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From:	Presidency
To:	Working Party on Trade Questions
Subject:	Anti-coercion instrument - Third Presidency compromise proposal - Explanations concerning revised Article 8 - Article 8 redraft with accompanying recitals

Article 8 redraft with accompanying recitals + explanations concerning revised Article 8

Explanations concerning revised Article 8

Article 8 has been revised to provide clarity and streamline its structure. This note provides an explanation of the revised provision.

Recital 16(bis)

This recital links to Article 8(1) and the possibility to impose Union response measures on persons which have been designated. It also gives reasons for the need of having such measures.

Recital 16(ter)

This recital links to Article 8(2) and the possibility to seek damages from persons which have instigated or otherwise caused the economic coercion. It gives clear reasons for such measures. It is clarified that this does not apply to government officials in the exercise of their functions; thereby it is also clear that the liability does not arise from an act or omission in the exercise of State authority (*acta iure imperii*). The scope of such liability is limited to persons who have instigated or otherwise caused the economic coercion (as provided in Article 8(2)). This ensures that actors who may have been required to *implement or follow* the measures of economic coercion (whose actions are caused *by* the coercion rather than them having caused the coercion) cannot be subject to damages claims. Further, it is clarified that such a claim is a non-contractual obligation (given there were questions about how this would relate to possible contractual claims) in a civil or commercial matter within the meaning of the Rome II Regulation.

Recital 16(quarter)

This recital clarifies that actions for damages should be brought before the courts of the Member States. It emphasises that the Regulation does not affect existing instruments of private international law and hence that those instruments (in particular the Rome II and Brussels I regulations) apply to actions for damages based on the regulation.

Article 8

Para. 1.

This provides for the possibility to apply Union response measures listed in Annex I to persons which are connected or linked to the 3rd country taking the coercive measures. The definition of persons which are “connected or linked” is provided in para. 6.

Para. 2

This provides for the possibility to make persons subject to damages claims by Union natural or legal persons. These are persons who have instigated or otherwise caused the economic coercion of the 3rd country and have done so intentionally or knowingly. This is a narrowing and clarification of the previous approach. As noted, this ensures that actors who may have been required to implement the measures of economic coercion cannot be subject to damages claims. *Acta iure imperii* are not covered. Union natural or legal persons are defined in para. 7.

The provision also clarifies that claims are to be started in the courts of the Member States in accordance with the Brussels I Regulation or where designated entities and persons acting on their behalf or as their intermediary hold assets.

Para 3.

This states that paragraphs 1 and 2 only apply where a person has been designated in accordance with the procedures of the regulation. This is done to avoid repeating language about designation in both paragraphs 1 and 2.

Para 3bis.

Provides for the Commission to issue guidelines on the application of paragraph 2.

Paras. 4 and 5.

Provides that decisions on designation and the application of measures shall be taken through implementing acts. Para 5. clarifies that this is to be adopted as a separate act, but that it can be adopted simultaneously or after acts adopted pursuant to Article 7 of the regulation.

Para 6.

Sets out the criteria relevant for a person to be “connected or linked” to the government practising the economic coercion. This is slightly adjusted from the 2nd compromise text.

Para 7.

Sets out the conditions for an entity to qualify as a Union natural or legal person. This covers also a Union entity which owns or controls an entity in a third country which has suffered damage. This structure is adapted from the EU’s Investment Protection Agreements.

Paras. 8 and 9

These paragraphs set out the procedures for designation and review of designations. These have been subject to editing but are unchanged in substance to the 2nd compromise text.

