EUROPEAN COMMISSION PROPOSES A NEW ANTI-COERCION REGULATION TO COUNTER ECONOMIC COERCION BY THIRD COUNTRIES

The European Commission (Commission) has proposed a draft Regulation (Regulation) to counter the use of economic coercion by third countries against the European Union (EU) or individual EU Member States. The Regulation would empower the Commission to take such measures as imposing tariffs, quotas, restricting access to EU financial markets and restricting intellectual property protection on a non-EU nation, its businesses and nationals where it has engaged in economic coercion with a view to influencing the policy choices of an EU Member State.

Background

Following a period of stakeholder consultation and requests from a number of EU Member States to review the Union's policies to combat economic coercion, on 8 December 2021 the Commission announced the Regulation entitled "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".[1]

The Regulation is a response to the EU's growing concern over third countries increasingly engaging in economic coercion against Member States. In the Regulation economic coercion is defined as *"seeking to pressure the Union or a Member State into making a particular policy choice by applying, or threatening to apply, measures affecting trade or investment"*.

Speaking at a press conference to launch the Regulation, Executive Vice-President and Commissioner for Trade Valdis Dombrovskis commented *"with this proposal we are sending a clear message that the EU will stand firm in defending its interests. The main aim of the anti-coercion tool is to act as a deterrent. But we now also have more tools at our disposal when pushed to act."*

The Regulation would allow swift retaliation against third countries by the EU and seek to fill a legislative gap concerning the EU's response to economic coercion. However, the announcement has been met with scepticism and concern by some Member States which have argued that the Regulation may lead to greater economic protectionism and trade wars and infringe World Trade Organization (WTO) rules.

The Regulation

The Regulation would empower the Commission to apply trade and financial restrictions on any non-EU country that the Commission believes is using economic means to interfere in the policy choices of the EU or its Member States.

The Commission has highlighted that the Regulation would act as a deterrent against non-EU nations which engage in economic coercion. The Regulation stipulates that the Commission would seek to engage with the third country to explore options to resolve economic coercion, and that any response to economic coercion would be proportionate and measured relating to the activities of the third country. However, should such negotiations not result in the cessation of the economic coercion, the Commission would have the ability to engage in a series of response measures to deter and counteract the actions of third countries.

Third Countries and Coercion

Article 2 of the Regulation provides that the Regulation would apply where a third country interferes in the legitimate sovereign choices of the Union or a Member State, by applying or threatening to apply measures affecting trade or investment.

The Commission would consider a number of factors when determining whether economic coercion has occurred, including but not limited to the intensity, severity and frequency of the third country's measures, whether the third country is engaging in a pattern of interference, and whether the third country is acting based on a legitimate concern that is internationally recognised. The Regulation does not define what such a legitimate concern would be.

Under the Regulation the Commission may examine the activities of a third country, acting in an expeditious manner to review whether the third country is engaging in activities of a coercive nature. The Commission would then adopt a decision determining whether the third country has engaged in economically coercive activities. The Commission would then notify the third country of its conclusion.

Engagement with the third country

The proposed Regulation focuses on proportionality and provides that the response measures outlined within the legislation exist as a last resort. Under Article 5 of the Regulation the Commission would be open to engage on behalf of the EU with the third country to obtain the cessation of the economic coercion. Such engagement may include direct negotiations, mediation or submitting the matter to international adjudication. The Regulation provides that it would be open to negotiation with the third country at any time following its adoption of any of the response measures described below.

Union response measures

Article 7 of the Regulation provides that where negotiations with the third country have not resulted in the cessation of the economic coercion, action would be required to protect the EU's interests. The Commission would adopt an implementing act to impose response measures.

The response measures under the Regulation must be engaged with in a proportionate manner and not exceed the required level needed to reflect the injury suffered to the Union or Member State from the third country. The Commission would select the response measures based on criteria in the Regulation. This would include but would not be limited to the effectiveness of the measures in inducing cessation of the coercion, avoiding negative impact on the EU from the response measures, and the avoidance of disproportionate administrative complexity in imposing the response measures.

