have specific dispute settlement mechanisms for issues covered under the agreements.

In addition, the EU and its Member States have ratified numerous bilateral investment treaties with third countries (BITs), including the Energy Charter Treaty. A state-to-state dispute following the commitments under a treaty could theoretically result in the EU or a Member State having to change a decision to comply with the obligations under the treaty. Investment treaties also generally include a possibility for an investor to be compensated in cases where there has been a breach of the relevant treaty by the respondent state. An Investor-state-dispute could result in the EU or one of its Member States having to pay pecuniary compensation which could undermine the anti-coercion instrument. As we see it, there is a risk that foreign investors will claim damages towards the EU or a Member State as a result of the EU´s response measures. Consequently, an individual Member State could potentially be financially responsible for an action taken due to obligations following a decision taken by the Commission. This raises the questions if and how the proposed instrument is consistent with investment agreements. It also raises the question if an individual

[27] Panel report in *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (2009), para. 7.759, with reference to the Panel report *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (2005), WT/DS285/R, para. 6.461.
[28] Article 1.

Member State should bear the financial burden resulting from a Commission decision on imposing a response measure.[29]

In addition to this, the EU is bound by the Charter of Fundamental Rights which gives individuals and companies rights within the EU. This includes for example the EU principles of non-discrimination (Art. 21), and freedom to conduct a business and property ownership (Articles 16 resp. 17).

3.5 Legal basis and competence issues

The ties between trade and foreign policy raises questions about the respective competences of the EU and its Member States, with consequences for the possibilities to act through legislation and the decision-making process. The common commercial policy (CCP) is part of the EU´s exclusive competence, but an analysis of competence issues in order to see if there are elements falling outside of the EU´s exclusive competence, could be useful.[30] There could also be reasons for analysing the legal basis, including whether any alternative or additional legal grounds is needed. Since the proposed regulation also addresses foreign policy issues in a wider sense than trade and investments, a case can be made for combining Article 207(2) with a legal basis in the Treaty of the European Union (TEU).

Competence issues may for example be relevant to analyse in relation to the imposition of response measures, adding new possible response measures to the list in Annex 1, or negotiations with the third country.[31] This could for example be the case regarding Article 9(3) in the proposal, according to which response measures can be initiated internally within the EU as regards foreign direct investment of established legal persons (but which are owned or controlled by a third country). Another potential issue may regard restrictions in relation to financial services, banking and access to Union capital markets, to the extent it could mean restrictions to the free movement of capital.[32]

In case there are elements that fall outside the exclusive competence, this could have consequences for the decision-making process. It is the Commission that makes decisions on the response measures through implementing acts.[33] This can be compared to decision-making when it

[29] A decision which is taken under the supervision of the relevant committee.
[30] See Articles 2 to 6 in TFEU.
[31] Articles 5, 7, 8, 9 and Annex1.
[32] See Annex I of the proposal and TFEU, Articles 3-6, 63 and 64(3).
[33] Article 7 and 8. For implementing acts, see TFEU, Article 291.

comes to the EU´s Common and Security Policy (CFSP), which normally requires consensus.[34] The implementing acts are legally binding Union acts which are used where uniform conditions for implementation are needed. They are decided under the supervision of committees consisting of EU countries' representatives, but it does not require unanimity between Member States. As a comparison, it is worth noting that according to the Treaty of the European Union, those implementing powers may in some cases be conferred on the Council. One such reason may be when it concerns the Common Foreign and Security Policy.[35]

The Commission may also add new possible response measures to the list in Annex 1 through delegated acts. An observation in this regard is that delegated acts are legally binding acts that enables the Commission to supplement or amend *non-essential parts* of EU legislative acts.[36] The question is whether new possible response measures, with restrictions of different kinds, may be regarded as "non-essential parts".

