

Legal Update

European Commission Unveils Its Anti-Coercion Instrument Proposal

On December 8, 2021, the European Commission (“Commission”) unveiled its much-teased proposal for an anti-coercion instrument, formally titled the “Proposal for a regulation on the protection of the Union and its Member States from economic coercion by third countries” (“Proposal”).¹

Already announced in the State of the Union 2020,² the Proposal builds on a Joint Declaration of the Commission, the Council and the European Parliament of February 2, 2021,³ as well as extensive stakeholder consultations carried out in 2021.⁴ It is a direct response to what the Commission perceives as the rising weaponization of trade in a geo-economic context, where third countries unduly interfere with the policy choices and sovereignty of the European Union (“EU”) or its member states.

If the Proposal is adopted, the Commission would possess far-reaching tools to dissuade or offset coercive actions by third countries, through deterrence, negotiation, threats of countermeasures and—as a last resort—actual countermeasures. The Proposal constitutes one of the most significant improvements to the EU’s trade arsenal and reflects the Commission’s ambitions for an EU open strategic autonomy and a more assertive role on the geopolitical scene.

1. Ensuring the sovereignty of the EU and its member states: What kind of economic coercion is targeted by the Proposal?

The Proposal seeks to tackle situations where a third country (i) interferes in the legitimate sovereign choices of the EU or a member state by seeking to prevent or obtain the cessation, modification or adoption of a particular act by the EU or a member state (ii) by applying or threatening to apply measures affecting trade or investment (“coercive measures”).

The definition is intentionally broad to cover both formal and informal measures of economic coercion in the form of trade or investment restrictions. It is also not limited to any specific sector and could therefore apply to any field in which the EU or its member states are active. Finally, this definition should cover not only actions having effects within the territory of a third country but also actions taken by the third country, including those having effects through EU entities that it controls or directs.

Examples of coercive measures that have been provided include “*extra, discriminatory import duties, intentional delays, or refusing authorisations needed to do business,*”⁵ as well as the use of “*explicit*

coercion and trade defence tools against the EU, to selective border or food safety checks on goods from a given EU country, to boycotts of goods of certain origin.”⁶

As a result, the Commission will have an important margin of discretion in identifying what constitutes a coercive measure. The Proposal, however, suggests several criteria to be assessed, namely:

- The intensity, severity, frequency, duration, breadth and magnitude of the third country’s measure and the pressure arising from it;
- Whether the third country is engaging in a pattern of interference seeking to obtain from the EU or from member states or other countries particular acts;
- The extent to which the third country measure encroaches on an area of the EU’s or member states’ sovereignty;
- Whether the third country is acting based on a legitimate concern that is internationally recognized; and
- Whether and in what manner the third country, before the imposition of its measures, has made serious attempts, in good faith, to settle the matter by way of international coordination or adjudication, either bilaterally or within an international forum.

2. Favoring the carrot over the stick: What are the processes under the Proposal to dissuade or offset economic coercion?

First and foremost, the Commission hopes that the simple existence of an anti-coercion instrument would dissuade third countries from adopting or threatening to adopt coercive measures, with the mere possibility of countermeasures acting as a credible deterrent against such measures.

Nonetheless, should dissuasion fail, the Proposal provides for the implementation of a four-step process to be triggered as soon as a third country adopts or threatens to adopt coercive measures. As summarized in the Commission’s press release, *“The anticoercion instrument is designed to de-escalate and induce discontinuation of specific coercive measures through dialogue as a first step. Any countermeasures taken by the EU would be applied only as a last resort when there is no other way to address economic intimidation.”⁷*

The four-step process can be summarized in four words, “assess, talk, warn, strike”:

- As a first step, the Commission would examine whether a particular third country measure qualifies as a coercive measure, either on its own or following information received from any source.

As part of this examination, the Commission would be entitled—but not obliged—to request information from third parties, including by publishing a notice in the *Official Journal of the EU* or other means of public communication.⁸

Should the Commission consider that a coercive measure exists, it would be required to adopt a public decision.⁹

- As a second step, the Commission would be “open” to enter into negotiations with the relevant third country, either through direct negotiations, mediation, good offices or international adjudication. The objective would be for the coercion to cease.
- As a third step, if no amicable or adjudicated solution is found,¹⁰ and if action is deemed necessary and in the Union’s interest, the Commission would be able to adopt an act detailing:
 - (i) the countermeasures to be adopted; and
 - (ii) a set deadline for their application.

