COMMISSION PROPOSAL ON COERCIVE ACTION BY NON-EU COUNTRIES: ONE FURTHER STEP IN EUROPE'S AFFIRMATION ON THE GLOBAL STAGE?

INTRODUCTION

Member States have recently been subject to coercive practices, notably in the fields of economic policy (digital tax, solar panels, Huawei and 5G), foreign policy (Iran) and energy policy (NordStream2). Such measures take several forms and, through economic sanctions or blackmail, aim at wringing out a determined behaviour from the targeted State in the essential spheres of their sovereignty.

These actions interfere with the freedom of States to freely define their policies in accordance with their international commitments, and encroach on the exercise of their sovereignty, often in strategic sectors. In theory, each State is recognised as having this sovereignty. However, this sovereignty must be "operational", absent which it is an empty shell.

Absent an existing adequate tool, the Commission opened the consultation process concerning the adoption of an anti-coercion instrument ("ACI") on 23 March 2021. Following the consultation, the Commission published its proposal for the Regulation on 8 December 2021. The ACI sets out a list of countermeasures that may be adopted to deter and counteract coercive action on part of third countries in order to guarantee the EU's rights to define and implement its policy choices, as well as the procedures for doing so.

The ACI aims at complementing the EU's toolbox to (re)act on the international arena, in conformity with international law. The key objective is deterrence of coercive action in the first place. Thus, the proposed countermeasures are strong: restricted access to the European market, erection of high tariff barriers, or exclusion from public procurement are there to discourage coercive action. It is, however, a means of last resort. Prior consultation with the aggressor State and the possibility for it to withdraw measures thus have to be explored first. Second, prior to the adoption of countermeasures, consultation with stakeholders and assessment of the efficiency and possible escalation must also be considered. Finally, countermeasures must be proportionate and the resolution of the conflict through international fora must be pursued in parallel of their application. Countermeasures must be withdrawn as soon as the originating action has been terminated.

THE COMMISSION'S PROPOSAL FOR AN 'ANTI-COERCION' INSTRUMENT

The Commission's proposed anti-coercion measures would be triggered whenever a third country "*interferes in the legitimate sovereign choices of the Union or a Member State by seeking to prevent or obtain the cessation, modification or adoption of a particular act by the Union or a Member State by applying or threatening to apply measures affecting trade or investment*", in particular taking into account the "*intensity, severity, frequency, duration, breadth and magnitude of the third country's measure and the pressure arising from it*" and the extent to which sovereign rights are affected (Article 2).

Autonomous capacity to promptly react

Absent relevant international rules, or in the face of violations of existing rules, Europe must be equipped with an autonomous capacity to promptly react to coercive measures by third countries. This is not an alternative to international reforms, but to safeguard Europe's position, at least until new relevant rules can be adopted.

The choice of Article 207 TFEU as the legal basis for the proposed ACI sets it under the EU's commercial policy. The proposed ACI allows the Commission to adopt countermeasures through implementing acts, increasing the potential for rapid counteraction. The Commission adopts the delegated acts after consulting a group of experts and subject to a vote in accordance with the examination procedure of the Comitology Regulation (negative qualified majority needed to prevent adoption).

When the Commission makes a formal finding that the actions identified constitute coercion (Articles 3 and 4), in accordance with international law, the Commission should then grant the aggressor country an opportunity to withdraw its coercive actions, prior to adopting countermeasure (Articles 5 and 7). If the coercing country refuses to desist, the Commission sets a deadline by which the third country must abide. In parallel, it defines the countermeasures that may be adopted. Before doing so, the Commission must carry out a consultation of stakeholders prior to the adoption of any measures under the proposed ACI.

Where coercive action has not ceased by the lapsing of the deadline, countermeasures enter into force. Such measures would be withdrawn as soon as the coercive action ceases or where the application of countermeasures is no longer in the Union interest (Article 10(4)), and the issue would be addressed through international fora while countermeasures are in force.

Autonomous capacity for unified reaction

Internal divisions lead to separate and ineffective reactions because they lack force and, consequently, credibility. There is a single market, there must be a single, unified, reaction. In furtherance of this objective, the proposed ACI is placed under the Union's trade policy, which should ensure unity of action.