According to the Commission, the legal basis for the proposal is Article 207(2) of the Treaty on the functioning of the European Union (TFEU). This is normally used for measures that fall within the scope of the Union's common commercial policy. We note that Article 207(2) are used in some other autonomous EU trade policy instruments, although not in the related Blocking Statute legislation.[37] The EU´s Anti-Subsidy proposal[38] has besides Article 207(2) an additional legal ground in Article 114, due to the fact that it may be applicable to certain activities performed by entities *who are established* in the EU. Therefore, it is considered to affect the right of establishment and the free movement of goods or services. As we see it, there may be parallels to this proposal in the sense that additional grounds could be considered.[39] We also note

[34] See TEU, Articles 21-46, especially Articles 22, 24, 26, 28-31.
[35] TFEU 291(2).
[36] Article 7(7). Regarding delegated acts, se TFEU, Article 290.
[37] See for example the IPI proposal, the Enforcement regulation, EU Antidumping Regulation and the EU´s Anti-Subsidy proposal. For references, se below. The Blocking Statute rely on art 73c, 113 and 235 of the Treaty (note that this concerns the old numbering of the Treaty Articles).
[38] Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, COM(2021) 223 final.
[39] See for example Article 9(3) in the proposal. According to this, response measures can also be initiated internally within the EU as regards provided services and foreign direct investment of established legal persons (but which are owned or controlled by a third country). Another potential issue may regard restrictions in relation to financial services, banking, insurance, access to Union capital markets, to the extent it could mean restrictions in free movement of capital. See in this case Article 63 and 64(3).

that the Commission in the Impact Assessment Report elaborates on Article 215 TFEU as an alternative legal basis but rejects it.

Regardless of potential competence issues in relation to the proposal, increased Member States influence could be considered in relation to some elements of the proposal. This could especially be the case for the country or the countries that the economic coercion is directed against, and the response measures risk escalate the conflict.

3.6 Relationship with other EU instruments

There are many autonomous EU instruments directed towards third countries, e.g. the Blocking Statute[40], the Enforcement regulation[41], the Anti-Subsidy proposal, the FDI Screening regulation[42], the International Procurement Instrument proposal (IPI)[43] and the EU´s Trade Defense Instruments. Particularly as regards the Blocking Statute, and its upcoming revision, there may be overlaps to consider, especially when extra-territorial sanctions are applied with *the intention to coerce the EU's or Member States' public authorities*.[44] There may also be overlaps in relation to the revised Enforcement Regulation, since it empowers the EU to impose unilateral measures in cases where access to dispute settlement is not possible. After the revision, it also includes possibilities to impose countermeasures in the area of services and intellectual property rights.

The proposed instrument may also overlap with the use of sanctions, which are instruments within the EU's common foreign and security policy that may regard economic measures such as restrictions on imports and exports.[45]

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[40] Council Regulation (EC) No 2271/96. The purpose of the statute is to protect EU operators from the extra-territorial application of third country laws.
[41] Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules. Amended through Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021.
[42] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.
[43] Amended proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries, COM(2016) 34 final.
[44] Impact Assessment Report, p. 24.
[45] Sanctions are instruments within the EU's common foreign and security policy, which are applied to further the objectives of the CFSP, namely to promote international peace and security, prevent conflicts, support democracy, rule of law and human rights, and defend the principles of international law.

In order to avoid overlapping instruments, the proposal should thoroughly describe the relationship between these different instruments.

3.7 Other aspects

Clarification of the scope

The proposed regulation is applicable in cases where a third country applies or threatens to apply measures *affecting* trade or investment. It is not completely clear what kind of measures are relevant. Could it mean other measures than trade or investment, such as for example climate policy?

