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WORKING DOCUMENT

From:	Presidency
To:	Working Party on Trade Questions

Subject:	Anti-coercion instrument - Presidency note on options for decision making process
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Presidency note

Options for decision making process in ACI

Based on the previous discussions at a Working party on trade questions and recently issued Council legal service (CLS) opinion on several aspects of the proposal for an Anti-coercion instrument, the Presidency prepared a note to facilitate the discussion on the possible options for decision making process.

There are two decisions during the process:

- Decision 1 (further as D1) on the determination of economic coercion (Article 4)
- Decision 2 (further as D2) on the imposition of countermeasures (Article 7 and 8)

Under the proposal both decisions are to be taken by the **Commission**. However, according to Article 291 TFEU, there is a possibility, under certain conditions, for the implementing acts to be taken by the **Council**. The PRES identified the following possibilities:

Commission decisions

1. *No formal consultation with the Council/Member States (D1 according to the proposal by the Commission)*

The Commission may examine measures of a third country in order to determine whether they meet the conditions for economic coercion set out in the Regulation. Following the examination, the Commission adopts a decision. No consultation with Council/Member States is mentioned in the text of the Regulation.

2. *Prior Consultation of the Council (D1 according to possibility 2 in CLS opinion)*

The Commission consults the Council before taking the decision. The Commission should take utmost account of the opinion of the Council. One example of such process gave the CLS in its opinion (Council Conclusion regarding conclusion of EU-UK TCA).

The text in ACI could for example read as follows:

"The Commission shall fully inform the Council in a timely manner of its intention to adopt a decision determining whether the measure of the third country concerned meets the conditions set out in Article 2(1) 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 also inform the European Parliament, as appropriate."

3. *Comitology - advisory procedure (D1 according to 2nd compromise by FR PRES)*

Standard comitology processes based on the Regulation 182/2011. The advisory procedure is described in its Article 4. The Commission consults a Committee composed of representatives of Member States. The Commission submits a proposal of a decision to this Committee for voting. The Commission should take utmost account of the result of the voting.

The text used in 2nd compromise of ACI reads as follows (additions to the original Commission proposal are marked yellow):

Article 3 (2bis)

"Where there are reasonable grounds to suspect that the measure of the third country concerned meets the conditions set out in Article 2(1), the Commission shall expeditiously inform the Member States."



Article 4 (1)

"Following an examination carried out in accordance with Article 3, the Commission shall inform Member States of the relevant information gathered pursuant to Article 3 and, as the case may be, pursuant to Article 4(2) and adopt a decision determining whether the measure of the third country concerned meets the conditions set out in Article 2(1) in accordance with the advisory procedure referred to in Article 15(1bis). The Commission shall publish such decision in the Official Journal of the European Union. The Commission shall act expeditiously."

4. Comitology – examination procedure (D2 according to the Commission proposal)

Standard comitology processes based on the Regulation 182/2011. The examination procedure is described in its Article 5, common provisions are described in its Article 3. The Commission consults a Committee composed of representatives of Member States. The Commission submits a draft implementing act to this Committee for voting, Member States can suggest amendments. There are four possible results of the voting:

- QMV for the proposal – Positive opinion – the act is approved
- QMV against the proposal – Negative opinion – the act is not approved
- Simple majority against - the Commission can either submit a revised version of the implementing act to the same committee or ask the appeal committee to vote. Article 3(4) or Article 6(2) of the Regulation 182/2011 apply.
- Any other result (i.e. resulting from many abstentions, not enough Member States voting actively for or against the proposal) - No opinion - The Commission may adopt the implementing act, but may also submit a revised version of the implementing act to the committee.

Regulation 182/2011 Article 5 (4) first subparagraph:

"Where no opinion is delivered, the Commission may adopt the draft implementing act, except in the cases provided for in the second subparagraph. Where the Commission does not adopt the draft implementing act, the chair may submit to the committee an amended version thereof."

"... the Commission shall not adopt the draft implementing act where: [...]

c) a simple majority of the component members of the committee opposes it."

Regulation 182/2011 Article 3(4):

"Until the committee delivers an opinion, any committee member may suggest amendments and the chair may present amended versions of the draft implementing act."

The chair shall endeavour to find solutions which command the widest possible support within the committee. The chair shall inform the committee of the manner in which the discussions and suggestions for amendments have been taken into account, in particular as regards those suggestions which have been largely supported within the committee."

Regulation 182/2011 Article 6(2):

"Until an opinion is delivered, any member of the appeal committee may suggest amendments to the draft implementing act and the chair may decide whether or not to modify it."

The chair shall endeavour to find solutions which command the widest possible support within the appeal committee. The chair shall inform the appeal committee of the manner in which the discussions and suggestions for amendments have been taken into account, in particular as regards suggestions for amendments which have been largely supported within the appeal committee."



