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From:	DE Delegation
To:	Working Party on Trade Questions
Subject:	Anti-Coercion Instrument (ACI) - DE comments

on the second Compromise Proposal of the Council's Presidency for a Regulation on the Protection of the Union and its Member States from Economic Coercion by Third Countries

General Comments

Germany thanks the former French as well as the current Czech Presidency for the valuable work that has gone into the second compromise proposal (ACI). We also welcome the written opinion of the Council's Legal Service (CLS) that has brought some clarity with regard to certain aspects of the proposal.

Germany supports the strengthening of the EU's toolbox against measures of economic coercion. The EU needs to be able to effectively safeguard its principles against coercive trade and investment measures. We generally welcome the design of the instrument as a deterrent and underline the importance of de-escalatory steps and countermeasures only as a last resort.

The second compromise proposal on ACI (draft proposal) is a step in the right direction. But some further improvement is needed. We reserve the right to submit further comments at a later stage. Currently, we would like to comment on the following points:

Scope of the instrument

We have underlined several times that it is important to us that the ACI is focused on addressing **such measure by third countries that constitute a serious threat to the Union**. Otherwise the use of the ACI could unnecessarily escalate trade tensions. We are convinced that the EU has other means (especially diplomatic ones) to address mere attempts to influence decision making. **Therefore, we are not convinced that it is necessary to open the scope of the ACI to scenarios where the act of the third country may constitute a nuisance but not a clear violation of public international law.**

The question whether the behaviour of the third country violates public international law is a fundamental one and should ideally be answered at an early stage of the foreseen multi-step approach. It affects a series of aspects: It determines the legitimacy of potential claims for reparation suffered by the Union or a MS (i.e. Art. 7 (1) lit a draft proposal) and also the legitimacy of counter measures that potentially violate obligations of the Union under public international law. In such a scenario countermeasures would only be lawful if the measure of the third country constitutes a violation of public international law.

With regard to threats we welcome the inclusion of Art. 7 (5bis.) draft proposal that states that countermeasures by the EU can only be applied if the measure of the third state has materialized in concrete action. In our view this limitation is an important consequence of the deterrent character of the instrument and the different steps foreseen to deescalate. The EU should not take pre-emptive measures. Furthermore, we still have doubts on how to determine that a threat is severe enough to trigger the ACI. In our view threats should be removed from the scope of the instrument.

Art. 8 (1) draft proposal

We have two concerns with regard to Art. 8 (1) draft proposal. We understand the rationale behind targeted measures against individual legal or natural persons. However, we have already voiced the following reservations:

(1) On the one hand we still have legal concerns with regard to the **proposed possibility for Union legal or natural persons to claim damages from natural or legal persons linked or connected to the government of a third country under Art. 8 (1) b of the draft proposal.**

We have submitted a detailed assessment from our legal experts which we refer to. We have serious doubts whether the reservations voiced by our legal experts can be adequately addressed. Therefore **we submit that this provision should either be deleted from the proposal entirely or be more aligned with the structure of a classical legal damage claim such as Art. 6 of the Blocking Statute.** Especially the predetermination of potential defendants by the COM is hard to reconcile with fundamental principles of German civil law. It is also still not clear to us how the COM intends to measure or even examine the extent of a **“person’s contribution”** under Art. 8 (1) lit. b draft proposal. Also, the newly introduced Art. 8 (3) draft proposal does not contain any concrete criteria in order to assess the level of contribution.

(2) With regard to the **possibility to impose direct countermeasures against natural or legal persons in accordance with Art. 8 (1) lit a** draft proposal we have read the deliberation of the CLS with great interest. In our view the arguments raised in points 37 and following are convincing. The limitation of measures based on the legal basis in Art. 207 (2) TFEU towards persons that have a “specific link to trade” is convincing and mirrors in our view the difference in scope between individual sanctions based on the legal basis in the CFSP and countermeasures based on the legal basis in Art. 207 (2) TFEU. We are not yet convinced that the text can be amended in a way to take full account of the concerns of the CLS. **In our view this would however be a condition to keep this possibility in the text.** Another point already mentioned in the discussions is that we are not yet convinced that the **criteria for determination of the required link or connection with the government are sufficiently clear in order to make the provision operable.** We think that the newly introduced Art. 8 (2bis) draft proposal brings about some clarity. The elements mentioned in Art. 8 (2bis) lit c draft proposal are in our view not sufficiently clear and would potentially lead to legal uncertainty. They should therefore be removed.