It seems like the regulation is applicable without a requirement that the third country´s measure breaches WTO or other commitments. A threat of applying measures affecting trade or investments is sufficient. The press release accompanying the proposal furthermore states that the instrument could be used in cases where another country uses Trade Defense Instruments, selective border controls or food security controls.[46] We note that this does not necessarily breach WTO rules. A question is therefore to what extent the regulation applies to measures that don´t necessarily qualify as "wrongful acts" under international law? And if not, how may the EU invoke Article 22 and 49-53 of the "Responsibility of States for Internationally Wrongful Acts" (2001) in defense of its measure?[47]

In order to clarify the scope of the regulation, it needs to more clearly exemplify what kind of measures affect trade or investment. It could also express more clearly that there is a requirement that the third country measure has infringed WTO, international law or other rules, before the EU could respond. Furthermore, the causal relationship between the third country´s restrictions on trade and/or investment and the alleged economic coercion should be more clearly stated.

[46] See the EU pressrelease: EU strengthens protection against economic coercion (europa.eu)

[47] Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the United Nations´ International Law Commission at its fifty-third session, in 2001, and taken note of by the United Nations General Assembly in resolution 56/83. Annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.

Response measures within the Internal Market

In relation to legal persons, response measures may also be issued in relation to services *provided* or investments *made*, within the European Union *internally*.[48] This could be the case if these legal persons are owned or controlled by persons of the third country. Depending on the commitments made (including the possibilities for justification according to the security exceptions or the general exceptions), this could be inconsistent with the WTO Agreement on Trade in Services (GATS). There are also risks for inconsistency with investment agreements.

If these restrictions were imposed within the market access commitments made by the EU in the context of the WTO Agreement on Government Procurement (GPA), it could also be seen as discriminatory. In addition to the national treatment principle, the GPA includes a special rule on non-discrimination of locally established suppliers on the basis of the degree of foreign affiliation or ownership.[49]

Our assessment is also that this could affect the Internal Market. The proposed rules of origin for services and investments[50] seems to indicate that established companies, with strong economic links to a Member State, in some cases could be seen as foreign, due to foreign ownership or control. Imposing restrictions in those cases could negatively affect the EU economy as a whole, as well as EU legal persons.[51]

On this aspect, the National Board of Trade seeks a deeper analysis of the consistency with the EU principles of non-discrimination (Art. 21 of the Charter of Fundamental Rights), proportionality (Article 5(4) FEU), Freedom to conduct a business and property ownership (Articles 16 resp. 17 of the Charter on Fundamental Rights).

Union interest

According to art 9(2) in the proposal, the Commission shall select and design an appropriate response measure. In making this choice, they shall consider the Union interest, the effectiveness of the response measure, its potential to provide economic relief on economic operators within the

[48] Article 7, 8, 9(3) and Annex 1.
[49] GPA, Article IV.
[50] See Annex II of the proposal.
[51] In comparison, Article 54 of the TFEU states that, within the EU, companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall be treated in the same way as natural persons who are nationals of Member States.

EU and the avoidance of negative effects on actors within the EU (who are affected by the EU´s own response measures).

Determination of the Union interest is not an easy exercise. Member States may have very different interests and there are a variety of parameters to take into account and balance. This is also evident in the application of other trade policy instruments, such as the EU´s Antidumping regulation. Compared to that regulation, the procedure in the proposed Anti-coercion Regulation seems even more complicated. A question related to this is whether there is a Union interest in cases where it only represents the interest of one or just a few Member States.

As noted above, the EU´s response measures could affect the EU´s economy and interests in other ways than the stated. Therefore, the Union interest should include effects on the EU economy as a whole (e.g. welfare and productivity), competitiveness and effects on consumers. It could also include further references to proportionality when selecting and designing the response measure. For example, the consideration of alternative measures for achieving the cessation of the economic coercion, which are less restrictive as regards trade and other international commitments. Furthermore, the risk of countermeasures from the third country should be taken into account.

4 Conclusions

The draft proposal has links to foreign policy, as trade policy may be used for foreign policy purposes. The arena is international trade and investment, but the argumentation lies within the sphere of public international law. Although the coercive measures by the third country affects trade, the purpose of introducing such measures may concern any policy area.

