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#### **OPINION OF THE LEGAL SERVICE<sup>1</sup>**

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From:	Legal Service
To:	Working Party on Trade Questions
Subject:	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 - legal basis and institutional aspects

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#### **I. INTRODUCTION**

1. On 10 December 2021, the Commission submitted a Proposal for a Regulation on the protection of the Union and its Member States from economic coercion by third countries ('the Proposal')<sup>2</sup>.

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<sup>1</sup> This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.

<sup>2</sup> Doc. 14943/21.

2. This Proposal was presented and discussed in the Trade Questions Working Party (TQWP) on 9 December 2021, 12 January 2022, 25 January 2022, 2 February 2022, 15 February 2022, 2 March 2022, 8 March 2022, 15 March 2022, 5 April 2022, 27 April 2022 and 3 May 2022. On 17 May 2022, 1 June 2022 and 9 June 2022, the TQWP discussed a compromise Proposal submitted by the Presidency.<sup>3</sup> On 28 June 2022 and 5 July 2022, the TQWP discussed the second compromise Proposal submitted by the Presidency.<sup>4</sup>
3. During the discussions, questions were raised regarding the legal basis proposed by the Commission, the institutional aspects of the proposed decision-making mechanism, and the compatibility of the Proposal with international law and WTO rules.
4. At its meetings on 27 April and 17 May 2022, the representative of the Council Legal Service (CLS) presented its legal advice on the legal basis and institutional aspects of the Proposal. At the request of the TQWP, this document further elaborates in writing some of the points made orally.

## **II. LEGAL ANALYSIS**

5. This opinion will first examine whether Article 207(2) TFEU is the correct legal basis for the Proposal (A) and then analyse the institutional aspects thereof (B).

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<sup>3</sup> Doc. WK 6814/2022.

<sup>4</sup> Doc. WK 9206/2022.

## A. LEGAL BASIS

### i) *The aim and content of the Proposal*

6. The choice of the correct legal basis of a Union act must be determined according to objective criteria amenable to judicial review, including in particular the aim and content of the measure<sup>5</sup>.
7. According to settled case-law, the choice of the correct legal basis requires the identification of the main or predominant aim or component of a measure. If a measure pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely, that required by the main or predominant aim or component. By contrast, if a measure simultaneously pursues a number of objectives, or has several components, which are inseparably linked without one being incidental to the other, such a measure will have to be founded, exceptionally, on the various corresponding legal bases. Nonetheless, the Court has held also that recourse to dual or multiple legal bases is not possible where the procedures laid down for each legal basis are incompatible with each other<sup>6</sup>.

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<sup>5</sup> Judgment of 26 March 1987, *Commission v Council*, 45/86, EU:C:1987:163, paragraph 11; judgment of 11 June 1991, *Commission v Council*, C-300/89, EU:C:1991:244, paragraph 10; Opinion 2/00 (*Cartagena Protocol on Biosafety*) of 6 December 2001, EU:C:2001:664, paragraph 22; judgment of 22 October 2013, *Commission v Council*, C-137/12, EU:C:1991:244, paragraph 10; judgment of 14 June 2016, *Parliament v Council*, C-263/14, EU:C:2016:435, paragraph 43; judgment of 2 September 2021, *Commission v Council (Agreement with Armenia)*, C-180/20, EU:C:2021:658, paragraph 32; and judgment of 4 September 2018, *Commission v Council (Agreement with Kazakhstan)*, C-244/17, EU:C:2018:662, paragraph 36.

<sup>6</sup> See, for example, judgment of 19 July 2012, *European Parliament v Council*, C-130/10, EU:C:2012:472, paragraphs 43-45 and case-law referred to therein.

8. According to the explanatory memorandum, the Proposal's aim is '*to protect the interests of the Union and its Member States by enabling the Union to respond to economic coercion*' in line with the values and interests, as recalled in recitals 1 to 3, that the Union is to uphold and promote in its relations with the wider world pursuant to Article 3(5) TEU and with the principles that should guide Union action on the international scene pursuant to Article 21(1) TEU, including respect for the principles of the UN Charter and international law, in particular that of developing friendly relations among nations based on respect for the principle of equal rights. Pursuant to recital 5, '[i]t is desirable that the Union contribute to the creation, development and clarification of international frameworks for the prevention and elimination of situations of economic coercion'.
9. The Proposal lays down rules and procedures in order to '*ensure the effective protection of the interests of the Union and its Member States where a third country seeks, through measures affecting trade or investment, to coerce the Union or a Member State into adopting or refraining from adopting a particular act*'. The Regulation aims to ensure an effective, efficient and swift Union response '*with the objective to deter, or have the third country desist from such actions, whilst permitting the Union, in the last resort, to counteract such actions*' (Article 1, recital 7).
10. Economic coercion is defined as third-country interference in the legitimate sovereign choices of the Union or a Member State by applying or threatening to apply measures affecting trade or investment in order to prevent or obtain the cessation, modification or adoption of a particular act (Article 2(1) and recital 11).
11. Following an examination of third-country measures, '*the Commission shall adopt a decision determining whether the measure of the third country concerned meets the conditions set out in Article 2(1)*' and '*notify the third country concerned of its decision, request it to cease the economic coercion and, where appropriate, repair the injury suffered by the Union or its Member States*<sup>7</sup>' (Article 4).

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<sup>7</sup> The provision also specifies that the Commission '*shall act expeditiously*' and may invite the third country concerned to submit its observations prior to adopting its decision.