5. Comitology – examination procedure with NONA¹ (D2 according to 2nd compromise by FR PRES)

Standard comitology processes based on the Regulation 182/2011. Examination procedure is described in its Article 5, common provisions are described in its Article 3. In addition, Article 5(4) second subparagraph point b) and Article 5(4) third subparagraph and Article 6 apply. The Commission consults a Committee composed of representatives of Member States. The Commission submits a draft implementing act to this Committee for voting, Member States can suggest amendments. There are three possible results of the voting:

- QMV for the proposal – Positive opinion – the act is approved
- QMV against the proposal – Negative opinion – the act is not approved
- Any other result (i.e. resulting from many abstentions, not enough Member States voting actively for or against the proposal) - **No opinion** - Article 5(4) second subparagraph point b) and Article 5(4) third subparagraph applies as follows:

"... the Commission shall not adopt the draft implementing act where: [...]

b) the basic act [in our case ACI Regulation] provides that the draft implementing act may not be adopted where no opinion is delivered"

"... where an implementing act is deemed to be necessary, the chair may either submit an amended version of that act to the same committee within 2 months of the vote, or submit the draft implementing act within 1 month of the vote to the appeal committee for further deliberation."

Then in the event the Commission goes back to the same committee with an amended proposal the same rules apply as for the examination procedure as above and if it decides to go to the **appeal committee** the same rules as in examination procedure apply:

- QMV for the proposal – Positive opinion – the act is approved
- QMV against the proposal – Negative opinion – the act is not approved
- Any other result (i.e. resulting from many abstentions, not enough Member States voting actively for or against the proposal) – No opinion - The Commission can adopt the draft implementing act.

Regulation 182/2011 Article 6 (3) second subparagraph:

"Where no opinion is delivered, the Commission may adopt the draft implementing act."

Article 3 (4) and Article 6 (2) of the Regulation 182/2011 apply accordingly as described above in point 4.

6. Comitology – examination procedure NONA + Commission declaration

Comitology process based on the Regulation 182/2011 as described above in point 5, accompanied by a unilateral Commission declaration on how the Commission would respond on the event that there is no opinion (at either the ACI committee or an appeal committee). Such a declaration would commit the Commission.

7. Comitology – examination procedure NONA + limitations (i.e. in duration of the measures)

Comitology process based on the Regulation 182/2011 as described above in point 5. Nevertheless, with a certain limitation applicable on those acts, which will be adopted by the Commission in case of appeal committee delivering No opinion. The Regulation could limit implementing acts for example in their duration (applicable only in D2, limited duration of the measures).

¹ No Opinion No Action



The text in Regulation may read as follows (text from 2nd compromise is marked yellow, changes to 2nd compromise are in bold):

*"Where the Committee delivers no opinion, the Commission shall not adopt the draft implementing act, and the third subparagraph of Article 5(4) of Regulation (EU) No 182/2011 shall apply. **Where the Appeal Committee delivers no opinion, Article 6(3) of Regulation (EU) No 182/2011 shall apply and the maximum duration of the measures set out in the implementing act shall be limited to [6] month**".*

Council Decisions:

Decisions would be taken by Implementing acts of the Council based on Commission proposals. Details of the procedure are not set in Treaties nor set in secondary legislation unlike in the case of comitology. Therefore, as was stated by CLS in its opinion, it is possible to define the procedure in ACI itself and it could be tailored in a way to ensure speed and effectiveness.

There are also many possible variations of the decision making by the Council, although stepping outside the rules of the Treaties is not possible (for example requiring unanimity):

1. *Council adopts the IA on the proposal of the Commission without specifying the voting rule for changing it*
 - a) voting by QMV – need to reach qualified majority of votes to adopt the proposal **OR**
 - b) voting by reversed QMV – need to reach qualified majority of votes against the proposal, to reject it. In other cases, the proposal is considered as adopted.

+ Unanimity would be required for changes opposed by the Commission.
2. *Council votes on the basis of the Commission's proposal, Council adopts the IA on the proposal of the Commission specifying the voting rule (QMV) for changing it*
 - a) voting by QMV – need to reach qualified majority of votes to adopt the proposal **OR**
 - b) voting by reversed QMV – need to reach qualified majority of votes against the proposal, to reject it. In other cases, the proposal is considered as adopted.

+ QMV would be required for changes opposed by the Commission.

Tabling of compromises are in the hands of the rotating Presidency if decision-making takes place within the Council.

