European Commission's **proposal for a regulation on the protection of the Union and its Member States from economic coercion by third countries**

AFEP CONTRIBUTION TO THE PUBLIC CONSULTATION

AFEP would like first to thank the European Commission for giving the opportunity to **submit comments on its proposal for a regulation on the protection of the Union and its Member States from economic coercion by third countries**, adopted and published on 8 December 2021.

As already signalled in their contribution to the public consultation held prior to the publication of this proposal, large French companies **welcome the adoption of such initiative**, meant to increase the resilience of the EU economy when confronted with economic pressures by trading partners.

Many features of the proposal make up for **significant steps forward this direction**, namely:

- the possibility to qualify as coercive measures not only actual/enforced measures but **also threat to impose measures**,
- a **balanced procedure** combining **attempts to find a negotiated settlement** and the possibility to **impose countermeasures** in case of a stalemate,
- **a large scope of sectoral or individual economic countermeasures** to increase **the deterrence** of the instrument and
- the legal possibility to **obtain damages from natural and legal persons** of the third country directly involved in the preparation and implementation of coercive measures

With a view to contributing to the public debate, **AFEP shares the following comments regarding various aspects of the proposed regulation** that would require further elaboration during the upcoming legislative process:

- **Notion and scope of coercive measures**

With a view to qualifying coercive measures by third countries, the European has opted, under Article 2, paragraph 1, for a **cumulative approach**, combining **objective/quantitative criteria** to measure up an economic pressure built up on the EU companies and economic interests and **subjective criteria based** on the **intention of a third state** to exercise such pressure with the **aim to have the UE and/or its Member States' adopting, cease or modify specific acts.**

Large French companies still consider that core principles and existing instruments of international public law on this matter **allow to go beyond this intention to obtain specific policy choices by the EU and its member States**.

As coercion can be defined as a deliberate and forceful interference with the **ability of a country to act as an independent actor in international relations/subject of international public law** , the notion of coercive measures should indeed cover any behaviour interfering and/or harming the economic and legal sovereignty of the EU **and of its Member States including its substantive aspect such as its strategic economic interests** in addition to procedural ones (adoption of a particular act). Since Article 2, paragraph 1 and 2 already mentioned sovereignty as an essential criterion for the qualification of coercive measures, it would be worth **further clarifying** in these paragraph that **a behaviour altering any elements contributing to the exercise of EU and Member States 's sovereignty** is deemed to be coercive in the sense of the proposed regulation.

In this respect, most extraterritorial measures, even when they are not nominally referring to the EU and its members States as the explicitly targeted political entities **should be presumed to present a coercive feature based on this interference with these substantive components of EU and Member States 's sovereignty,** with, in addition, the understanding that the country exerting such pressure **cannot ignore**

the effects of its economic pressures on EU natural or legal persons or even **deliberately uses these pressure** against officially targeted third countries**.**

In any case, such a legal presumption should apply when **key strategic economic sectors** in the EU are severely affected by economic pressures, and especially **sectors** the protection of which is closely related to **national security and public order considerations** such as referred to in the **European regulation on foreign investment screening.** As a result, there would be **no need to identify a specific intention to obtain a policy's change from the EU or its Member States** when such **a harmful effect** of third countries' behaviours on EU **strategic economic sectors** would have been **ascertained** via the European Commission's investigations.

By the same token, hurdles deliberately opposed by third countries to the EU and its Member States when they act upon their **competence to protect their citizens abroad**, grounded in **treaty-based or customary diplomatic/consular protection**, should be regarded as **coercive**, without the requirement to demonstrate an attempt to obtain a proper policy change.

Consequently, the scope of the proposed regulation should be further clarified so that at least following behaviours are deemed to make for coercive measures:

- **measures adopted in violation of EU Member States economic sovereignty** in particular when hurting **sectors relevant for national security and public order in the sense of FDI screening**.
- exercise of 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** and, in any event, **legal or practical obstacles set up to prevent** EU Member states from **protecting their citizens during this judicial or prejudicial proceedings**

- **Consultation with countries imposing coercive measures before the adoption/enforcement of EU countermeasures**

Undoubtedly, international public law such as the United nation Charter condition the lawfulness of countermeasures against a third country's coercive measures to the determination of this country as being in the position of a mere "aggressor". Therefore, the EU should, before adopting any countermeasure, demonstrate its good faith notably through objective proofs that the targeted country has been given an opportunity to halt coercive measures and that the due process of law has been abided by, in particular with the possiblity to hear the observations of this country.