12. Subsequently, the Commission is to explore options with the third country concerned, with a view to obtaining the cessation of the economic coercion, which in a non-exhaustive manner includes direct negotiations, mediation, conciliation or good offices, submission of the matter to international adjudication or raising the matter in any relevant international forum (Article 5). The Commission shall also consult and cooperate with other third countries affected by the same or similar measures of economic coercion or with any interested third country (Article 6).
13. When the above actions do not result in the cessation of the economic coercion and reparation of the injury it has caused to the Union or a Member State and *‘action is necessary to protect the interests and rights of the Union and its Member States in that particular case’*, and *‘is in the Union’s interest’*, the Commission shall adopt an implementing act in accordance with the examination procedure determining the Union response from the range of measures provided for in Annex I to the Proposal (Article 7(1)).
14. According to Annex I<sup>8</sup> and recital 10, the measures listed relate to trade in goods, international public procurement, trade in services, foreign direct investment, trade-related aspects of intellectual property rights, financial services such as banking, insurance, access to Union capital markets and other financial service activities, and access to or exclusion from Union-funded research programmes. They may all take the form of either measures constituting a non-performance of applicable international obligations, i.e. permitted countermeasures, or autonomous measures that are consistent with the Union’s international obligations.

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<sup>8</sup> Doc. 14943/21 ADD 1.

15. Measures laid down in Annex I may also apply to a legal or natural person, designated by the Commission, *‘that is connected or linked to the government of the third country concerned’* (Article 8(2)(a)) or *‘that 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’* (Article 8(2)(b)). In addition, with respect to the latter category the Proposal creates an entitlement for a *‘Union natural or legal person’* to recover *‘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’* (Article 8(1)(b)).

**ii) Common commercial policy**

16. The Commission Proposal is based on Article 207(2) TFEU, which provides that the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.
17. Article 207(1), which forms part of Title II of Part Five of the TFEU, states that: *‘[t]he common commercial policy shall be based on uniform principles particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods, and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of principles and objectives of the Union’s external action’.*

18. The common commercial policy is not limited to measures intended to facilitate (liberalise or promote) trade with third States but may comprise measures governing trade restrictions<sup>9</sup>. Nor, in regulating trade, is the common commercial policy limited to measures that pursue purely commercial objectives: on the contrary, it may take account of wider objectives of the Union's external action<sup>10</sup>.
19. Moreover, according to Article 21(3) TEU, '[t]he Union shall respect the principles and pursue objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the [TFEU], and of external aspects of its other policies'. The Court of Justice held that the common commercial policy '*belongs within the context of the Union's external action*' and therefore '*relates to trade with third States*'<sup>11</sup>.
20. It is also settled case-law that '*the mere fact that an EU act is liable to have implications for trade with one or more third States is not enough for it to be concluded that the act must be classified as falling within the common commercial policy*'. Rather, '*an EU act falls within that policy if it relates specifically to such trade in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it*'<sup>12</sup> (emphasis added).

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<sup>9</sup> As the Court of Justice stated: '*a ban on the export of illicit devices to the European Union concerns the defence of the European Union's global interests and falls, by its very nature, within the ambit of the common commercial policy*,' (judgment of 22 October 2013, *Commission v Council*, C-137/12, EU:C:2013:675, paragraph 69 and the case-law cited therein). See also CLS Opinion of 31 March 2017, 7885/17, paragraph 13 and the case-law referred to in the footnote.

<sup>10</sup> Ibid., paragraphs 14 and 15. CLS Opinion of 23 March 2018, 7334/1/18 REV 1, paragraphs 20 and 21.

<sup>11</sup> Opinion of the Court of Justice of 16 May 2017, *Opinion 2/15 (Free Trade Agreement with Singapore)*, EU:C:2017:376, paragraph 35.

<sup>12</sup> Ibid., paragraph 36 and the case-law referred to therein, in particular judgment of 18 July 2013, *Daichi Sankyo and Sanofi-Aventis Deutschland*, C-414/11, EU:C:2013:520, paragraph 50 and 52. See also C-137/12, *ibid.*, paragraph 58; *Opinion 2/15*, *ibid.*, paragraph 37, Opinion of the Court of Justice of 14 February 2017, *Opinion 3/15 (the Marrakesh Treaty)*, EU:C:2017:114, paragraph 61.

21. The stated objectives of the proposed instrument, i.e. the safeguarding of the Union's values, fundamental interests, security, independence and integrity as well as consolidating and supporting the rule of law and the principles of international law, correspond to the objectives set out in Article 21(2)(a) and (b) TEU that the Union is obliged to pursue in the context of its external action, including, therefore, within the framework of the common commercial policy<sup>13</sup>.

It must however be determined whether the proposed instrument is intended to promote, facilitate or govern trade and has direct and immediate effects on it, in accordance with the standard set by the Court in its abovementioned case-law (see paragraph 20 above).

**iii) *Examination of certain proposed measures vis-à-vis the common commercial policy***

22. The majority of measures set out in Annex I to the Proposal are either expressly provided for in Article 207(1) TFEU<sup>14</sup> or have clearly been established as falling within the common commercial policy<sup>15</sup>. Even if it can therefore be established that the main focus of the Proposal's regulatory content falls within the common commercial policy, three categories of the proposed measures necessitate, in the view of the CLS, further examination before it can be established whether they can be part of the proposed framework adopted under Article 207(2) TFEU.

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<sup>13</sup> These objectives are also supported by Article 3(5) TEU according to which '[I]n its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to (...) free and fair trade, (...) the strict observance and the development of international law (...)'

<sup>14</sup> This applies to the measures set out under a), b), c), e), f), g), and i).

<sup>15</sup> This applies to the measures set out under d), j) and k).

Regarding access to the Union's public procurement markets for third-country goods and services, see CLS Opinion of 6 December 2012, 17407/12. Regarding restrictions on registrations and authorisations under the chemical legislation or sanitary and phytosanitary legislation constituting measures related to market access, see Opinion 2/15, *ibid.*, paragraph 44.



