European Commission's Impact Assessment – **Legislative initiative for an anti-coercion instrument**

AFEP CONTRIBUTION TO THE PUBLIC CONSULTATION

AFEP would like first to thank the European Commission for giving the opportunity to **submit comments in the context of the public consultation for the impact assessment of a legislative regarding the adoption of an anti-coercion instrument** in line with international law.

As already signalled in its comments on the roadmap published in February 2021, large French companies clearly **welcomes the preparation of such initiative**, announced in the joint declaration adopted at the sides of the revised Enforcement Regulation.

In complement to replies to the public consultation's online set of questions**, AFEP shares the following comments regarding the different aspects of the intended legislative proposal** on an anti-coercion tool, updating comments previously made on the roadmap:

Close coordination with the impact assessment on the revision of the Blocking Regulation and articulation between the two pieces of legislation

Large French companies have long advocated for a substantive revision of the Blocking Regulation with a view to effectively protecting EU businesses against measures with extraterritorial effects and increase its deterrence.

In this respect, AFEP strongly supports the **inclusion of extraterritorial sanctions and other extraterritorial measures in the scope of measures by third countries taken into account to decide on EU responses** ("triggers") under the proposal for an anti-coercion instrument (see below) and the **parallel initiative of a possible update of the Blocking Regulation regarding notably protective tools for businesses as well as non-trade retorsion measures**[1].

Large French companies deem **necessary that the two impact assessments are conducted hand in hand** and that the resulting legislative proposals bring forward an **optimum articulation of both legislations on adequate EU responses**. This consistency exercise should be **extended to the entire spectrum of policy initiatives proposed to increase the EU resilience** such as the much-expected set-up of an **EU resilience taskforce** that could work both on the uniform enforcement of EU sanctions as well on countermeasures to coercive measures by third countries (identification of coercive measures and possible countermeasures, assistance to EU companies facing coercive measures inter alia).

Regarding the substantive articulation between the two pieces of legislation, AFEP suggests **three possible directions** to achieve a real complementarity and avoid overlaps for responses against exterritorial effects.

First, EU legislators should make sure that the anti-coercion instrument focuses on **trade and investment responses** to extraterritorial measures whereas a strengthening of the Blocking Statute should aim at adding the possibility to **impose non-trade responses such as countersanctions (denial of visas, asset freezes)** and **easing the enforcement of remedies before EU and non-EU judicial bodies to make sure that EU companies are either exempted from coercive measures or compensated.**

[1] Key action 15 of the communication « the European economic and financial system : fostering openness, strength and resilience

Secondly, the anti-coercion instrument should be designed as a **short-term and rapid corrective** tool including for harms inflicted to the financial, banking and insurance sectors whose vulnerability to extraterritorial sanctions impacts all EU operators' behaviours on markets, while the Blocking Statue should remain a **mid-term protection shield against extraterritorial measures** providing for the nullification of extraterritorial measures in EU law coupled with enforcement mechanisms, judicial remedies, or an array of non-trade responses.

Thirdly, parallel impact assessments should determine which instrument is the most appropriate for providing a direct compensating mechanism for losses endured by the effect of extraterritorial measures. At this stage, two elements plead for lodging this mechanism under the umbrella of the anti-coercion instrument. On the one hand, the fact that EU countermeasures could consist in the imposition of additional tariffs would **provide a direct funding for such compensating mechanism**. On the other hand, placing a possible compensating mechanism under the anti-coercion instrument would also guarantee that **coercive measures that do not consist in extraterritorial measures also give way for compensation for EU companies.** Conversely, the improvement of the Blocking Regulation with respect to compensation can focus on the strengthening of judicial remedies in and outside of the EU. Within the EU, **the scope of assets likely to be seized could be expanded** whereas, outside of the EU, a **substitutive mechanism could allow the EU or Member States to seek damages or other remedies before foreign courts on behalf of EU companies**.