Autonomous capacity for credible reaction

The European countermeasures cannot be a "paper tiger" as we have seen with the Blocking Regulation and the INSTEX mechanism in the area of extraterritorial sanctions. Absent a genuine reaction capacity, coercive practices of third countries will become increasingly aggressive. For countermeasures to be credible, they should:

a) be **adopted at the level of the entire single market:** It is only by exploiting its position as the largest trading bloc in the world that Europe can really dissuade third countries from adopting coercive practices against European countries (as the U.S. leverages access to the U.S. market with regards to sanctions).

b) **hit where it really hurts**: They must be specific, precise and defined in advance in order to avoid the creation of distortions in the markets and ensure their legality under international law. The Commission's proposed ACI contains the following possible **countermeasures** listed in Annex I: **suspension of international obligations** and:

- increased customs duties and restrictions (quotas, licenses, others) on the import, export or trade of goods (in transit); restrictions on trade in services; foreign direct investment; IP rights;
- suspension of public procurement concessions;
- restrictions for banking, insurance, access to Union capital markets;
- suspension of food and chemical safety authorization procedures;
- restrictions on Union-funded research programmes;

These options must be weighed against their proportionality, expected effectiveness, potential for relief to those targeted by coercive action, the avoidance of escalation and other criteria which may be relevant under international law (Article 9). The Commission may add other measures through delegated acts.

That said, the proposed instrument's first and **foremost aim is to deter** any coercive action on part of third countries. The adoption of countermeasures should only be used in last resort. However, the dissuasive potential of the instrument may be questioned in light of the EU's past track-record, not least the EU Blocking Regulation. For the ACI to truly show its deterrent character, a real and strong application of the instrument might first be necessary to demonstrate the Europe's will to use it when needed.

c) acknowledge the exploitation of economic issues for geopolitical purposes is increasing, which implies that **companies are increasingly actors on the global geopolitical stage and will have to take sides**.

This implies both support for companies that comply with EU countermeasures and sanctions against companies and individuals carrying out the coercion, possibly, though unlikely, extended to those who choose to comply with third states' enforcement actions rather than EU and/or national countermeasures.

This understanding of private actors' role in the geopolitical arena appears in the proposal as it provides for the possible adoption of sanctions against those persons or entities that are linked to the aggressor State and/or who participate in the exercise of coercion (Article 8(1)).

In such a case, the proposed ACI provides for those persons or entities affected by coercive action on part of a third state to "*recover, from persons designated* […], *any damage caused to them by the measures of economic coercion up to the extent of the designated persons' contribution to such measures of economic coercion*". However, contrary to requests in the public consultation, the proposed ACI does not provide for compensation to companies affected by the third countries' coercive actions.

PRELIMINARY APPRAISAL OF THE COMMISSION PROPOSAL

Turning point participating in a deeper trend

The Commission's proposal clearly participates in **wider trend to strengthen the EU's position** on the international stage to uphold its international commitments on the one hand, but also to stop serving as a doormat for those who do not respect these commitments, or who refuse to participate in good faith in the construction of updated international rules, for example at the WTO. In doing so, the Commission increasingly relies on international public law as the *lex generalis* in which the different agreements and commitments operate.

This same trend underpinned the adoption of the **Enforcement Regulation**, allowing for the adoption of trade retaliation in the absence of WTO compliance or refusal to have recourse to arbitration in the absence of a functioning Appellate Body, the tackling of transnational subsidies (with much emphasis on international public law) in anti-subsidy investigations such as Glass Fibre from Egypt and the PRC or the announced revision of the EU Blocking Regulation to address extraterritorial sanctions.

Nevertheless, it should be noted that **this instrument, if adopted, would constitute a turning-point**. This is true not only with regards to the EU's ability of acting on the international stage to uphold its interests and react against coercive action on part of third countries, but also in that the European Commission would be endowed with the exercise of genuine foreign policy powers. The adoption of the proposed regulation would mark a real shift in the exercise of powers between the EU and its Member States in the highly sensitive area of foreign policy which lies at the very core of State sovereignty.