23. These three categories of measures are: first, non-performance<sup>16</sup> of applicable international obligations with respect to trade-related aspects of intellectual property rights and the imposition of restrictions on the protection of such intellectual property rights or their commercial exploitation, in relation to right-holders who are nationals of the third country concerned (point h)); second, non-performance of applicable international obligations and the imposition of restrictions on access to Union-funded research programmes or exclusion from them (point l)); and third, measures designating natural or legal persons connected or linked to the government of the third country concerned and such persons who have ‘*additionally caused or been involved in or connected with economic coercion*’ (Article 8), including the right for Union operators affected by the third country measures to claim damages from designated persons.
24. First, as regards measures related to trade-related aspects of intellectual property rights<sup>17</sup>, the Court of Justice held in its Opinion on the EU-Singapore Agreement that ‘*standards of protection of intellectual property rights displaying a degree of homogeneity between operators of the EU and a third country concerned contribute to the participation [of the entrepreneurs of the EU and a third country concerned] on an equal footing in the free trade of goods and services*’<sup>18</sup> and concluded ‘*that in the light of the key role (...) that the protection of intellectual property rights plays in trade in goods and services in general, and in combatting unlawful trade in particular, the provisions of Chapter 11 of the envisaged agreement are such as to have direct and immediate effects on trade between the European Union and the Republic of Singapore*’<sup>19</sup>.

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<sup>16</sup> The Annex refers to ‘*the suspension of applicable international obligations*’, which is not a correct term and, in any event, could not be decided pursuant to the proposed procedure. A suspension of an international agreement or parts thereof between the Union and a third country is only possible in accordance with the procedure set out in Article 218(9) TFEU or pursuant to a procedure agreed in accordance with Article 218(7) TFEU.

<sup>17</sup> It should be noted that the measures proposed under this item are broader in scope than measures under Article 5(a)(bb) of Regulation (EU) 2015/1843 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union’s rights under international trade rules, in particular those established under the auspices of the World Trade Organisation (OJ L 272, 16.10.2015), which are limited to intellectual property rights granted by a Union institution or agency that is valid throughout the Union.

<sup>18</sup> *Opinion 2/15*, paragraphs 122, 123.

<sup>19</sup> *Ibid.*, paragraph 127.

25. The relevant provisions of the abovementioned agreement constitute an example of applicable international obligations that, pursuant to the Proposal, the Union could decide not to perform as a countermeasure, should the country in question refuse to refrain from its economic coercion. Such measures would therefore – in principle – also have direct and immediate effects on trade between the Union and the third country concerned, as set out in the abovementioned case-law (see paragraph 20), in that they would ‘*operate in the context of the liberalisation of trade in the sense that they are an integral part of the WTO system*’, albeit with the intention to restrict trade rather than to facilitate it<sup>20</sup>.
26. However, this conclusion cannot apply in relation to measures constituting a non-performance of obligations concerning the protection of intellectual property rights or their commercial exploitation in the context of a non-trade related agreement, such as for example the Marrakesh Treaty that facilitates access to published works for persons who are blind, visually impaired or otherwise print disabled<sup>21</sup>. A suspension of the obligations under non-trade related agreements ‘*would lead to an excessive extension in the field covered by the common commercial policy by bringing within that policy rules that have no specific link with international trade*’<sup>22</sup>.

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<sup>20</sup> See *Opinion 3/15*, *ibid.*, paragraph 79.

<sup>21</sup> Adopted by the World Intellectual Property Organization (WIPO) on 27 June 2013 and with respect to which the Court held in its *Opinion 3/15* that it did not fall within the common commercial policy.

<sup>22</sup> *Opinion 3/15*, *ibid.*, paragraph 85. On that ground, the Court rejected the Commission’s claim that only moral rights are excluded from the concept of commercial aspects of intellectual property.

27. In addition, the imposition of autonomous restrictions on the protection of intellectual property rights, or their economic exploitation in relation to the existing right-holders of the third country concerned, raises the question of a possible conflict with international human rights law or the Charter of Fundamental Rights of the European Union ('the Charter'). The fact that restrictions are limited to trade-related aspects of intellectual property means that a withdrawal of protection will either prevent or limit the ability of the right-holder to derive material benefits from the protected subject matter. An interference by the Union with the intellectual property rights, protected as part of the fundamental right to property (Article 17(1) of the Charter and the equivalent international rules<sup>23</sup>), cannot be excluded.

A careful examination will therefore be required at the level of the implementing act to ensure that the restriction related to the existing right-holders is limited to the exercise of the rights, respects the essence of those rights and respects the principle of proportionality, in that it is necessary and genuinely meets objectives of general interest recognised by the Union (Article 52(1) of the Charter).

28. Subject to the above considerations, which should be appropriately clarified in the operative part of the Proposal as part of the essential elements that should frame and guide the exercise of implementing powers, measures referred to in point h) of Annex I to the Proposal can be adopted on the basis of Article 207(2) TFEU.

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<sup>23</sup> See also Article 27 of the Universal Declaration of Human Rights as well as Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights.

29. Second, as regards measures related to access to Union-funded research programmes, the CLS recalls that rules governing Union research programmes constitute Union activities under the Treaties in the area of research and technological development, which pursuant to Article 179(3) TFEU must be decided on, and implemented, in accordance with the provisions of Title XIX of the TFEU.<sup>24</sup>

This may include rules regarding restrictions on access to, or exclusion from Union research programmes of third countries or entities established in third countries or controlled by third countries' entities.<sup>25</sup> Article 186 TFEU also specifies that, in implementing the multiannual framework programme, the Union '*may make provisions for cooperation in Union research, technological development and demonstration with third countries or international organisations*' and that '*[t]he detailed arrangements for such cooperation may be the subject of agreements between the Union and the third parties concerned*'.