Notion and scope of coercive measures

The appreciation whether a measure is deemed to be coercive should not only focus on the intended effect on EU and its member states policies. EU companies are indeed faced on a regular basis with **abusive measures by third countries** such as extraterritorial measures or predatory extorsion of information or electronic data that are not ultimately directed at the EU and its Member States but **are designed to exert a disproportionate and/or unfair economic pressure on their activities** in the EU or abroad, potentially to target other countries (for example secondary sanctions). The definition of coercive measures retained in the regulation should capture such practices by third countries, notably by **taking into consideration the intended effects on EU financial and non-financial companies and the nature/intensity of trade and non-trade measures imposed on them, to the extent they can be regarded as a breach of international law.**

Intended effects other intended policy changes by the EU and its Member States could **cover significant impact on the way EU companies normally conduct their business** on the EU internal market or on foreign markets such a **brutal market eviction,** including by a **deprivation of banking, investments or insurance channels** resulting from such measures or **access to decisive assets that could not be obtained** via legal means, low-intensity trade and investment measures restrictive measures or other type of "regular" unfair competition that could be subject to trade defence mechanisms, EU rebalancing legislation such as future IPI or WTO/FTA dispute settlement mechanisms.

Eligible trade and non-trade coercive measures should cover:

- **extraterritorial measures adopted in violation of EU Member States sovereignty** (sanctions, export control or investment screening decisions with an extraterritorial reach);
- extraterritorial measures affecting the capacity to act on third countries'markets;

- a large spectrum of behaviours such as the adoption of **trade and investment restrictive measures** including refusal of licenses or authorisations, extorsive transfer of technologies and breach of intellectual properties rights, legal/illegal expropriation;
- **threats** of such measures as well as **intended administrative delays** for instance during certification processes, **excessive border controls** (acting as de facto export ban or custom duties) or
- **exercise of legal constraints** or **pressures** to abusively extract sensitive piece of information and data from EU companies and their staff in the context of **judicial procedures, prior criminal investigations by foreign prosecuting authorities** on the EU territory or in the jurisdiction of these third countries, or an extrajudicial context (administration retention, abductions).

Such list cannot be exhaustive or limited to official/published measures, since foreign countries resorting to coercive behaviours may deny that they derive from a deliberate policy. This is also an additional reason why the European Commission should **retain a certain room for manoeuvre in the material determination of these coercive actions**, using for instance an **approach based on a set of evidence** ("faisceau d'indices").

Procedures prior to the enforcement of the anti-coercion instrument

Assuming that the instrument's enforcement will likely be made contingent upon prior investigation procedures in potential coercion cases, large French companies insist that these procedures are **framed in time to allow for rapid actions** in case EU interests are deeply affected by coercive measures. A quick and swift assessment and response to these behaviours is indeed a key element to strengthen the deterrent effect of this tool.

EU companies being first in line to endure the economic damages inherent to coercive measures by third countries, AFEP also recommends that **investigation procedures could be initiated both ex officio and upon requests of impacted businesses.** The same way, if an EU interest for acting is required, this test should take into account not only the harm done on the EU and its member States sovereignty but also **economic damages, as well as the likely impact of EU responses**, including in terms of countermeasures adopted in turn by targeted third countries**.** This requires putting into place **a monitoring system** to quantify losses endured by EU businesses due to coercive measures and risks inherent to EU envisaged responses.

That being said, large French companies are **not in favour of setting a quantitative threshold to determine whether coercive measures should give way to EU countermeasures** under the anti-coercion instrument. Given the possibility to exert pressure via apparent low-scale measures, it is rather advisable to resort to a **qualitative assessment** using different set of **indicative criteria** ("faisceau d'indices") to determine whether coercive measures are to be regarded harmful.

In conducting this qualitative assessment, the European Commission should be left a large room for manoeuvre and not **be bound by a set of pre-established requirements limiting the scope of coercive measures that can give way to countermeasures** as referred in question 18 of the public consultation.