The third country would have to be notified of this act and of the option to cease coercion, negotiate or face the countermeasures. The effective implementation of the countermeasures may then be deferred, in case of indications that coercion ceased, or terminated, in case coercion ceased, before the deadline set by the Commission.

- As a final step, if coercion has not ceased before the set deadline, countermeasures would start being applied.

As an exception, the Proposal foresees that countermeasures may be immediately applied when this is necessary for the preservation of the rights and interests of the EU or member states, notably of the effectiveness of countermeasures.

The Proposal clearly favors de-escalation and agreed-on solutions. Even if countermeasures are adopted, the Commission would have to remain open to engage with the relevant third country in order to obtain the cessation of the coercion measure, with the option to suspend the countermeasures.

The Proposal also pushes for international cooperation and multilateralism, as the Commission would be required to (i) raise the issue of coercive measures in relevant international fora and (ii) consult or cooperate with other countries affected by coercive measures, like-minded partners and allies.¹¹

3. Taking the gloves off as a last-resort solution: What countermeasures would be available to the Commission, and how should they be adopted?

3.1 NATURE OF THE COUNTERMEASURES CONTEMPLATED BY THE PROPOSAL

To ensure an effective deterrence and—where needed—response, the Commission would be empowered to adopt a wide array of countermeasures, that are to be detailed in an Annex I,¹² as well as any measures that it can take pursuant to other legal instruments.

The potential countermeasures are far-reaching and include (i) tariff measures; (ii) import or export restrictions; (iii) restrictions on trade in goods, including on transit or internal measures applying to goods; (iv) restrictions on participations to tenders, including exclusions therefrom or application of price penalty; (v) additional export control restrictions; (vi) restrictions on services; (vii) restrictions on foreign direct investments; (viii) restrictions on intellectual property rights; (ix) restrictions on financial services, including access to EU capital markets; (x) restrictions on chemical or sanitary and phytosanitary registrations or authorizations; or (xi) restrictions on access to or exclusion of EU-funded research programs.

Among the measures that can be taken under existing legal instruments, the Commission is also considering the option to restrict EU funding to third countries, as indicated in a communication to the European Parliament and the Council accompanying the Proposal.¹³

Furthermore, the Proposal would allow the Commission, where necessary to avoid circumvention, to also adopt countermeasures targeting services supplied, or direct investments made, within the EU by one or more legal persons established in the EU and owned or controlled by persons of the third country concerned.

In the Proposal, the Commission also suggests that it should be empowered to expand the list of countermeasures in Annex I where other countermeasures would (i) be as effective or more effective to induce cessation of the coercive measures, (ii) provide as effective or more effective relief to affected EU operators or (iii) avoid or minimize the negative impact on affected actors or administrative complexity and costs.

3.2 TARGETS OF THE COUNTERMEASURES CONTEMPLATED BY THE PROPOSAL

The natural target of countermeasures would be the coercing third country as a whole, which would apply to specific goods, services, service providers, investments or intellectual property right holders “originating” in that third country, as per rules of origin to be detailed in an Annex II.

In addition, the Proposal would entitle the Commission to adopt specific countermeasures against certain legal or natural persons. More specifically, the Commission would be empowered to designate, based on relevant criteria and available information,¹⁴ and after having invited them to submit observations.¹⁵

- Legal or natural persons connected or linked to the government of the third country concerned (“Targeted Persons”);¹⁶ and
- Targeted Persons that have caused or been involved in or connected with the economic coercion (“Coercing Targeted Persons”).

Furthermore, while Targeted Persons could be subject to countermeasures, Coercing Targeted Persons could be subject to actions for damages resulting from the coercion measures up to the extent of the Coercing Targeted Persons’ contribution to such coercive measures.