Article 8 redraft with accompanying recitals

- (16bis) The Union should be able to designate natural or legal persons connected or linked to the government of the third country engaging in economic coercion and thereby make them subject to Union response measures in order to induce the prompt cessation of economic coercion, and avoid or minimise the negative effects of such coercion on Member States' economies and Union economic operators and final consumers
- (16ter) As a result of economic coercion, Union natural and legal persons may suffer significant harm. Without prejudice to the third country's obligation under international law to repair the injury caused by a breach of its international obligations and in order to facilitate effective legal protection of Union operators affected by the third country's measures of economic coercion, it is appropriate to entitle Union persons to recover their damage from legal or natural persons, other than governmental officials in the exercise of their functions, that have intentionally or knowingly instigated or otherwise caused the third country's measures of economic coercion. Such contribution may, for example, consist in requesting the government of the third country concerned to interfere with the legitimate sovereign choice of the Union or a Member State. Such claim for compensation arises as a result of the afore-mentioned wilful instigation or other form of causation of the economic coercion and is a non-contractual obligation in a civil and commercial matter within the meaning of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).
- 16(quater) To recover the damage suffered, Union persons should be able to invoke the responsibility of the person designated to be liable under this Regulation before the courts of Member States. This Regulation does not affect the application of existing rules of private international law regarding jurisdiction or the recognition and enforcement of judgments or applicable law. Accordingly, existing instruments of Union law apply to lawsuits brought to recover damages as provided by this Regulation, in particular, Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) and Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Article 8

Union response measures with regard to natural or legal persons

1. Natural or legal persons which are connected or linked to the government of the third country concerned may be subject to Union response measures pursuant to Annex I.
2. Natural or legal persons which have intentionally or knowingly instigated or otherwise caused the third country measures of economic coercion shall be liable for any damage

suffered by Union natural or legal persons as a result of the economic coercion, to the extent of their contribution to such measures of economic coercion.

The Union natural or legal person which has suffered damage, be it directly or through a person owned or controlled by it, may seek recovery through judicial proceedings instituted in the courts of a Member State in accordance with Regulation (EU) No 1215/2012. Recovery may also be obtained through judicial proceedings instituted in the courts of Member State where the persons or entities designated in accordance with paragraph 4, as well as persons acting on their behalf or as their intermediary, hold assets.

3. Paragraphs 1 and the first subparagraph of paragraph 2 shall only apply to natural or legal persons designated in accordance with this Article.

[3bis. To facilitate the application of paragraph 2, the Commission shall issue guidelines for Union natural or legal persons by [six months from the entry into force of this Regulation] and update them as necessary in light of practice under this Regulation.]

4. For the purposes of this Article, [the Commission shall adopt implementing acts in accordance with the examination procedure referred to in Article 15(2)]. Such implementing acts shall designate persons falling under paragraphs 1 or 2, and in the case of persons falling under paragraph 1, specify the Union response measures applicable to such persons

5. The implementing act referred to in paragraph 4 of this Article may be adopted simultaneously with the implementing act referred to in Article 7(1), or subsequently.

6. A natural or legal person may be considered as connected or linked to the government of the third country concerned pursuant to paragraph 1 where:

- (a) that government beneficially owns more than 50 % of the equity interest in such person, exercises directly or indirectly more than 50 % of the voting rights in it, or has the power to appoint a majority of its directors or otherwise to legally direct its actions;
- (b) such person benefits from exclusive or special rights or privileges granted in law or in fact by the government of the third country concerned, if it operates in a sector where that government limits to one or more the number of suppliers or buyers, or if it is allowed directly or indirectly by that government to exercise practices which prevent, restrict or distort competition; or
- (c) such person effectively acts on behalf of, or at the direction or instigation of the government of the third country concerned.

7. For the purposes of paragraph 2, Union natural or legal persons include:

- (a) any natural person who is a national of a Member State;
- (b) any natural person who is a permanent resident in a Member State;
- (c) any legal person which is incorporated or constituted under the law of a Member State

8. Where the Commission has grounds to believe that a person should be designated on the basis of paragraph 1 or 2, it shall inform such person of its intention, including grounds for designation, and, where relevant, the possible measures pursuant to Annex I that that person would be subject to. The Commission shall publish a notice in the *Official Journal of the European Union* to this effect and, whenever possible, notify directly the person concerned.

Before deciding on the designation, the Commission shall give:

- (a) any persons referred to in the first subparagraph the opportunity to submit observations on the possible designation within a reasonable period of time, in particular on whether they fall under the conditions established in paragraphs 1 or 2; and
- (b) other interested parties the opportunity to submit observations on the possible designation.

The Commission may also seek information it considers relevant concerning the potential designation under this Article, including by requesting such information from Member States.

9. Without prejudice to Article 10, the Commission shall review designations under this Article when new substantial evidence is submitted to the Commission and inform the designated natural or legal persons concerned accordingly.