Although we recognise that coercion as such is indeed problematic, the proposed instrument raises a number of concerns from a trade policy perspective. The proposal empowers the EU to suspend international obligations without going through the WTO´s dispute settlement process, which normally requires authorization. In this way there is a risk that it could be inconsistent with the rules of the WTO´s Dispute Settlement Understanding. We note however, that when assessing WTO-compatibility, all the institutional and administrative elements in the proposal, and the discretion of the Commission could be relevant.

The whole idea with the Dispute Settlement System is to be the forum for interpreting the agreements and solve disputes. The rules are meant to avoid that members decide for themselves whether their rights have been impaired and act unilaterally. Our opinion is therefore that the EU as a firsthand option should seek to settle disputes through the DSU or FTA process. Also, in case of inconsistency, it is not clear whether the exceptions in the WTO rules could justify this.

Moreover, as the EU's 2020 Trade Policy Review, established, "rules-based multilateralism is a key geopolitical EU interest". While there might be short-term benefits from circumventing the WTO, the rule of law is an integral part of the EU, structurally and in term of identity. Consequently, in the long-term other global powers are likely to be better at exploiting the loopholes that we open.

In addition to this, some of the rules risk being incompatible with the material rules or commitments of the WTO, FTAs or Investment treaties in other ways. Whether response measures would infringe commitments in WTO or FTAs would have to be analysed on a case-by-case basis. According to WTO law, suspensions of commitments would however have to be justified by the applicable exceptions.

Without a very clear case of economic coercion, the EU could be accused of the same which affects its credibility as an actor in the multilateral arena. Furthermore, if other countries use similar instruments and

arguments for suspending international obligations, this risk affecting the legitimacy and efficiency of a system that has contributed to economic integration for a long time.

In light of the above, we recommend that the Legal Services of the Council provide their view on issues regarding WTO/FTA compatibility as well as competence issues in relation to the proposal. It would also be relevant if the Commission, or the Legal Services, could provide their view on how the proposal relates to the principle of Lex Specialis.

4.1 Specific proposals for minimizing negative effects on international trade

In order to minimize negative effects on international trade and investments, and improve the draft proposal from a trade policy perspective, we provide comments on specific articles below:

Preamble text

In order to give more weight to the general goals of the Common Commercial Policy (stated in Articles 206 and 207), the preamble could include the following reference:

"Whereas the objectives of the Community include contributing to the harmonious development of world trade and to the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers." We note that a similar reference is made in the preamble of the EU´s Blocking Statute.

Article 1 and 2, Subject-matter and scope

According to 1(2), any action taken under the proposed regulation shall be consistent with the Union´s obligations under international law. It is not completely clear whether for example WTO law and FTAs could be included here. From a trade policy perspective, it is preferable that the instrument does not breach WTO rules, FTAs or other commitments (BITs, conventions, etc.).

Regarding Articles 1(1) and 2(1), it should also be clarified what is meant by "measures affecting trade or investment" in order to better understand when the regulation is applicable. Does it always mean a "wrongful act" under international law? (And if not, how may the EU invoke Article 22

and 49-53 of the "Responsibility of States for Internationally Wrongful Acts" (2001) of the UN in defense of its measure?).[52]

Does it target third country measures that are in line with WTO and other international legal commitments, or measures that breach such commitments? What kind of measures *affect* trade or investment? Does it only concern trade policy measures or could it be other measures?

Article 2 could further clarify the need for a causal relationship between the coercion and the third country´s measures affecting trade or investment.

Articles 4, Determination with regard to the third-country measure
According to the proposal, the Commission shall notify the third country and request it to cease the economic coercion, and where appropriate, repair the injury, if a third country´s measure is found to be coercive.