The **prior investigation phase should include a thorough stakeholder consultation** during which EU companies would be able to **share data on the impact of economic coercive measures** but also be given the opportunity to **participate in hearings on the nature and level of EU intended responses**, to share their view on their likely impact on their activities. This consultation process should take place at an early stage in the design of intended measures and rely on the publication of consultation notices by which the European Commission would detail the types of evidence requested as well as EU responses envisaged. **This is the reason why the consultation phase should last at least 20 to 30 days.**

EU Trade and investment responses

Large French companies agree that the anti-coercion instrument should mainly act as a deterrent and that trade and investment responses should be considered only if the threat of these measures is not sufficient to have EU trading partners backtracking, notably after an attempt to solve the issue by diplomatic means including a period left to the country in cause to discontinue coercive measures.

Such attempts **should however not delay the procedure towards the determination and enforcement of countermeasures**. They should therefore **be run in parallel with the investigation/consultation phase and subject to a short timeframe as well.**

The deterrent effect will much rely on the **credibility and the scale of trade and investment measures** that the EU is likely to roll out. This requires contemplating a very large scope of restrictive measures, covering **trade in goods** (both in terms of tariffs and non-tariff barriers), **trade in service**, **investment, IPR**, **government procurement and digital trade**. By contrast, the a priori exclusion of certain measures or sectors could undermine the instrument's credibility or efficiency.

Besides, a wide spectrum of countermeasures would allow the EU **either to reciprocate on the same type of trade and investment restrictions or to target the most sensitive sector in the non-EU country initiating coercive measures** to trigger a rapid withdrawal of these measures, according to a logic of **cross-retaliation**. Such flexibility is also needed to **define appropriate trade and investment countermeasures in response to non-trade measures** (such as legal constraint exerted against EU companies or their staff).

With a view to complying with international law and preventing further escalation, **EU countermeasures should be in principle proportionate to the economic harm inflicted to EU companies and economy**, based on the objective assessment methodology as referred above**.** Nonetheless, in case coercive measures make up for **a serious threat to EU essential interests**, the EU should be able to design non-proportionate countermeasures when such responses might be an efficient deterrent against later coercive measures and halt further escalation.

At the same time, the determination of EU responses should take into account the **likeliness of countermeasures by third countries** and be **calibrated with respect to the pre-existing trade relationship**. It would be advisable to avoid imposing restrictive measures on sectors for which the EU has a trade surplus to limit the scale of countermeasures by targeted countries.

To guarantee an efficient enforcement of EU countermeasures, AFEP suggests that **their imposition is subject to a flexible timeframe**, **combining incentives to withdraw coercive measures** and the **reactivity against non-cooperative third countries**.

The standard period for the imposition of EU countermeasures should be of 6 months, subject to a mandatory assessment whether the country in cause has appropriately removed its coercive measures by the end of the period.

When the European Commission notices that coercive measures have been maintained, three options would be available: (1) **extension of countermeasures for another period of six months based on a simplified non-objecting procedure** ("semi-automatic extension"), (2) **strengthening of countermeasures according to the initial comitology procedure** or (3) **decision not to extend initial countermeasures following the initial comitology procedure** if there are objective reasons to believe that they are not appropriate and/or are leading to an unwanted escalation, with the possibility to impose other measures.

Finally, as clarified above, French large companies are supportive of **a direct compensation mechanism for damages endured due to coercive measures and to EU countermeasures**, to be preferably lodged under the anti-coercion instrument.

About AFEP

Since 1982, AFEP brings together large companies operating in France. The Association, based in Paris and Brussels, aims to foster a business-friendly environment and to present the company members' vision to French public authorities, European institutions and international organisations. Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation is AFEP's core priority. AFEP has around 111 members. More than 8 million people are employed by Afep companies and their annual combined turnover amounts to €2,600 billion.

AFEP is involved in drafting cross-sectoral legislation, at French and European level, in the following areas: economy, taxation, company law and corporate governance, corporate finance and financial markets, competition, intellectual property and consumer affairs, labour law and social protection, environment and energy, corporate social responsibility and trade.

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