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<sup>24</sup> Regulation (EU) 2021/695 of the European Parliament and of the Council of 28 April 2021 establishing Horizon Europe – the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination, and repealing Regulations (EU) No 1290/2013 and (EU) No 1291/2013 (OJ L 170, 12.5.2021, p. 1) ('Horizon Europe Regulation') was adopted on the following legal bases Article 173(3), Article 182(1), Article 183, and the second paragraph of Article 188 TFEU.

<sup>25</sup> For example, Article 22(5) of the Horizon Europe Regulation, the research framework programme under the current multiannual financial framework, foresees that '*For actions related to Union strategic assets, interests, autonomy or security, the work programme may provide that the participation can be limited to legal entities established only in Member States or to legal entities established in specified associated or other third countries in addition to Member States. Any limitation of the participation of legal entities established in associated countries which are EEA members shall be in accordance with the terms and conditions of the Agreement on the European Economic Area. For duly justified and exceptional reasons, in order to guarantee the protection of the strategic interests of the Union and its Member States, the work programme may also exclude the participation of legal entities established in the Union or in associated countries directly or indirectly controlled by non-associated third countries or by legal entities of non-associated third countries from individual calls for proposals, or make their participation subject to conditions set out in the work programme*'.

The Proposal does not explain in what way this measure could relate to trade and on what basis it was included in the catalogue of possible measures. It also does not elaborate on the existing research programmes concerned.

30. It appears that neither the non-performance of the applicable international obligations that the Union has undertaken in the field of research, nor the imposition of an autonomous restriction on access to Union research programmes could be regarded as specifically related to international trade, even if taken in the context of trade relations with the third country in question.

While such measures may be liable to force the third country to lift its coercive trade-related measures, and therefore ultimately restore trade, the effects of such measures on trade would not be direct and immediate, as set out in the abovementioned case-law (see paragraph 20), but indirect and distant. Moreover, to accept such measures as falling within the ambit of the common commercial policy could be considered as ‘[leading] to an excessive extension in the field covered by the common commercial policy by bringing within that policy rules that have no specific link with international trade’<sup>26</sup> and would risk to deprive the relevant Treaty provisions on other Union competences (here in the area of research and technological development) of their *effet utile*<sup>27</sup>.

31. Therefore, measures referred to in point I of the Annex I to the Proposal cannot be adopted on the basis of Article 207(2) TFEU and this point should be removed therefrom.
32. At the same time, measures such as the ones proposed in Annex I (I) could be enacted by the Union pursuant to the applicable rules and procedures governing the participation in Union research programmes.

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<sup>26</sup> *Opinion 3/15*, *ibid.*, paragraph 85.

<sup>27</sup> See also Opinion of the Court of Justice of 6 December 2001, *Opinion 2/00 (Cartagena Protocol on Biosafety)*, EU:C:2001:664, paragraph 40, from where it is clear that the common commercial policy does not take priority over other areas of Union competence.

Article 7(1) of the Proposal already refers to other possible frameworks within which response measures could be taken.<sup>28</sup> This could also be relevant for the suspension of or termination of participation in the research programmes<sup>29</sup> or for the suspension of bilateral cooperation with third countries in the research field. The different sorts of response measures that can be taken on the basis of the relevant provisions of the current Union legal framework in the area of research could be exemplified in the recitals.

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<sup>28</sup> The Proposal does not explain what type of action the Commission envisages under this provision. However, it follows from its Communication on measures within the Commission's powers, which the Commission can adopt when it determines, pursuant to the proposed Regulation, that the Union takes response measures to counteract a third-country measure of economic coercion (COM(2021) 774 final) that it considers the following type of actions: not engaging in new Union financial commitments for programmes or funds under the terms of the relevant budgetary implementation procedure; opposing new financing operations, where permissible in accordance with the agreement between the Union, represented by the Commission, and an entity entrusted with the indirect management of a programme; refraining from proposing new macro-financial assistance to the third country concerned pursuant to Articles 209, 212 and 213 TFEU, and suspending or cancelling disbursements in running operations in accordance with the applicable agreements; suspending or terminating, where permissible, any contribution or guarantee agreement between the Commission on behalf of the Union and entrusted entities that relate to a third country concerned or a designated person; appropriate measures, including suspension of actions financed under Regulation (EU) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe or under Regulation (EU) 2021/1529 of the European Parliament and of the Council of 15 September 2021 establishing the Instrument for Pre-Accession assistance (IPA III) or their successor instruments. It also considers the following measures regarding financing by the European Investment Bank or the European Bank for Reconstruction and Development: adopting unfavourable opinions regarding applications for financing to the European Investment Bank; and recommending the European Bank for Reconstruction and Development Board Director representing the Union to vote against approving funding.

<sup>29</sup> For instance, on 3 March 2022, the Commission declared that following the Russian military aggression, it has decided to suspend the preparations of grant agreement for four projects under the Horizon Europe programme that involve five Russian research organisations. Signing of any new contracts were put on hold until further notice. It also decided to suspend any payment to Russian entities under existing contracts. [[https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT\\_22\\_1528](https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_22_1528)]

33. Third, concerning Article 8 of the Proposal, which provides for a possibility to adopt measures of individual application and creates a right to claim damages, it is first important to address the concerns raised by some delegations as regards the possible overlap with restrictive measures adopted in the Union's implementation of its common foreign and security policy (CFSP).
34. The fact that certain provisions resemble rules that the Union is allowed to adopt in the implementation of its CFSP, does not, in itself, preclude the adoption of similar measures in the implementation of another Union policy, provided the adoption of such measures respects the limits of competences conferred on the Union in that policy area and respect the so-called 'non-affectation clause', i.e. does '*not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under Chapter 2 of Title V of the TEU*', i.e. under the CFSP (Article 40(2) TEU).