Important aspects to consider when thinking about appropriate decision-making process:

- Resources and competence for preparation and adjustment of IA (information gathering, consultation of the relevant stakeholders, examination, analysis, drafting, ...), in some cases need to administer the act, for example by setting dates and act quickly (i.e. suspension, termination)
- Possible political pressure from third country before D1 and D2.
- Desirable broad political support for D1 due to foreign policy implications.
- The institution adopting the IA would have to defend it in case of a legal challenge



Possible options for ACI

Based on the information above, discussions held during the meetings of a Working Party and the CLS opinion issued on 30th August, we propose several options of decision-making process in ACI for your consideration.

There are 4 basic possibilities:

D1 Commission + D2 Commission

D1 Council + D2 Commission (possibility 1 in CLS opinion)

D1 Commission + D2 Council (option suggested in non-paper of several Member States)

D1 Council + D2 Council

Option A

D1 Commission + D2 Commission

- Commission decisions in D1
 - consultation with Member States could be done via standard comitology (advisory or examination procedure – as described in points 3 and 4 above in “**Commission decisions**”) or in version with NONA (as described in point 5 above in “**Commission decisions**”) or via comitology in a strengthened version (point 6 or 7 above in “**Commission Decisions**”)
 - or it is possible to introduce consultations of Commission’s proposal with the Council (political level) before adopting the decision (as described in point 2 above in “**Commission decisions**”)
- Commission decisions in D2 could be done via standard comitology with examination procedure and NONA (as described in point 5 above in “**Commission decisions**”) or possibly via comitology in a strengthened version (point 6 or 7 above in “**Commission Decisions**”) to give additional assurance for Member States.
- Decisions could be taken fast.

Option B

D1 Council + D2 Commission

- Option suggested in the CLS opinion
- Powers conferred to the Council only in the D1
 - Council can act upon the proposal from the Commission
 - Possible strict time frames to ensure effectiveness.
 - Voting rules - positive QMV for adoption of the measures
- Commission decisions in D2 could be done via standard comitology with examination procedure and NONA (as described in point 5 above in “**Commission decisions**”) or via comitology in a strengthened version (point 6 or 7 above in “**Commission Decisions**”)
- Higher exposure of the Council towards a pressure from third countries in the D1 phase.
- If determination not made in D1 even though Commission has made a proposal confirming that there is economic coercion in the terms of the regulation – risk of credibility of the instrument.
- Actions pursuant to Option B would have strong political backing in the determination phase.



Option C

D1 Commission + D2 Council

- One of the options outlined in the non-paper of several Member States
- Commission decisions in D1
 - consultation with Member States could be done via standard comitology (advisory or examination procedure – as described in points 3 and 4 above in “**Commission decisions**”) or in version with NONA (as described in point 5 above in “**Commission decisions**”) or via comitology in a strengthened version (point 6 or 7 above in “**Commission Decisions**”)
 - or it is possible to introduce consultations of Commission’s proposal with the Council (political level) before adopting the decision (as described in point 2 above in “**Commission decisions**”)
- Powers conferred to the Council only in the D2
 - Council can act upon the proposal of the Commission.
 - The negotiations within the Council might offer more flexibility and allow for a better control by the Member States and possibility to solve political issues at higher political levels, including the COREPER and the Council
 - Voting rules - positive QMV for adoption of the measures.
 - Possible strict time frames to ensure effectiveness.
- Higher exposure of the Council towards a pressure from third countries in the D2 phase
- Politically more difficult to agree on the measures
- Conferral of powers in D2 would be more difficult to justify.
- If measures are not adopted in D2 even though economic coercion has been determined on the basis of Article 4 and coercion still persists – risk of credibility of the instrument.
- Imposition of the measures pursuant to Option C give Member States more flexibility to accommodate their political concerns through negotiations within the Council.

Option D

D1 Council + D2 Council

- All implementing powers conferred to the Council – Council is responsible for both decisions – D1 and D2.
- Information gathering and examination process continue to be led by the Commission. Need to specify what to do with subsequent suspension, termination, fixing of dates, emergency actions.
- Suggestion for both decisions D1 and D2 to be Council implementing acts, while Council acts upon the proposal from the Commission.
- Voting rules - positive QMV for adoption of the measures. Possible to set strict time frames to ensure effectiveness.
- Voting rules and timeframes are connected to options 1 and 2 above in “**Council decisions**” and to whether the Council would decide to draft changes to Commission proposal.
- Conferral of powers in D2 would be more difficult to justify.
- Higher exposure of the Council towards a pressure from third countries (especially D1)
- Actions pursuant to Option D would have stronger political backing.
- It may be harder to agree on specific provisions of the EU response measures in D2.

The Presidency kindly asks Member States to indicate on the upcoming meeting of the Working Party (20th September 2022) their preferred option for decision making procedure. On this basis the third compromise text will be drafted.