Participation of Member States

We have repeatedly underlined that in our view the participation of MS especially with regard to decisions about concrete EU-countermeasures needs to be effectively expanded.

In a non-paper we have together with 12 other MS underlined the common understanding that Member States’ participation rights need to be strengthened significantly. In the non-paper we stated that we welcome the addition of a formal involvement of MS on the first step of the instrument, e.g. the determination of an economic coercion, and that it should be further discussed whether an advisory procedure constitutes an adequate involvement of the Council. On the second step of the proposal, i.e. the imposition of concrete EU-countermeasures, we stated that **a qualified majority of MS in support of a COM proposal should be necessary. This does not imply a veto right for individual MS. Thus, the instrument would still be effective and practicable.** The currently foreseen comitology procedure which would require a qualified majority of MS against a COM proposal in order to stop it is not enough to safeguard the justified interests of MS. This holds especially true since currently decisions under the CFSP like the imposition of sanctions require

unanimity of MS. Due to the proximity of the ACI to certain aspects of the CFSP a comitology procedure is not enough.

We have read the opinion of the CLS with regard to the necessity of MS involvement. We welcome that the CLS points out that the institutional structure as foreseen in EU primary law requires for a significantly strengthened position of MS with regard to the first step of the instrument. We take note of the statement of the CLS that it “suggests conferring implementing powers on the Council” in point 63 of the opinion with regard to the first step of the instrument and are open for such an amendment. We need to ensure compliance with EU primary law.

With regard to the second step of the instrument, the CLS has not provided any written comments. We do not believe that this part is **less important or that the decisions to be taken have a less far reaching effect – neither in legal, nor in political nor in economic terms.** The argument brought forward that the second stage is more of a standard trade procedure is in our view not convincing. The ACI is a novel trade instrument. The proposed list of countermeasures is extensive and so far there is no instrument of the EU that would enable the COM to take such far reaching countermeasures in the area of the Union’s common commercial policy. Therefore, we think that there are strong arguments in favour of a significantly strengthened position of MS with regard to the second step of the instrument as well, e.g. requiring for an approval of the Council with a positive qualified majority.

Union Interest

We welcome the introduction of a Union interest test in Art. 9bis draft proposal. However, we think that it should be included **that an action of the COM is only to be taken if it is in the “clear Union’s interest” to take such action. In cases of doubts the decision should not be taken.**

Annex I

We welcome the Commission’s invitation to an expert meeting on the Annex I of the proposal. **In our view, the potential benefits and costs of counter-measures need to be assessed and it is still not clear whether the entirety of countermeasures needs to be included in the proposal.** It should be assessed in every instance whether the counter-measures in the context of the ACI should go beyond the countermeasures foreseen in the Trade Enforcement Regulation (TER) which was only recently revised in 2020. We think that a shortened list combined with a review mechanism could be a good solution in order to see where gaps exist and where the list of measures should be expanded.

So far, we are for example not convinced that restrictions and authorizations related to the chemicals legislation of the Union (lit. j) of Annex I) or sanitary and phytosanitary legislation (lit. k) of Annex I) are necessary to address gaps in the traditional portfolio of countermeasures. With regard to the potential restriction of IP-rights we share the view of other MS that this is a difficult issue and have also taken note of the restrictive remarks of the CLS thereto. In the amended TER, we limited countermeasures to trade-related aspects of intellectual property rights granted by a Union institution or agency and valid throughout the Union. We should not go beyond this possibility in the ACI in lit. h.