35. The Court of Justice expressly confirmed, having regard to the terms of Article 29 TEU<sup>30</sup> and other specific provisions relating to the CFSP, that the Council does have the power to adopt decisions ‘*capable of directly affecting the position of individuals*’. The Court of Justice held that: ‘[t]he concept of ‘*approach of the Union*’ (...) lends itself to a broad interpretation, so that (...) not only acts programmatic in nature or mere declarations of intent, but also, in particular, decisions providing for measures capable of directly affecting the legal position of individuals may be adopted on the basis of Article 29 TEU. That is moreover confirmed by the wording of the second paragraph of Article 275 TFEU’<sup>31 32</sup>.

Article 275 TFEU refers to the review of the legality of ‘*decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union*’.

36. Clearly, such a wide discretion does not follow from the wording of Articles 206 and 207 TFEU. It is therefore necessary to examine whether the measures set out in Article 8 of the Proposal display the required specific link to international trade, as set out in the case-law of the Court (see paragraph 20 above), and could therefore be adopted under the proposed legal basis.

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<sup>30</sup> According to Article 29 TEU ‘*The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature*’.

<sup>31</sup> Judgment of 27 February 2017, *Ahmed Ezz v Council and Commission*, T-256/11 EU:T:2014:93, paragraph 24, confirmed on appeal C-220/14 P, EU:C:2015:147.

<sup>32</sup> See also judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 88: ‘*It is apparent from Articles 24 and 29 TEU that, as a general rule, the Council is called upon, acting unanimously, to determine the persons and entities that are to be subject to the restrictive measures that the Union adopts in the field of the CFSP. Taking account of the wide scope of the aims and objectives of the CFSP, as set out in Article 3(5) TEU and Article 21 TEU and in the specific provisions relating to the CFSP, in particular, in Articles 23 and 24 TEU, the Council has a broad discretion in determining such persons and entities*’.



37. The formulation of the criteria for designation in Article 8 of the Proposal, which refers to natural and legal persons ‘*connected or linked to the government of the third country concerned*’, is open-ended and very broad. Under such a criterion, designations of any natural or legal persons, including those not engaged in trade between the Union and the third country concerned or any specific economic activity for that matter, for example government officials or ministers, would be possible. The link with trade of measures designating a natural or legal person in a position of influence and who could therefore in theory, through the exercise of such influence, obtain the removal of measures of economic coercion by the third country concerned is, in the view of the CLS, too tenuous to meet the requisite standard of a specific link with trade established by the Court. While it is possible to argue that such a measure would be intended to promote, facilitate or govern trade, it seems virtually impossible to conclude that such a measure would have ‘*direct and immediate effects on trade*’ between the Union and the third country in question as required by the case-law (see paragraph 20 above). At most, the effects would be only potential, conditional on the successful exercise of the influence over the third country government, and therefore indirect and distant<sup>33</sup>.

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<sup>33</sup> It would however be possible to designate such persons in the pursuance of the same objectives, as part of the CFSP, on the basis of acts adopted under Article 29 TEU and Article 215 TFEU.

38. The situation would be different for measures adopted against economic operators connected or linked to the government, i.e. natural or legal persons or entities engaged in international trade or commercial activities. In such cases, it seems possible to argue that the trade measures set out in Annex I - to the extent that they can apply to a designated individual – would restrict access to the Union market, and therefore be intended to govern (i.e. restrict) trade and have a direct and immediate effect on it in that those measures would hinder such access and as a result reduce trade with the country concerned.
39. Therefore, while measures designating economic operators connected to or linked with the government of a third country could be considered as having a direct and immediate effect on trade, and could be adopted under Article 207(2) TFEU, this cannot be said for measures designating just any natural or legal person connected to or linked with the government of a third country. If the possibility for such designation is to be maintained, the criteria for compliance with the requirement of a specific link to international trade must be spelt out and the categories of persons and the criteria under which they could be designated must be made clear in the operative part of the Proposal itself, as part of the essential elements that should frame and guide the exercise of implementing powers, rather than only in the implementing act as envisaged by the Proposal.<sup>34</sup>

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<sup>34</sup> Article 8(3) of the Proposal leaves a considerable discretion to the Commission in the examination of ‘*all relevant criteria*’.

40. As regards the provision conferring the right to claim damages from designated persons who have '*caused or been involved in or connected with the economic coercion*' (Article 8(1)(b) of the Proposal), the CLS recalls that Council Regulation No 2271/86 of 22 November 1996 (the Blocking Statute)<sup>35</sup> which contains a similar entitlement under Union law, was not adopted solely on a trade legal basis (Article 113 TEC, now Article 207 TFEU), but also on the basis of Articles 73c and 235 TEC (now Articles 64 and 352 TFEU).<sup>36</sup> At the time, the CLS concluded that it was Article 235 TEC, which permitted the adoption of measures set out in Articles 4, 5 and 6 of the Blocking Statute.<sup>37</sup>
41. However, the Court of Justice held with respect to Articles 5 and 6 of Section III, 'Sanctions and remedies', of the European Convention on the legal protection of services based on, or consisting of, conditional access, which relate to seizure and confiscation measures, that those provisions '*are intended generally to ensure effective legal protection for conditional access services*' and '*help to achieve the primary objective of the contested decision*' and can therefore be part of the agreement which primarily pursues an objective that has a specific connection to the common commercial policy.<sup>38</sup>

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<sup>35</sup> Council Regulation No 2271/86 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, OJ L 309, 29.11.1996, p.1. According to its Article 6, '[a]ny person referred to in Article 11, who is engaging in an activity referred to in Article 1 shall be entitled to recover any damages, including legal costs, caused to that person by the application of the laws specified in the Annex or by actions based thereon or resulting therefrom'.