3.3 CRITERIA FOR THE SELECTION OF MEASURES UNDER THE PROPOSAL

The Proposal sets forth a number of criteria to be considered for the selection and design of countermeasures, thereby ensuring tailor-made responses. Countermeasures should therefore be:

- Proportional to the injury suffered by the EU or its member states;
- Effective to induce the cessation of coercion;
- Suitable to provide relief to EU economic operators;
- Adequate to avoid or minimize the negative impact on (i) EU operators; (ii) other EU policies or objectives; or (iii) excessive administrative burden and costs;
- In light of countermeasures adopted by other countries affected by the coercive measures; and
- In compliance with international law, including, therefore, World Trade Organization (“WTO”) law.

Additional criteria would have to be considered in cases where countermeasures target services supplied, or direct investments made, within the EU by one or more legal persons established in the EU and owned or controlled by persons of the third country concerned.¹⁷

3.4 MECHANISMS AND VOTING RULES FOR THE ADOPTION OF COUNTERMEASURES PURSUANT TO THE PROPOSAL

While the Proposal favors diplomatic solutions over countermeasures, it acknowledges the need for the EU to be in a position to swiftly impose countermeasures, if and when needed.

Countermeasures are therefore to be adopted on the basis of implementing acts, subject to the examination procedure under the EU’s comitology rules.¹⁸ In essence, the Commission would be entitled to adopt countermeasures if they are approved by a committee consisting of representatives of the 27 member states, by a qualified majority vote.¹⁹

On duly justified imperative grounds of urgency to avoid irreparable damage to the EU or its member states by the coercion measures, the Commission would be entitled to adopt an immediately applicable implementing act, for a duration of up to three months, meaning that the act can be adopted first and then submitted to the relevant member states committee.

This is a significant departure from the unanimous voting rule that applies when the EU intends to adopt foreign policy tools.²⁰ The unanimous voting rule has been criticized in the past for allowing member states to block the adoption of swift and assertive actions, e.g., in the field of economic sanctions.

3.5 AMENDMENT, SUSPENSION AND TERMINATION OF COUNTERMEASURES UNDER THE PROPOSAL

The Proposal would require the Commission to continuously monitor coercive measures and EU countermeasures, with a view to:

- Amend countermeasures, where necessary;
- Suspend countermeasures in cases where (i) the third country suspends its coercive measure, (ii) suspension is necessary in the Union's interest or (iii) the matter is referred to international adjudication and the third country also suspends its coercive measure.
- Terminate countermeasures if (i) coercion has ceased, (ii) an agreement has been reached, (iii) a binding international adjudication requires the EU or its member states to withdraw the countermeasures or (iv) termination is necessary in the Union's interest.

The mechanisms and voting rules for amending, suspending or terminating countermeasures would be the same as for adopting them.

3.6 STAKEHOLDER INVOLVEMENT IN THE DESIGN AND IMPLEMENTATION OF COUNTERMEASURES UNDER THE PROPOSAL

The Proposal foresees a mandatory information gathering process for the adoption or amendment of countermeasures, along with an optional one in cases of suspension or termination.²¹

The process would start with the publication of a notice in the *Official Journal of the EU* or another means of public communication with a view to gather information on the impact of countermeasures, the interaction of countermeasures with member state legislation, the administrative burden caused by countermeasures and whether their adoption is in the Union's interest.

The Commission would be required to "take utmost account" of the information gathered and to provide an analysis of the envisaged measures when adopting the implementing act relating to the countermeasures.

4. Next steps

The Proposal will now go through the ordinary legislative procedure and must be adopted formally by both the European Parliament and the Council, which may submit amendments. In that regard, in the Joint Declaration, the European Parliament and the Council committed "*to consider the proposal in a timely manner, taking into account the Union's obligations under public international law and WTO law as well as relevant developments in international trade.*"

Nonetheless, while the Proposal appears to be broadly supported within the European Parliament and the member states, some member states—including Sweden and the Czech Republic, which will hold the presidency of the Council from July 2022 and January 2023, respectively—and certain third countries and stakeholders have already voiced their concerns regarding the implementation of an anti-coercion instrument. Their main concerns relate to the risk of escalation, tit-for-tat retaliations, irritating the transatlantic relationship, weakening the multilateral system, respect for the rules-based order and compliance with WTO law.

The negotiations within the European Parliament and the Council will therefore determine whether the EU's anti-coercion mechanism will be a true game-changer or a sword cutting through water.

For more information about the topics raised in this Legal Update, please contact any of the following lawyers.

