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From:	Presidency
To:	Working Party on Trade Questions
Subject:	Anti-coercion instrument - Presidency note on key issues

In view of the discussions at the Working Party on Trade Questions meeting on 25 October 2022, the Presidency shares the note as the basis for exchange with the Member States.



Presidency note

Key issues regarding the Anti-coercion instrument

Annex 1

In order to ease concerns of Member States, who view the response measures listed in Annex 1 as too broad, the Presidency proposes revision of Annex I. The changes are based on the comments and concerns expressed during the WPTQ meetings and in written comments, taking into account the need for wide range of response measures in order to keep flexibility and deterrent effect of the instrument.

1. IPR measures – amended in order to mirror the scope of such measures in Enforcement Regulation. The aim is to increase clarity of those measures and minimise administrative burden.
2. FDIs – measures narrowed to pre-establishment phase in order to reflect concerns of Member States regarding their commitments in BITs.
3. Removal of measures in the field of chemicals - in order to reflect concerns of Member States regarding adverse effects of potential measures on EU economy due to very complex supply chains.
4. Removal of measures regarding funding of research programmes – removed according to the Council Legal Service Opinion.

ANNEX I

Union response measures pursuant to Articles 7 and 8

Measures which may be adopted pursuant to Articles 7 and 8 are:

- (a) the ~~non-performance suspension~~ of applicable international obligations as regards any tariff concessions, as necessary, and the imposition of new or increased customs duties, including the re-establishment of customs duties at the most-favoured-nation level or the imposition of customs duties beyond the most-favoured-nation level, or the introduction of any additional charge on the importation or exportation of goods;
- (b) the ~~non-performance suspension~~ of applicable international obligations, as necessary, and the introduction or increase of restrictions on the importation or exportation of goods, whether made effective through quotas, import or export licences or other measures, or on the payment for goods;
- (c) the ~~non-performance suspension~~ of applicable international obligations, as necessary, and the introduction of restrictions on trade in goods made effective through measures applying to transiting goods or internal measures applying to goods.
- (d) the ~~non-performance suspension~~ of applicable international obligations concerning the right to participate in tender procedures in the area of public procurement, as necessary, and:
 - i. the exclusion from public procurement of goods, services or suppliers of goods or services of the third country concerned or the exclusion of tenders



- the total value of which is made up of more than ~~a specified percentage~~ 50 % of goods or services ~~originating in~~ of the third country concerned; and/or
- ii. the imposition of a mandatory price evaluation weighting penalty¹ on tenders of goods, services or suppliers of goods or services of the third country concerned.

Origin shall be determined on the basis of Annex II;

- (e) the ~~non-performance suspension~~ of applicable international obligations, as necessary, and the imposition of restrictions on the exportation of goods falling under the Union export control regime;
- (f) the ~~non-performance suspension~~ of applicable international obligations regarding trade in services, as necessary, and the imposition of measures affecting trade in services;
- (g) the ~~non-performance suspension~~ of applicable international obligations, as necessary, and the imposition of measures affecting **the access of** foreign direct investment **to the Union**;
- (h) the ~~non-performance suspension~~ of applicable international obligations with respect to trade-related aspects of intellectual property rights **granted by a Union institution or agency and valid throughout the Union**, as necessary, 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;
- (i) the ~~non-performance suspension~~ of applicable international obligations with respect to financial services, as necessary, and the imposition of restrictions for banking, insurance, access to Union capital markets and other financial service activities;
- (j) ~~the non-performance suspension of applicable international obligations with respect to the treatment of goods, as necessary, and the imposition of restrictions on registrations and authorisations under the chemicals legislation of the Union;~~
- (k) the ~~non-performance suspension~~ of applicable international obligations with respect to the treatment of goods, as necessary, and the imposition of restrictions on registrations and authorisations related to the sanitary and phytosanitary legislation of the Union;
- (l) ~~the non-performance suspension of applicable international obligations, as necessary, and the imposition of restrictions on access to Union-funded research programmes or exclusion from Union-funded research programmes;~~

Question:

- Do Member States see these changes as acceptable in light of previous discussions?



Article 8

The Presidency has presented new drafting proposal for Article 8 (WK 13576/22) with a view to respond to Member States' comments regarding practical application and relation to relevant horizontal legislation (Brussel I, Rome II) and also in order to provide for more clarity of the Article and the terms used therein, while enabling targeted approach and ensuring deterrent effect of the instrument.

Questions:

- **What is Member States' opinion about the new drafting of the Article 8?**
- **Do the changes sufficiently address the concerns expressed regarding the Article?**
 - If the concerns relating to practical applicability of claims for damages are still not sufficiently addressed, do Member State see it acceptable to delete the possibility to claim damages, in order to ensure overall acceptance of the Regulation in the near future?
 - If other concerns relating to this Article are still not sufficiently addressed, do Member State see it appropriate to delete the whole Article, in order to ensure overall acceptance of the Regulation in the near future?

Decision-making process

The Presidency would like to recall the discussion on 20 September on decision-making process, when the Presidency Note (WK12047/22) has been presented regarding different options for decision-making process.