By taking Article 207 TFEU as legal basis, the Commission ensures that the decision-making mechanism provided for in the ACI allows for the adoption of decisions in the absence of unanimity in the Council. In the

proposal, the Commission has all the powers: to adopt countermeasures through implementing act. While it can be understood as it avoids political manoeuvring in the Council across Member States (often divided on these issues, see e.g. NordStream 2), though at the same time is a big political responsibility.

This is clearly one of the points on which Member States will insist in the legislative process as to have control on the final decisions. Ultimately, the proposal could end up with a more traditional adoption process including for instance a Council decision with a majority to be defined. Indeed, given the political sensitivity for Member States of recent cases where anti-coercion could have been mobilized, and the frequent links with defence and security issues for which Member States retain the exercise of sovereignty, it seems likely that they will insist on keeping control of the decision process.

Relation with international and WTO law

What is sought under the ACI is not a multiplication of unilateral measures, but only credible and effective countermeasures, within the framework of public international law, when another country decides, first, to take measures forcing another state to change its behaviour in the field of its sovereign rights. Such a view is also supported by recitals 10-11 of the proposed ACI Regulation.

Not only is the adoption of such anti-coercive measures in line with public international law, but it does not contravene other obligations undertaken by EU Member States in the international legal order, in particular in the WTO framework. States have not entrusted the WTO with the competence to resolve geopolitical conflicts (this is very clear from the negotiating history of the GATT and its Article XXI in particular). WTO law cannot be used to paralyse legitimate action by the EU and its Member States to secure its sovereignty from external pressure.

Just as public policy, security or other exceptions under Article XX of the GATT cannot be invoked when the real purpose of the measures is to engage in economic protectionism, **WTO law cannot be invoked to cover up with a commercial veil disputes whose real purpose concerns the infringement of state sovereignty**, not trade concessions and obligations subscribed to in the WTO. Thus, the anti-coercion instrument is not intended to override or replace WTO law, but to complement it. Such is also apparent from the multilateral action envisaged in the proposed ACI (Article 6) to end coercive practices at multilateral level. Challenges on compatibility with international commitments, particularly with WTO law, might be expected on part of third countries, but the proposed ACI is designed to ensure its compliance with relevant international rules , as is the case for the Enforcing Regulation.

Scope of the proposal and role for private actors

The Commission defines coercive practices quite broadly, but **limits** them to issues of coercion materialising through **trade or investments measures**. Further, it is noted that coercive action must be directed at the EU and/or its Member States, not private companies, for the application of countermeasures to be triggered. However, depending on the targeted company, its strategic character, link to the State, etc., potentially, coercive action targeting private companies could fall within the scope of coercion as defined in the proposed instrument.[1]

Furthermore, much hinges on the exact understanding of an EU or Member State "act" the adoption of which the aggressor state would seek to prevent through coercive action: Should it be a legal act, a government decision or legislation, the mere adoption of a policy or a position in international fora? The Commission has

[1] This seems to be supported by the Commission's Q&A on the ACI.

just adopted Global Gateway, a big package of investment measures designed to challenge the Chinese Belt & Road. If China took measures to prevent the EU from adopting this strategy, would this qualify for anti-coercion measures? The proposed ACI does not explicitly address such a possibility.

As it is the manner and intention with which third State measures are used that is the key element in assessing the coercive nature of these measures, not (only) their form, one could advocate for a broader definition of coercion, whether or not it materialises through trade and investment measures only.[2]

For companies and industry associations, the proposed ACI appears to limit their involvement to the **consultation and information-gathering**, possibly under the seal of confidentiality, prior to the adoption of countermeasures, particularly with regards to "*the impact of such measures on third-country actors or Union competitors, users or consumers or on Union employees, business partners or clients of such actors*", the administrative burden involved and Union interest (Articles 11(4) and 12). Nevertheless, they may also **alert** the Commission on coercive measures to push the Commission to initiate the process (Article 3(2)), though the proposed ACI does not provide for a formal channel of complaint. The establishment of a so-called "resilience bureau" has also not be retained at this stage.

Tackling extraterritorial sanctions

Some participants to the public consultation raised doubts about soundness of a distinction between the tackling of extraterritorial sanctions on the one hand, and of coercive measures on part of third countries on the other.