<sup>36</sup> Opinion of the CLS of 21 October 1996, doc. 10845/96. See also Opinion of the CLS of 24 October 2001, doc. 13173/01, paragraph 7.

<sup>37</sup> In 1992, that is before the insertion in the TEC of Articles 301 and 60, Regulation (EEC) No 3541/92 prohibiting the satisfying of Iraqi claims with regard to contracts and transactions the performance of which was affected by measures taken by the UN Security Council pursuant to Resolution 661 (1990) and related resolutions (OJ L361, 10.12.1992, p. 1) was adopted also on the basis of former Article 235 (and not solely on Article 113 TEC). However, Regulations (EEC) No 2340/90 (OJ L213, 9.8.1990) and No 3155/90 (OJ L304, 1.11.1990), whereby the Community took measures to prevent trade between the Community and Iraq were taken solely on the basis of a trade legal basis (Article 113 EEC at the time).

<sup>38</sup> Judgment of 22 October 2013, *Commission v Council* C-137/12, EU:C:2013:675, paragraphs 70, 71 and 76.

42. Hence, to the extent that this measure is intended to facilitate effective legal protection of Union operators affected by the third country's measures of economic coercion, it helps to achieve the objective of the instrument, i.e. the fight against economic coercion by third States. It can therefore be adopted on the basis of Article 207(2) TFEU.
43. Finally, it seems important to recall that in line with the imperative of the non-affectation clause (Article 40(2) TEU), the exercise of powers in the area of the common commercial policy should not affect the possible exercise of the Union's competences in the area of the CFSP, including in the pursuance of the same objectives or adoption of similar measures. It should therefore be clarified in the text of the Proposal that this instrument is without prejudice to Union's powers under the CFSP.
44. Consequently, the examination of the aim and content of the Proposal undertaken above confirms that the Proposal constitutes a framework for the implementation of the common commercial policy in so far as it allows for a Union response to measures of economic coercion taken by a third country that affect trade or investment, through measures falling within the common commercial policy. This applies to all measures proposed with the exception of those relating to Union's research programmes and measures allowing for the designation of persons who are not directly engaged in international trade.

## B. INSTITUTIONAL ASPECTS

### i) *Principles*

45. Article 13(2) TEU provides that each institution is to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out therein. That provision reflects the principle of institutional balance, characteristic of the institutional structure of the Union, a principle which requires that each of the institutions exercise its powers with due regard for the powers of the other institutions.<sup>39</sup>
46. As regards the Council's powers, the second sentence of Article 16(1) TEU provides that the Council is to carry out policy-making and coordinating functions as laid down in the Treaties. With regard, in particular, to the Union's external action, the third subparagraph of Article 16(6) TEU provides that the Foreign Affairs Council is to elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and to ensure that the Union's action is consistent. In addition, the first paragraph of Article 26(2) TEU provides that the Council shall frame the CFSP and take the decisions necessary for defining and implementing it on the bases of the general guidelines and strategic lines defined by the European Council.
47. Concerning the Commission's powers, Article 17(1) TEU stipulates that the Commission is to promote the general interest of the Union and take appropriate initiatives to that end, to exercise coordinating, executive and management functions, as laid down in the Treaties, and to ensure the Union's external representation, with the exception of the common foreign and security policy and other cases provided for in the Treaties.

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<sup>39</sup> See judgment of 28 July 2016, *Council v. Commission (Swiss MoU)*, C-660/13, EU:C:2016:616, paragraphs 31-32, and case-law referred to therein.

48. According to the second subparagraph of Article 21(3) TEU, the obligation to ‘*ensure consistency between the different areas of [the Union's] external action and between these and its other policies*’ is incumbent on the Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security policy, that must ‘*cooperate to that effect*’.<sup>40</sup>
49. Furthermore, it has been established by the case-law that the conclusion of non-binding instruments with third countries or international organisations falls within the Council’s policy-making powers<sup>41</sup>, whereas the conclusion of legally binding agreements with third countries or international organisations falls within the Council’s treaty-making powers in accordance with Articles 207 and 218 TFEU.

*ii) Analysis*

50. Under the proposed mechanism (Article 4 of the Proposal, see paragraph 11 above), the Commission alone, without any role for the Council, would be empowered to determine whether a third country’s measure constitutes economic coercion. Such a decision by the Commission would have a number of consequences internationally, both political and legal.
51. First, under the Proposal, such a decision would trigger an obligation for the Commission to notify the third country concerned, request it to cease economic coercion, and where appropriate, repair the injury suffered by the Union or its Member States. Second, the Commission would be required to engage with the third country concerned, ‘*seek to obtain the cessation of the economic coercion by raising the matter in any relevant international forum*’ and ‘*enter into consultation, cooperation and coordination with any other country, including as regards coordination in response to the coercion*’ (Articles 5 and 6 of the Proposal, see paragraph 12 above).

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<sup>40</sup> Also according to the second subparagraph of Article 26(2) TEU, ‘*The Council and the High Representative of the Union for Foreign Affairs and Security policy shall ensure the unity, consistency and effectiveness of action by the Union.*’

<sup>41</sup> Case C-660/13, *ibid.*, paragraphs 40-42. Arrangements between Secretaries General on non-binding instruments, 15367/17.

Finally, the determination of possible Union response measures could be decided by the Commission, as a last resort, by means of an implementing act in accordance with the (simple) examination procedure (Article 7 of the Proposal, see paragraphs 13 to 15 above), which is the one under which in case of no opinion by the committee, the Commission may nevertheless adopt the implementing act<sup>42</sup>. The Commission would also be empowered, and in certain cases obliged, by virtue of proposed Article 10, to amend, suspend and terminate the measures.