That being said, such procedural requirements **should not be conducive to excessive delays** in adopting or enforcing countermeasures, as third countries may **take advantage of these different mandatory consultative steps** to postpone the moment they would be hit by EU measures.

Without compromising the contradictory character of the procedure, large French companies suggest that several **"procedural shortcuts" are introduced** to **speed up the process** when the third country has been already provided with the possibility to react to EU investigations on whether its measures can be qualified as coercive or to EU intention to impose countermeasures.

For instance, the European Commission could be **exempted from the obligation** to:

- **engage in bilateral consultations with the third country** in cause as provided under Article 5 if the country has **not been responsive upon the notification that the European Commission is considering determining its behaviour as coercive** as provided under Article 3 or/and **upon the notification that the European Commission has adopted such determination** as provided under Article 4 or
- **call the country to cease the economic coercion** in the notification of EU countermeasures or **to set a differed date for the entry into force of EU countermeasures** when the country has not been responsive to any of the attempts to engage bilaterally already performed by the European Commission under Article 3, 4 and 5. Such flexibility is already foreseen under Article 7, paragraph 5, but subject to a proportionality test ("where this is necessary for the preservation of the rights and interests of the Union and Member States")

- **Consultation with stakeholders during the procedural steps leading to the adoption or amendments of the EU countermeasures**

As they are best placed to inform the European Commission on the extent of economic coercion, its effects on the EU economy as well as the likely impact of EU countermeasures, **stakeholders**, and, especially EU companies and their representatives, should be **consulted in depth before the determination of a behaviour as being a coercive measure**, the **adoption of EU countermeasures and the possible repeal/amendment of these EU measures.**

In this respect, without altering the ex officio procedure opted for the launch of investigation on possible coercive behaviours, provisions of Article 3 on the examination of third country-measures should be made **more specific regarding the possibility for individual companies /and or Member States to alert** the European Commission on these behaviours. The procedural rules on the examination should also **provide for the possibility to hold**, in addition to written submissions, **closed-door hearings on economic pressures exerted by third countries**, subject to the same confidentiality requirements as for the transmission in written forms.

The same way, the involvement of stakeholders in the **preparation, the repeal or the amendment to EU countermeasures** should be **strengthened along two main directions**.

Whereas Article 11, paragraph 3 provides that the consultation of stakeholders is mandatory, paragraph 6 leaves the European Commission the possibility to depart from this obligation based on imperative grounds of urgency (that would also justify the immediate entry into force of countermeasures under Article 7 paragraph 6). Given the importance of stakeholders' feed-back even in the situation of an emergency, **such waiver should be better framed and/or alternatively, a fast-track consultation procedure should be set up**.

As for the determination of a behaviour by a third country as a coercive measure, the consultation phase prior to adaption, the repeal or the amendment to EU countermeasures should provide for the **possibility to hold close-door hearings** in addition to written submissions requested from relevant stakeholders.

Finally, the confidentiality of written information submitted to the European Commission by stakeholders at all procedural stages of this instrument should be **further protected** via the set-up of a **secured encrypted information system, made available both for Member States and EU companies.**

- **Managing the risk of escalation in trade and investment restrictions**

The proposed regulation should in principle stave off possible escalations in trade and investment restrictions since Article 9 on criteria for selecting and designing EU countermeasures retains the proportionality of EU responses to the initial coercive measures as one of the main parameters for adopting countermeasures, along with the minimisation of negative side-effects.

Nonetheless, as some third countries might be tempted to react themselves in a disproportionate manner, the European Commission should be put in a position to **consider whether it is worth maintaining EU countermeasures, repeal them or opt for further measures** in case of harm to EU key interests. Such possibility is already allowed under Article 10 that governs the conditions for suspension, repeal, or amendment but **escalation as such has not been identified as a specific ground for triggering these provisions, while this is a key point of concern**.

It is therefore suggested to **complement Article 9 paragraph 2** on assessment criteria for EU responses, which is also applicable when the European Commission considers the amendment or the repeal of such responses, to **mention the fact that the third country in cause has escalated restrictive measures**. Likewise, **Article 11, paragraph 4** on information/views items to be collected from stakeholders should also **mention relevant data or views on risks or evidence of escalation by the targeted third country.**

- **Grant of damages to stakeholders hit by coercive measures**

As mentioned above, large French companies are appreciative of the inclusion of provisions allowing stakeholders hit by coercive measures to sue natural or legal person directly involved in the design or implementation of coercive measures for the grant of damages, when these persons have been subject to EU individual measures, when decided accordingly by the European Commission (Article 8, paragraph 1 (b) of this proposed regulation).

