

Public consultation on the review of the EU blocking Statute (Regulation (EC) n°2271/96)

COMMENTS BY AFEP (FRENCH ASSOCIATION OF LARGE COMPANIES)

Large French companies **have long called for an overhaul of Regulation (EC) n° 2271/96** otherwise termed EU “blocking Statute” and therefore **welcome the launch of a public consultation by the European Commission on the review of this important piece of legislation**, opening the possibility to **develop new approaches to tackle extraterritorial measures by non-EU countries** and, in any event, to improve the functioning of the current tools available under this regulation.

AFEP would like to share the following comments with respect to the main features to be considered for the review of the blocking Statute, in addition to formal replies to the questions of the public consultation:

- **Strengthen deterrence based on countermeasures against non-EU operators rather than on blocking measures (prohibition clause) or existing judicial remedies**

The adoption of the blocking Statute back in 1996 -in the context of trade tensions arising from extraterritorial measures targeting Cuba- exerted at the time a deterrent effect. If this legislation might still be considered by foreign enforcement and/or judicial bodies not to impose sanctions against EU companies, **the deterrence of the blocking Statute has not proven effective against significant extraterritorial regimes such as secondary sanctions imposed by the United States against Iran, with important side-effects for EU and French companies**. The fact that **other third countries also adopt extraterritorial measures or blocking statutes with an array of strong countermeasures** also stresses the **need to base deterrence on another ground than the prohibition to comply with extraterritorial measures or other blocking measures**.

Moreover, blocking measures such as the **prohibition clause** have the major drawback to place EU companies in the difficult position to **choose between the economic harm inherent to not abiding with these third countries measures and penalties imposed by EU member States: they make up for a further vulnerability** instead of creating incentives for non-EU countries to scale down their extraterritorial measures. The same way, the current judicial remedies provided for by the blocking Statute is **not enough effective when it comes to the recovery of damages based on the seizure of foreign assets to impress third countries**.

Hence, the best way to gain on actual deterrence is certainly, as explored by the public consultation’s set of questions, to **build up a credible sheaf of potential countermeasures targeting goods, economic operators and nationals originated in the third countries** in cause, likely to **discourage such countries to impose or maintain extraterritorial measures applicable to EU businesses**. This should be the main axis in in the EU approach to extraterritorial measures by third countries.

With a view to tailor EU responses on a country-specific basis, large French companies suggest providing for the possibility to adopt **trade and investment restrictive measures** (including possible restriction on the movement of **goods, services, direct investment or data** or restrictions imposed **on intellectual property rights or the participation in public procurement contracts**). Such tools could be combined with **non-trade measures** such as **limitations imposed on the issuance of visa for business and investment operations in the EU**.

By contrast, AFEP suggests a **more cautious approach regarding the range of financial countermeasures to be considered**. Given the strong exposure of EU companies on international financial markets and the level of integration on the interbank markets, restrictions such as financial decoupling (restrictions on the free movement of capital between the EU and the country beyond direct investment flows) or exclusion of non-EU operators from EU financial markets **might prove disproportionate and/or harmful to EU companies**.

To make sure that EU countermeasures or the threat of countermeasures would actually induce de-escalation with third countries imposing extraterritorial measures, **it is advisable to provide for a fine-tuned political steering based on the inputs by EU companies** : the procedure leading to countermeasures should be **triggered either by EU businesses' complaints or ex officio by the European Commission and the European External Action Service (EEAS)** and include an **assessment on the proportionality and possible side-effect of measures being considered**.

- **Scale down the negative impact of blocking measures and penalties for EU companies and reduce the administrative burden linked to the enforcement of the blocking Statute**

If the upgrade of existing provisions of the blocking Statute is a secondary objective compared with the development of a “counter-measures pillar”, **the most harmful aspects of the regulation as it stands should nonetheless be amended toward an alleviation of constraints for EU companies**.

Large French companies therefore **oppose any additional measure aimed at ensuring a better compliance with the prohibition to implement extraterritorial measures** such a backlisting of infringing companies or an imposition of higher penalties in case of non-compliance, as suggested under question 21.1 of the public consultation. Companies are equally wary against the possible development of a new legal venue for the enforcement of the prohibition as proposed by the CJEU's advocate-general in the case “Bank Melli Iran against Telekom Deutschland” with the possibility for third parties to seek injunctions or damages before civil jurisdictions when a business has for instance terminated a contract based on extraterritorial measures. The set-up of such civil liability regime added to the penalties by Member States should be avoided.