52. The Proposal provides that the Commission's obligation to keep the European Parliament and the Council informed of relevant developments is triggered only after the Commission has determined that there is economic coercion and after it has engaged with the third country concerned (Article 5(3)). A similar obligation towards the two institutions is also provided for as regards the assessment of measures taken during the review process (Article 10(1)).

The Proposal therefore provides for the Council to be merely informed, *ex post*, and puts the Council on par with the European Parliament. As to the involvement of the Member States, the Proposal provides for the application of the comitology procedure (ordinary examination procedure) only at the stage of the Commission adopting the 'Union response measures' (Article 7 of the Proposal).

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<sup>42</sup> The Comitology Regulation (Regulation No 182/2011, OJ L 55, 28.2.2011, p. 3) also provides for a stricter procedure, the so-called 'no opinion clause' examination procedure, whereby in case of no opinion by the committee, the Commission may not adopt the implementing act (see point (b) of Article 5(4) of the Comitology Regulation).

53. First, it is important to observe that a determination of economic coercion by a third country revolves around the principle of non-intervention and its articulation under customary international law.<sup>43 44</sup> According to the Court of Justice, ‘*a principle of customary international law does not have the same degree of precision as a provision of an international agreement*’<sup>45</sup>. The precise definition of coercion, and thus of unauthorised intervention, is not yet fully crystallised in international law. In addition, while countermeasures as such are considered legitimate under customary international law, the individual requirements and procedures for doing so are often debated and less clear.

The Proposal recognises this when it refers in recital 5 to the desire ‘*that the Union contribute to the creation, development and clarification of international frameworks for the prevention and elimination of situations of economic coercion*’. This distinguishes the Union action under the proposed framework from action taken in the context of a detailed multilateral regulatory framework, such as for example that of the WTO<sup>46</sup>.

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<sup>43</sup> See recital 3 and Article 2(2) and the impact assessment report, which refers, on page 8, to the prohibition of certain forms of interference in the affairs of another subject of international law when there is no basis in international law for doing so and cites two academic articles in support.

<sup>44</sup> The Union response will, to the extent required, also follow rules of international law concerning the responsibility of States for their internationally wrongful acts, as formulated, by way of codification and progressive development, in the draft articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its fifty-third session. *Yearbook of the International Law Commission, 2001, vol. II, Part Two*.

<sup>45</sup> Judgment of 7 April 2022, *United Airlines*, C-561/20, EU:C:2022:266, paragraph 51.

<sup>46</sup> See Regulation (EU) 2015/1843 (OJ L 272 16.10.2015, p.1) whereby the Commission is empowered to act in order to ensure the exercise of the Union’s rights under international trade rules, in particular those established under the auspices of the World Trade Organisation. Regulation (EU) 2015/1843, OJ L 272 16.10.2015, p.1.



54. Second, a decision determining that a third country is engaging in economic coercion will have an impact on the relations between the Union and the third country concerned and will constitute a distinct Union '*action on the international scene*' within the meaning of Article 21(1) TEU, in the context of a legal environment considerably less predictable than the one governed by international trade rules. By its very substance, such a decision will form the Union's policy vis-à-vis a particular third country and direct its external action, with inevitable consequences on the implementation of the CFSP vis-à-vis that country.
55. Taking a decision determining the existence of economic coercion by a third country in an area for which the Union is competent will obviously '*require an assessment to be made of the Union's interests*<sup>47</sup> (...) *in the context of its relations with the third country concerned, and the divergent interests arising in those relations to be reconciled*', to use the words of the Court in its case-law<sup>48</sup>. An assessment of this nature should, under that case-law, be carried out by the Council in accordance with the powers on the Union's external action that the Treaties confer on it.
56. Therefore, the Council should be involved in the determination of economic coercion by the third country concerned. Such an involvement could take different forms or have different levels of intensity. It is for the Council to choose its preferred option when discussing the Proposal.

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<sup>47</sup> The Union interests for that purpose must be distinguished from the concept of the Union's interests referred to in Articles 9 and 11 of the Proposal, which, as explained by the Commission, is essentially about specific economic interests and implies taking into consideration the interests of those subject to the third country coercive measures on the one hand, and of those that may be affected by the possible Union response measures, on the other hand.

<sup>48</sup> See paragraph 39 of the *Swiss MoU judgment*, Case C-660/13.

57. A first way to involve the Council in determining that a third country is taking measures of economic coercion could be to confer on the Council implementing powers in accordance with Article 291(2) TFEU. This Article provides that ‘[w]hen uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified cases and in the cases provided for in Articles 24 and 26 of the [TEU], on the Council’ (emphasis added).
58. Conferring such implementing powers to the Council should therefore be justified in the recitals of the Proposal. Given that such implementing powers could be limited to the determination of economic coercion, the requirements under Article 291(2) TFEU for the conferral to be duly justified and limited to specific cases would be fulfilled. Moreover, the need to respect the Council’s powers on the Union’s external action, including the need to ensure consistency between, for instance, possible CFSP measures and the Union response measures under the Proposal, would equally provide a valid justification for conferring such implementing powers on the Council.
59. When acting on the basis of an empowerment laid down in secondary legislation, the Council is not acting ‘pursuant to the Treaties’, thus the legislator retains a large margin of discretion regarding the procedural modalities for the exercise of the Council’s implementing power. The Court held that ‘*the EU legislature has the ability to have the provisions implementing the basic regulations adopted according to a procedure different from that followed for the adoption of the basis regulation*’.<sup>49</sup> Therefore, and as already clarified by the CLS, the applicable procedure could be tailored to the circumstances to ensure speed and effectiveness, provided the arrangements do not undermine the balance of powers between the institutions, or modify the share of powers among members of the institutions, or affect their fundamental prerogatives.<sup>50</sup>

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<sup>49</sup> See judgment of 16 February 2022, *Poland v Parliament and Council*, C-157/21, EU:C:2022:98, paragraph 307 and the case-law referred to therein. See also the CLS Opinion of 25 October 2018, doc. 13593/18, paragraph 49 and the practice of co-legislators mentioned therein.