AFEP reiterates the suggestion made during the public consultation prior to the publication of this initiative that this judicial path is complemented by **the set-up of a EU-wide compensation fund** that would be easier to trigger for EU companies (especially small and mid-range businesses) and would be **exclusively financed by resources originated in the country imposing coercive measures : for instance by the revenues generated by EU tariff- based countermeasures and/or the seizure of assets of natural and legal persons targeted by individual measures by EU Member States**. By contrast, such compensation fund should **not rely on revenues stemming from the EU overall budget** or **from a financial contribution levied on EU companies as done in the past for several guarantee funds** established under EU financial and banking regulations for instance. Additionally, rules governing the grant of damages under this compensation fund should clearly **discourage moral hazard in EU companies' risk exposure** in concerned countries.

In any event, regarding the entitlement to recovery for stakeholders referred to in Article 8, **several amendments could be made** to the proposed regulation to **ease the access to judicial proceedings** before Member States' civil courts.

First of all, French large companies suggest that **this entitlement should be made automatic against natural and legal persons of a third country targeted by EU individual measures** and **meeting the requirements of Article 8, paragraph 2 (b)** ("such person is connected or linked to the government of the third country concerned and has additionally caused or been involved in or connected with the economic coercion") hence, **without the requirement of a specific decision by the European Commission** as currently provided for.

Secondly, Article 8 provisions on this entitlement need to be **made much more specific so that EU companies can effectively act upon them in civil courts**. Difficulties met by EU companies in seeking damages based on the "recovery tool" provided for in the Blocking regulation (Article 6 of this regulation) – although these provisions are already more detailed than in the proposed regulation- show that a too vague definition of assets or of civil law measures are an obstacle to a proper enforcement of such compensation scheme.

As a result, AFEP suggest that the regulation clearly **mention categories of assets** that could be targeted in civil lawsuits, **types of civil law proceedings that could be initiated** against persons subject to EU individual measures and a **reference to relevant EU secondary law applicable to determine the competent jurisdiction in Member States**, should individual measures adopted by the European Commission be more detailed depending on the nature of natural and legal persons targeted by individual sanctions as well the specific assets they are likely to detain within the EU.

Finally, as judicial actions even within the EU might be sensitive for EU companies when natural and legal persons targeted by individual measures play an important part in the third country state's machinery or/and have direct connections with political leaders, Article 8 should also include provisions on **possible legal subrogation/substitution by the European Commission or Member States** in the right of EU companies to **initiate these actions before EU civil courts on their behalf**.

- **Articulation with the upcoming proposal for a revision of the blocking regulation**

In the event a large range of extraterritorial measures by third countries could be regarded as coercive measures in the sense of the proposed regulation as requested above, AFEP maintains that it would make sense that this **instrument makes up for the main deterrence (via potential trade and investment countermeasures)** 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.

In case the notion of coercive measures should remain strictly confined to behaviours aiming at a policy change of the EU and its Member States, 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 scope of proposed anti-coercion regulation during the legislative process.

This would **redress the current situation** in which EU companies find themselves caught between third countries sanctions and the prohibition to comply with them imposed by the blocking regulation, resulting in **an extreme compliance and economic pressure on individual companies without any concrete outcome in terms of deterrence and balance of powers**.

- **Set up an EU resilience taskforce**

As already mentioned in AFEP contribution to the public consultation prior to the adoption of the proposed regulation, large French companies are of the view that a proper enforcement of such instrument as well as of the blocking regulation requires **the set-up of an EU resilience taskforce** that could:

- monitor the **adoption of coercive and other extraterritorial measures by third countries**,
- **coordinate the investigation on these 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**
- **coordinate the enforcement of EU measures across the board (sanctions, countermeasures, access to funding, licensing and so on)**

The establishment of such taskforce is even more a priority in current circumstances: the development and diversification of trade defense and other responsive tools (enforcement regulation, blocking statute, the upcoming anti-coercion tool and the IPI) and the emerging issue of resilience require a solid **interinstitutional "control tower"** with strong cross-sectoral **economic and geopolitical assessment capacities.**

At some point, it could be also envisaged to entrust the EU resilience task force with the supervision of the EU-wide compensation fund mentioned above.

competition, intellectual property and consumer affairs, labour law and social protection, environment and energy, corporate social responsibility and trade.

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