Response measures would enable the Commission to suspend applicable international obligations. These measures are set out in Annex I of the Regulation and include[2]:

- the suspension of any tariff concessions, the imposition of new or increased customs duties, or the introduction of any additional charge on the importation or exportation of goods;
- the introduction or increase of restrictions on the importation or exportation of goods, whether made through quotas, import or export licences or on the payment for goods;

1 The Regulation is available at: https://trade.ec.europa.eu/doclib/docs/2021/december/tradoc_159958.pdf

2 Annex I of the Regulation is available at: https://trade.ec.europa.eu/doclib/docs/2021/december/tradoc_159967.pdf

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- the introduction of restrictions on trade in goods through measures applying to transiting goods;
- restrictions on the right to participate in the tender of public procurement procedures. This can include the exclusion from public procurement of goods, services or suppliers of goods or services of the third country, or the imposition of a mandatory price evaluation weighting penalty;
- imposition of restrictions on the exportation of goods falling under the Union export control regime;
- the suspension of applicable international obligations regarding trade in services, and the imposition of measures affecting trade in services;
- the imposition of measures affecting foreign direct investment;
- the suspension of applicable international obligations with respect to trade-related aspects of intellectual property rights, and the imposition of restrictions on intellectual property rights or their commercial exploitation for right holders who are nationals of the third country concerned;
- the suspension of applicable international obligations on financial services, and the imposition of restrictions for banking, insurance and access to EU capital markets;
- the imposition of restrictions on registrations and authorisation under EU chemicals legislation;
- restrictions on registrations related to sanitary and phytosanitary EU legislation; and
- restrictions on access to EU funded research programs, and the possible exclusion from such programs.

Any of the above responses would apply from a specified date following the adoption of the implementing act. Upon the adoption of the above responses, the Commission would notify the third country, and again call upon that country to cease its coercive activities.

Article 8 of the Regulation provides that the above restrictions may apply to legal (including companies) or natural persons, either through the implementing act that imposes the restrictions or otherwise through a separate implementing act. The Commission can designate a natural or legal person as subject to the response measures where that person is connected or linked to the government of the third country concerned. It should be noted that the Regulation does not give guidance on the definition of what qualifies a natural or legal person as "connected" or "linked" to the government of the third country.

Furthermore, the Commission may provide through an implementing act that natural or legal persons in the EU affected by the coercive activities of a third country would be entitled to recover any damage from a natural or legal person connected or linked to the third country government that has been involved in economic coercion and has additionally caused or been involved in or connected with the coercion. Damage recovered would be up to the extent of the designated person's contribution to the economic coercion.

Amendment and termination of response measures under the Regulation

The Commission under Article 10 would review the effectiveness of response measures. Where the third country concerned suspends the economic coercion, or where it is necessary in the Union's interest, the Commission may suspend the application of response measures.

If the third country offers to submit the dispute to binding third party international adjudication, and the Commission accepts this, then the response measures would be suspended. The suspension of response measures would be contingent on the third country ceasing its economic coercion during the adjudication process.

Implications and further developments

The Regulation has been received with a mixture of support and concern from EU Member States. France, which will hold the Presidency of the EU in the first half of 2022, has expressed support for the Regulation. Press reports indicate that Sweden, Estonia and the Czech Republic in contrast have questioned the need for the Regulation, arguing that WTO rules relating to coercion have a greater impact than unilateral action by the EU. Japan has claimed that the Regulation could infringe WTO rules.

The legal basis of the Regulation exists under the EU's Common Commercial Policy, as opposed to its foreign policy legislative process. This means that any implementing act and imposition of response measures only require a qualified majority in the Council of the EU to come into force, as opposed to unanimity. This would theoretically allow for a faster paced response from the Commission.

Governments and non-EU companies, especially those which are State owned or State-controlled or otherwise connected or linked to government, should be aware of the potential impacts of restrictive measures that the Regulation permits and consider how their engagements and communications with EU Member States may be perceived. Aggressive negotiation tactics may result in a perception of economic coercion, ultimately resulting in the risk of a response from the Commission. Further, Article 8 of the Regulation makes clear that the proportionate Union response measures may be enacted against a legal or natural person. Thus, companies may see themselves barred from public procurement engagements and subject to restrictions in accessing EU financial markets as a result of perceived economic coercion. This is of significant importance to state owned enterprises and corporate entities with significant government involvement.

What happens next?

The Regulation will need to be approved by the European Parliament and the Council of the EU before it comes into force. It will be considered under the Ordinary Legislative Procedure. This involves the European Parliament and Council of the EU internally developing their positions before negotiating with each other in discussions with the Commission's assistance.

Over the next two months, stakeholders and citizens of the EU may provide further feedback, on which the Commission will report to the Council and Parliament.

Should approval be obtained, the Regulation will enter into force on the twentieth day following its publication in the Official Journal of the European Union.

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