Paulette Vander Schueren

+32 2 551 5950

pvanderschueren@mayerbrown.com

Nikolay Mizulin

+32 2 551 5967

nmizulin@mayerbrown.com

Edouard Gergondet

+32 2 551 5946

egergondet@mayerbrown.com

Dr. Dylan Geraets

+32 2 551 5948

dgeraets@mayerbrown.com

Tony Martin-Brieu

+32 2 551 5957

tmartinbrieu@mayerbrown.com

Endnotes

- ¹ Proposal for a regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries, COM(2021) 775 final, 8.12.2021, available at: https://trade.ec.europa.eu/doclib/docs/2021/december/tradoc_159958.pdf
- ² State of the Union 2020, Letter of Intent to President David Maria Sassoli and to Chancellor Angela Merkel, 16.9.2020, available at: https://ec.europa.eu/info/sites/info/files/state_of_the_union_2020_letter_of_intent_en.pdf The Proposal was also part of the Commission Work Programme 2021, available at: https://ec.europa.eu/info/sites/info/files/2021_commission_work_programme_en.pdf
- ³ Joint Declaration of the Commission, the Council and the European Parliament on an instrument to deter and counteract coercive actions by third countries, OJ C 49, 12.2.2021, p. 1 ("Joint Declaration").
- ⁴ In particular, see the feedback on the inception impact assessment of February 17, 2021, and the summary factual report of the open public consultation and the summary, European Commission, *Trade – mechanism to deter & counteract coercive action by non-EU countries*, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12803-Trade-mechanism-to-deter-&-counteract-coercive-action-by-non-EU-countries_en
- ⁵ Inception Impact Assessment, Instrument to deter and counteract coercive actions by third countries, 17.2.2021, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12803-Trade-mechanism-to-deter-&-counteract-coercive-action-by-non-EU-countries_en
- ⁶ European Commission, *EU strengthens protection against economic coercion*, 8.12.2021, available at: <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2339>
- ⁷ Ibid.
- ⁸ In that case, the third country targeted would have to be notified.
- ⁹ While the third country targeted may be invited to submit observations before the adoption of that decision, it would have to be notified in any case upon publication of the decision and invited to cease coercion and, where appropriate, repair the injury suffered by the EU or its member states.
- ¹⁰ With regard to not only the cessation of the economic coercion but also the reparation of the injury caused to the EU or a member state.
- ¹¹ Including, where appropriate, coordination in relevant international fora and coordination in response to the coercion.
- ¹² The annexes to the Proposal are available at: https://trade.ec.europa.eu/doclib/docs/2021/december/tradoc_159967.pdf
- ¹³ Communication from the Commission to the European Parliament and the Council on measures within the Commission's powers which the Commission can adopt when it determines, pursuant to the Regulation of the European Parliament and of the Council

on the protection of the Union and its member states from economic coercion by third countries, that the Union takes response measures to counteract a third country measure of economic coercion, COM(2021) 774 final, 8.12.2021, available at:

https://trade.ec.europa.eu/doclib/docs/2021/december/tradoc_159961.pdf

- ¹⁴ Including whether the persons concerned are known to effectively act on behalf of or are beneficially owned or otherwise effectively controlled by the government of the third country.
- ¹⁵ The list of Targeted Persons and Coercing Targeted Persons is to be published by the Commission.
- ¹⁶ Pursuant to the Proposal, the application of countermeasures targeting natural or legal persons could be deferred to a later date following the application of country-wide countermeasures.
- ¹⁷ Namely, (i) the risk of circumvention of countermeasures, (ii) the contribution of intra-EU restrictions to the cessation of coercion and (iii) the existence of alternative, reasonably available less restrictive measures.
- ¹⁸ Rules on the examination procedure are set forth in Article 5 of Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by member states of the Commission's exercise of implementing powers, OJ L 55, 28.2.2011, p. 13 ("Comitology Regulation").
- ¹⁹ A qualified majority vote means that the vote must account for 55 percent of the EU member states representing at least 65 percent of the EU population.
- ²⁰ This is justified by the fact that the Proposal is legally based on the EU's common commercial policy rather than its foreign policy.
- ²¹ This would also apply in cases of adoption of immediately applicable implementing acts unless the imperative grounds of urgency are such that information seeking and consultations are not possible or not needed for objective reasons.

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