No decisive argument, however, has been made to not include these measures in the scope of the ACI. Experience with U.S. extraterritorial measures shows that their purpose goes beyond preventing foreign companies from undermining the sanctions' effectiveness. Rather, they also pressure third countries to align with U.S. sanctions and foreign policy, and thus, such extraterritorial application of U.S. sanctions indeed constitutes coercive action on part of a third country that could fall under the anti-coercion instrument.

At first, the European Commission had not considered these to be included in the scope of the anti-coercion instrument. In the meantime, it has, however, announced it is considering revising the EU Blocking Regulation with a view to more effectively tackle extraterritorial sanctions.[3] The possibility of integrating the revised Blocking Regulation in the new anti-coercion instrument was also aired, a possibility not followed-up on as the proposed anti-coercion instrument does **not cover extraterritorial sanctions**. Nevertheless, it seems that the European Commission has not fully closed the door on such sanctions being covered by the ACI.

The combination into a single instrument presents obvious advantages: it could extend the "blocking" to issues other than extraterritorial sanctions (anti-corruption investigations and extraterritorial export controls), and thus be a useful complement to the retaliatory measures that would be adopted under anti-coercion *stricto sensu*. However, DG FISMA is in charge of the proposed revision of the Blocking Regulation, whereas DG Trade is in charge of the proposed anti-coercion mechanism, which could make such a combination more difficult. At the very least, the two instruments should be carefully articulated.

---

[2] See UNGA Resolution 2131 of 21 December 1965 which declares that "*no State may apply or encourage the use of economic, political or any other type of measures to coerce another State to subordinate the exercise of its sovereign rights or to obtain from it advantages of any kind*". Such a definition could be accompanied by an illustrative list of elements that may be taken into account in assessing whether third country measures constitute coercive action.

[3] Unlawful extra-territorial sanctions – a stronger EU response (amendment of the Blocking Statute) (europa.eu).

NEXT STEPS & CONCLUDING REMARKS

The European Parliament and the Council will now continue the legislative process. At the **European Parliament**, the INTA Committee will have the lead. Berndt Lange, INTA Chair, is rapporteur, Anna-Michelle Asimakopoulou, Vice-Chair, has been assigned the role of shadow rapporteur, and Marie-Pierre Vedrenne will act as shadow rapporteur for the Renew political group.

Chair Lange has recently expressed his views on the need for the instrument and appears in adherence with the three principles outlined above of prompt, unified and credible action. He also stressed the instrument participates in a wider trend, with the Enforcement Regulation, for the EU to catch up with the geopolitical reality of global affairs. It is thus expected that Parliament will support the adoption of the instrument, though amendments are to be expected.

It is expected that the Proposal will be pushed forward during the **French Presidency of the UE** as it squarely falls within the three themes of "*recovery, power, belonging*" around which France will centre its presidency. As the proposal falls under trade policy, only a majority vote would be needed in the Council to adopt the Regulation. As the proposal reportedly has the backing of Germany, the proposal stands a good chance for adoption in the **Council**, though countries such as the Czech Republic, Estonia and Sweden seemed to express concern at compatibility with WTO rules and the critical role played by the Commission in the use of the proposed instrument, possibly at the detriment of the Member States' foreign policy positions and other countries, including Italy, appear lukewarm. Other countries, like Japan, have raised concerns of compatibility with international commitments.

It is not for the Member States and their companies to bear the weight of third countries that do not uphold reciprocal relations or do not abide by their commitments as the EU does. If some do not accept to trade and act by the rules (at the WTO, but not only), they should expect a response. For many foreign companies, a withdrawal or suspension of authorisation or licence to operate on the EU market, the erection of high tariff barriers, or exclusion from public procurement would have a real deterrent effect because of the dramatic consequences of such measures for many companies.

In the end, if it is clear that EU regulations are not a sufficient condition to give substance to a Europe willing and capable to stand for itself, it is just as clear that these texts are a necessary first step, as demonstrated, for example, by the U.S.

CONTACTS

Olivier PROST
prost@gide.com

Agnieszka NOSOWICZ
agnieszka.nosowicz@gide.com

Anna DIAS
anna.dias@gide.com

Arnaud VAN DE PUTTE
arnaud.vandeputte@gide.com

Clément BOUVAREL
clement.bouvarel@gide.com

Marie PARYS
marie.parys@gide.com