It is not clear what a reparation of an injury could be. Does it regard the payment of pecuniary compensation? In that case, it goes beyond what is regulated by the WTO main rules and also beyond the scope of a State-State Dispute under an FTA. The result in a dispute is usually that the State must change a rule or a regulation in order to comply with the treaty. It may also raise issues such as how the consent from the third country for adjudication on the dispute could be obtained, and what forum and which rules could be relevant. The injury that the third country has caused to the Union may also be difficult to estimate, at least without any indications of criteria.

Regarding Article 4, increased participation of Member States could be considered. The Commission should also have a duty to inform directly concerned Member State(s) about the developments, or even consult or obtain consent. The Member State(s) concerned should also be informed before the third country about a determination on the coercive nature of a third country´s measure.

Article 5, Engagement with the third country concerned
Article 5 could further clarify that negotiation and mediation is the firsthand option.

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[52] Annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.

It is not clear what kind of international adjudication or other international forum the matter could be referred to. This affects what rules are applicable and what arguments are relevant.

Furthermore, competence issues could be further analysed in relation to Article 5. If all the elements of this article are to be seen as within the exclusive competence of the EU, increased participation of Member States could still be considered for issues such as negotiations, mediation and submitting the matter to international adjudication. Currently, there is only a requirement to inform the European Parliament and the Council of relevant developments.

Article 7, Union response measures

According to the preamble, these response measures should either take the form of measures adhering to the Union´s international obligations or measures constituting permitted countermeasures.[53]

Article 7(1) stipulates the requirements for adopting response measures. According to Article 7(1)(a), response measures could be imposed if contacts with the third country has not resulted in the cessation of the economic coercion *and* reparation of the injury that it has caused to the EU. The fact that the requirements on cessation of the economic coercion and reparation of the injury seems to be applicable cumulative ("and"), will likely point to a need of Union response measures in many cases. Instead of "and", it could state "where appropriate", which seems to be in line with Article 4. See further comments on reparation of the injury above regarding Article 4.

7(1)(b) refers to "interests and rights". This should be specified or explained, including from which legal ground they stem.

7(1)(c) refers to that action should be in the Union´s interest. For this, see comments below regarding Article 9.

This article could state the need for an assessment of whether the third country´s measure have infringed international law, and a specification of how, before a response measure that suspends international obligations could be initiated. As an alternative, this could be mentioned in Article 9 or Annex 1.

From a WTO systemic perspective, it is recommendable that the EU uses the Dispute Settlement System before countering economic coercion.

[53] Preamble (10).

As mentioned above, there may also be competence issues in relation to this Article and Annex I (list of response measures). Regardless of competence issues, it could be argued that Member States should have more influence than is the case through implementing acts.

Article 8, Union response measures in relation to natural or legal persons

From Article 8 (and Annex II), on possibilities to impose response measures in relation to *natural* persons, is not completely clear whether they could be imposed in relation to services provided by natural persons with permanent residence in the EU.[54] However, the fact that Article 9(3) stipulates that response measures targeting services supplied (or direct investment made) could be applied to *legal persons* established *within the EU*, may mean that this is not possible in relation to natural persons. This could however be clarified.

Natural or legal persons within the EU affected by the third country´s economic coercion, shall be entitled to recover any damage caused to them by natural or legal persons involved in the third country measure. This is without prejudice to the responsibility of the third country under international law. The Commission could be asked to explain the legal ground, fora and applicable rules, as well as enforcement issues. How could this be enforced?

Article 9, criteria for selecting and designing Union response measures

According to Article 9(1), any response measure should not exceed the level that is commensurate with the injury suffered by the Union or a Member State, taking account of the gravity of the third country´s measures and the rights in question. In order to include further elements of proportionality, it could be stated that alternative measures for achieving the cessation of the economic coercion, which are less restrictive as regards trade and other international commitments, should be considered. The current writing implies that this proportionality principle is only relevant regarding restrictions for investment and services in the third paragraph of the article. This addition could perhaps lead to that the EU, to the largest extent possible, take into account less trade restrictive measures.