<sup>50</sup> CLS Opinion of 25 October 2018, *ibid.*, paragraph 48.

60. Thus, the implementing powers conferred on the Council could provide that the Council would act on the basis of a proposal by the Commission, which would have examined the third country's measures in the light of the criteria set out in the proposed regulation. The Council would then adopt the implementing act by a qualified majority as set out in Article 16(4) TEU. One could also provide for a reversed qualified majority, whereby the implementing act proposed by the Commission is adopted, unless, in the Council, a qualified majority votes against the adoption. It could also be specified that the Council may modify the Commission's proposal by a qualified majority.<sup>51</sup> Otherwise, the usual rules under Article 293(1) TFEU would apply (i.e. unanimity required in the Council for modifying Commission's proposal where the latter opposes such modification).
61. Another way to ensure the Council's involvement could be through an obligation on the part of the Commission to consult, or involve, the Council prior to the adoption of its decision. This would give the Council the opportunity to assess whether the adoption of such a decision by the Commission would be in the Union's interest at that particular time, having regard to the overall relations with the third country concerned. A consultation of this type could be accompanied by an obligation for the Commission to take utmost account of the views expressed within the Council and provide reasons for a possible departure from the views expressed by the Council.

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<sup>51</sup> See for example Article 6 of Regulation (EU) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget: *'The Council shall adopt the implementing decision referred to in paragraph 9 of this Article within one month of receiving the Commission's proposal. If exceptional circumstances arise, the period for the adoption of that implementing decision may be extended by a maximum of two months. With a view to ensuring a timely decision, the Commission shall make use of its rights under Article 237 TFEU, where it deems it appropriate. The Council, acting by a qualified majority, may amend the Commission's proposal and adopt the amended text by means of an implementing decision'*. The legal feasibility of this approach was confirmed in *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97 and *Poland v Parliament and Council*, C-157/21, *ibid*.

This approach would be similar to that followed in the 2021 Council Decision concluding the Trade and Cooperation Agreement between the Union and the UK where Article 3(2) provides that, before taking certain suspension, remedial, safeguard or rebalancing measures vis-à-vis the UK, *‘the Commission shall fully inform the Council in a timely manner of its intention to adopt measures (...) with a view to allowing a meaningful exchange of views in the Council. The Commission shall take the utmost account of the views expressed. The Commission shall inform the European Parliament as appropriate’*.<sup>52</sup>

62. Finally, as regards further steps following the notification of the third country concerned, it is important to recall that while the possibility to engage with the third country concerned *‘to explore options’* falls within the Commission’s external representation prerogatives, it is only with the Council’s approval that the Commission may launch negotiations with the third country concerned on behalf of the Union on an instrument containing commitments, binding or non-binding.<sup>53</sup> In any event, submitting the matter to international adjudication or arbitration that would be binding on the parties, and therefore also on the Union, would always require the conclusion of an international agreement pursuant to the procedures laid down in Article 218 TFEU.
63. Accordingly, in view of the impact that the determination of economic coercion by a third country would have on the Union’s external action as a whole and in view of the fact that the Union’s action envisaged falls outside a precise and stabilised international legal framework, the Council should be involved in the very determination that there is economic coercion by the third country concerned. Given that the Proposal places such a determination by means of a legal act at the centre of the Union response, the CLS suggests conferring implementing powers on the Council to determine that such economic coercion exists. Alternatively, a prior compulsory consultation, or involvement, of the Council by the Commission similar to previous mechanisms could be envisaged.

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<sup>52</sup> See Council Decision (EU) 2021/689 of 29 April 2021 (OJ L 149, 30.4.2021, p. 2).

<sup>53</sup> Presumably, the specifics of a possible resolution of a dispute would as a rule have to be agreed in a joint instrument, be it pursuant to the NBI Arrangements, *ibid.*, or procedures set out in Article 218 TFEU.

### **III. CONCLUSION**

64. In the light of the above, the CLS is of the opinion that:
- a) In view of its objective and content, the Proposal falls under the common commercial policy and can be adopted on the basis of Article 207(2) TFEU subject to the following considerations.
  - b) The imposition of autonomous restrictions on the protection of intellectual property rights or their commercial exploitation in relation to right-holders of the third country concerned require clarification in the operative part of the proposed instrument, notably as regards the protection of fundamental rights, as part of the essential elements that should frame and guide the exercise of implementing powers.
  - c) Measures allowing for the non-performance of applicable international obligations and the imposition of restrictions on access to Union-funded research programmes or exclusion from Union-funded research programmes fall outside the ambit of the common commercial policy and cannot be adopted under Article 207(2) TFEU. Action in that area should be undertaken within the applicable legal framework through which the Union research policy is implemented.
  - d) Measures allowing for the designation of economic operators connected to or linked with the government of a third country fall within the area of the common commercial policy and can be adopted under Article 207(2) TFEU. The text of the Proposal however needs to be clarified so as to better comply with the requirement of a specific link to international trade, as part of the essential elements that should frame and guide the exercise of implementing powers.

- e) In view of the impact on the relations between the Union and the third country concerned, and bearing in mind the Council's powers under the Treaties as regards the EU's external action, the Council should be involved in the determination of the economic coercion by a third country.
  - f) Such an involvement of the Council could be achieved through conferring on it implementing powers in accordance with Article 291(2) TFEU, to be exercised on a proposal from the Commission, or through prior compulsory consultation, or involvement, of the Council by the Commission.
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