By contrast, AFEP welcomes suggestions that **the scope of the prohibition to comply with extraterritorial measures is significantly reduced** either by a mechanism of **permanent block-exemptions** or through **moratoriums for sectors most impacted** by extraterritorial sanctions. The same way, proposals that an **application to be authorised to apply extraterritorial measures would suspend the prohibition until a decision by the European Commission is made** or even that companies would **enjoy a tacit authorisation if the European Commission has not returned a decision under a specific timeframe** are very appropriate.

On the front of administrative burden, large French companies are also supportive of the suggestion that **the notification referred under Article 2 of the blocking Statute would be regarded as an application for authorisation for sectors not being exempted from the start** and

that the European Commission would centralise all notifications, avoiding a double “filing exercise” for EU companies at EU and national level.

Regarding the imposition of penalties by Member States, AFEP recommends a **convergence towards administrative sanctions instead of criminal liabilities** and a **harmonisation of the level of sanctions across all Member States**.

- **Set up a compensation fund for damages underwent by individual companies**

Another important aspect for improving the functioning of the blocking Statute would be a **large overhaul of proceedings at disposal of individual companies for the compensation of damages underwent when abiding by the prohibition to apply extraterritorial measures**. As the exercise of companies’ rights for compensation through intra-EU judicial proceedings or before foreign courts prove extremely difficult, a review of the blocking statute should **definitively prioritise the set-up of a compensation fund at the EU level**. Such compensation fund should also cover damages resulting from **the observance of third countries’ own blocking statutes which create an additional burden on them**. Calculation of damages should include the administrative costs incurred in observing compliance processes but also a partial recoup of economic damages directly underwent due to extraterritorial measures or foreign blocking statutes.

Financing such compensation fund should of course rely first on resources obtained from third countries imposing extraterritorial measures or their economic operators. The EU or Member States could be subrogated in the rights for compensation of individual companies and exercise them in judicial proceedings either by requesting the seizure of foreign assets before national courts or request compensation before foreign courts especially when extraterritorial measures are likely to be regarded as illegal under the laws of the country in cause. Alternatively, or complementarily, the fund **could also be financed by a recycling of custom duties levied on goods originating from the third country** imposing extraterritorial measures or similar types of countermeasures as AFEP has also [proposed in the context of the legislative initiative on an anti-coercion instrument](#).

As a second best, the review of compensation proceedings could provide at least for **an optional legal substitution of Member States to individual companies in litigations before national and foreign courts** with the **refunding of companies when proceedings prove successful**. Such possibility would guarantee a **better balance in judicial proceedings** compared with the current situation in which individual companies often shy away from going to court given the meager legal prospects and possible negative fallouts in the country imposing extraterritorial measures. It is also worth explore how this solution of legal substitution could be combined with the introduction of punitive damages envisaged in the public consultation to significantly enhance civil damages lawsuits in the EU.

Finally, a review of the Blocking statute should also encourage and/or **impose EU Member States to support individual businesses facing litigations and criminal prosecutions based on extraterritorial measures**.

- **Adequately combine the review of the blocking Statute with the anti-coercion instrument in the making**

As already [indicated in the public consultation for the legislative initiative on an anti-coercion instrument](#), large French companies insist that a **consistent and comprehensive approach should be taken on extraterritorial measures across both pieces of legislation.**

In the event all the range of extraterritorial measures by third countries would fall within the scope of the anti-coercion instrument, AFEP maintains that it would make sense that **this instrument makes up for the main deterrence (via potential trade and investment countermeasures) and, possibly, direct compensation pillar of EU policy toward extraterritorial measures** while the blocking statute would continue to focus on additional non-trade countermeasures, the neutralization of legal effects of these measures and judicial remedies subject to the significant overhaul proposed above.

Given the uncertainty on the exact scope of the future anti-coercion instrument and notably the doubt whether extraterritorial measures not meant to obtain a policy change from EU and/or its Member States such as United States secondary sanctions against Iran would be covered, large French companies would nevertheless favor **the inclusion of economic countermeasures in addition to non-trade measures and new compensation tools in the blocking Statute at this stage of the preparation of both legislations.** AFEP will further update its position in the light of clarification brought on the anti-coercion instrument.

- **Set up an EU resilience taskforce**

As also highlighted in AFEP contribution in the public consultation for an initiative on an anti-coercion instrument, large French companies are of the view that a proper enforcement of such instrument as well as of the blocking Statute requires **the set-up of an EU resilience taskforce that could monitor the adoption of coercive measures, process the notification of extraterritorial measures, carry out the quantitative assessment of damages to individual companies and the EU economy as well as a cost-benefit analysis of potential countermeasures**. It could be also envisaged to entrust the EU resilience task force with the management of an EU-wide compensation fund as described above.

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 113 members. More than 8 million people are employed by AFEP companies and their annual combined turnover amounts to €2,600 billion.

Contact:

Marc POULAIN, International Trade Negotiations Director/ m.poulain@afep.com