[54] In case of a natural person, the origin of a service provider shall be the country of which the person is a national or where the person has a right of permanent residence, Annex II (2)(a).

As regards art 9(1), it is not clear what parameters are relevant for the "injury" suffered by the Union or a Member State. Is it economic injury or injury for the coercion as such, or both?

Regarding art 9(2), it could state that the Union´s interest or other parameters also includes effects on the EU economy as a whole, such as welfare and productivity, competitiveness and effects on consumers. The risk for escalation and countermeasures from the third country is also relevant. As an alternative, there could be a separate article on the elements of the Union interest to be taken into account of.

As regards Article 9(3), we note that these kinds of measures could breach the GATS, GPA or investment treaties, but would have to be analysed on a case-by-case basis. As regards investment treaties, this could especially be the case if there is no specific clause in the treaty that gives the country such a right, and that is usually, if ever, the case.

It is also not clear if it falls within the competence of the Commission to put restrictions on a specific investor in a Member State.

The Commission should decide "the appropriate Union response" in close cooperation with the Member State(s), especially those affected by the third country´s measure.

Article 10, Amendment, suspension and termination of Union response measures

Paragraph 2 states that the Commission shall suspend the Union response measures if the third country concerned has offered, and the Union has concluded, an agreement to submit the matter to binding international third-party adjudication. It is not clear what kind of fora that could be relevant.

Articles 14 and 15, Delegated Acts and Committee procedure

See comments above (3.5) as regards competence issues.

Article 16, Review

The review and evaluation report shall examine the effectiveness and operation of the response measures. We note that there are no explicit requirements that the evaluation report should consider other elements in Article 9(2) and 10, e.g. the effects on the EU´s interest.

The proposal's Annex 1
The Annex lists possible response measures for the EU in order to counter the third country´s economic coercion.

A lot of these restrictions could infringe WTO rules or FTA commitments, but this would have to be analysed on a case-by-case basis. The Annex also specifically states that a suspension of applicable international obligations is an option, if deemed necessary. This could possibly include WTO rules and other international obligations such as FTAs or BITs, which may be infringed by the EU measure. For WTO and FTA consistency, it is recommendable to use the relevant trade agreements for settling disputes as a firsthand option.

Some of the restrictions may also affect other countries than the targeted and could be seen as discriminatory. For example, possible restrictions regarding public procurement, may affect goods, services or suppliers from other third countries. This could be the case for example if goods from a targeted country are supplied by a supplier from another third country. It could also affect EU suppliers who offer goods from a third country, or EU goods offered by a supplier from a targeted third country. We also note that there is overlapping with the EU proposal International Procurement Instrument (IPI).

We would like to emphasize that restricting intellectual property rights would be to restrict ownership in intangible assets, which could harm the innovation and investment climate. Intellectual property rights are also referred to in the EU´s Charter of Fundamental Rights (Article 17).

In general, the list of possible response measures should be analysed in relation to competence issues, and possibly shortened. It is preferrable that the Commission explains and exemplifies further regarding the possible measures. Is the list exhaustive?

Both natural and legal persons can be targeted. As regards restrictions on financial services and banking, access to Union capital markets etc, there may be overlapping with other instruments, such as sanctions. It cannot be ruled out that this could mean restrictions for free movement of capital between the EU and third countries.

The proposal's Annex II, Rules of origin

The rules of origin of goods, services and investments are found in Annex II. With regards to origin of services, it is not clear whether nationality or permanent residence will determine the origin for services for *natural* persons as the firsthand option.

As regards *legal* persons, the relationship and hierarchy between point 2 (ii) and (iii) needs to be clarified. The derogation regarding investments in point 3 (e) also needs clarification. There seems to be a risk that legal persons with commercial presence within the EU, which are engaged in substantive business operations within the EU and has a direct and effective link with that economy, is seen as originating in a third country. This due to nationality or place of permanent residence of the natural or legal person who own or control it.

Appendix.
Principles in Public International Law

Public International Law and the prohibition on intervention

Under public international law, there is *a prohibition on intervention*, which is part of customary international law.[55] The principle forbids "[s]tates or groups of [s]tates to intervene directly or indirectly in internal or external affairs of other [s]tates".[56] Pursuant to the principle of State sovereignty, a state is supposed to act freely on matters of political, economic social and cultural systems, and the formulation of foreign policy. An intervention contrary to any of these internal state matters is prohibited. The principle was initially drafted in Article 2(7) of the UN Charter, but has also been codified in the UN Declaration of 1970 on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. The latter is considered to reflect customary international law and has also been applied as such in a number of international disputes.[57]

The prohibition on intervention is built on the foundational principles of international law, i.e. sovereign equality, political independence and self-determination.[58] However, the exact content is unclear, but some argue that two elements need to be fulfilled for the principle to be violated: (i) the pursuing of unlawful ends, and (ii) through unlawful means. The unlawful means can consist of any policy tool, including military, economic, cyber, or political instruments.[59]

As regards economic coercion, not every type of economic pressure (direct or indirect) can be considered as forbidden. Pursuant to paragraph 2 of Principle III of the UN Declaration of 1970 on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, only economic measures that are designed "/…/to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind./…/" is forbidden.

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[55] Military and Paramilitrary Activities in and Against Nicaragua (Nicar. V. U.S.), Judgement, 1986 I.C.J. Rep. 14, (hereinafter *Nicaragua Case*), para. 202.
[56] Nicaragua Case, para. 205.
[57] Gaeta et al., *Cassese's International law,* Third Edition, Oxford University Press, 2020, p. 54. Article 2(7) of the UN Charter mainly prevents unlawful intervention of the UN in the internal matters of the UN Members, while the customary principle also concers the relations among states.
[58] M. S. Helal, *On Coersion in International Law, 52 N.Y.U. J. Int'l L. & Pol. (2019)*, p. 53.
[59] Helal.

Countermeasures and retortion in public international law

If a country has intervened in any of these internal state matters reserved for another state, the injured state has the right to take peaceful countermeasures or retortion under international law. First, however, as contemplated by the instrument, an injured state must request a reparation. If no reparation is made or it is considered unsatisfactory, the state should try to settle the dispute by peaceful means, by for example negotiations, conciliation, and arbitration.

The right to take countermeasure is codified in Articles 49 et seq. of the International Law Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts.[60] Pursuant to Article 49, states may implement countermeasures in the case of a violation of international law to induce the author of the violation to comply with its obligations. Article 22 stipulates that a breach of international law is justified if that breach is a countermeasure to an internationally wrongful act. This could possibly include breach of international trade law, but should be analyzed further.

It can be noted that countermeasures may generally not breach the rights of third States, which means that any treaty obligations granting rights to other States should not be breached. Amongst other things, any countermeasure must also be proportionate to the breach by the delinquent State.

Under public international law, injured states may also respond by retortion, by for example stopping or reducing trade and investment. A retortion is an unfriendly act, which does not amount to a violation of international law. However, such retortion must be (i) proportionate in gravity to the first conduct, and must (ii) discontinue as soon as the unfair, unfriendly or wrong behavior to which it is intended to react ceases.[61]

Although the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts have not been adopted as a binding treaty, they are generally considered to reflect customary international law and have been applied and referred to by international courts (including the ICJ) and tribunals.[62]

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[60] Adopted by the United Nations' International Law Commission at its fifty-third session, in 2001, and taken note of by the United Nations General Assembly in resolution 56/83, 28 January 2002.

[61] A. Cassese, *International Law*, Second edition, Oxford University Press, 2005, p. 310.

[62] Gaeta et al., *Cassese's International law,* Third Edition, Oxford University Press, 2020, p, 248.

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