During this meeting and following meetings of 27 September and 11 October Member States expressed their preferences regarding this issue.

Conclusions from these discussions are:

- There are Member States who want Commission's decision in both stages (D1 – determination of coercion, D2 – countermeasures) /option A/
- There are Member States who want strengthened role of Member States and Council decision in both stages /option D/

In light of the above as well as of Council legal Service opinion, the Presidency views as the most appropriate solution for decision-making process the Council decision in the first stage and Commission decision in the second stage with strengthened comitology and COM declaration /option B/. This option also seems as the most probable to be agreed on by the Council. Solution for decision-making process is also linked to final form of Annex I and Article 8 (discussed also in this Note).

Therefore, the Presidency proposes following form of decision-making procedure:

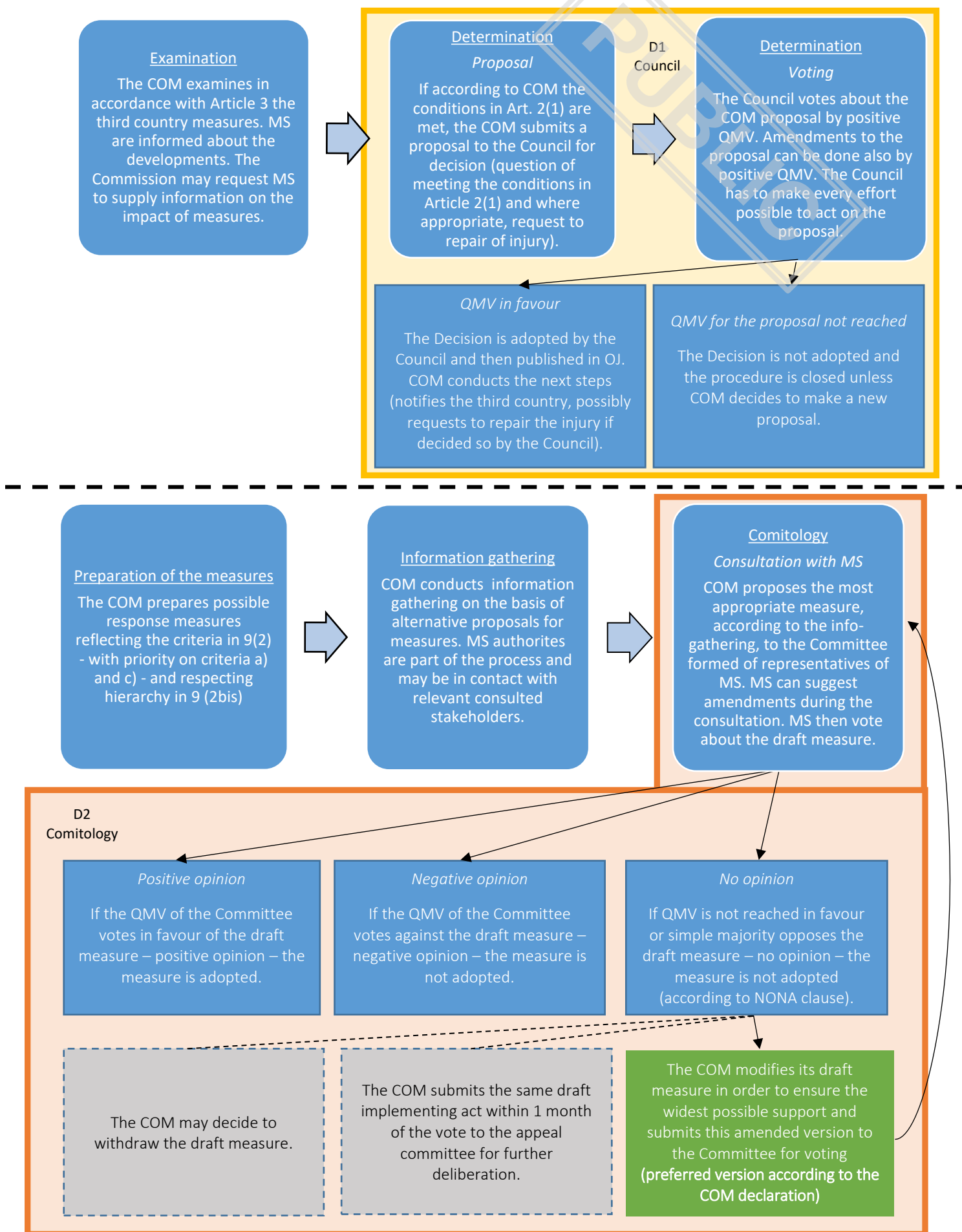
D1	Council decision	Council takes a decision on determination of the economic coercion on the basis of Commission proposal. Decision taken by QMV, possible amendments on the proposal also taken by QMV. Council also takes decision on whether it is appropriate to request a recovery of damages from the third country concerned (also based on Commission proposal).
D2	Comitology	Comitology procedure with no-opinion/no-action (NONA) clause + Strengthened MS involvement as proposed by the Commission in the non-paper: 1/ consultation of alternative options during the information gathering exercise 2/ prioritisation of criteria a) and c) in Art. 9 (2) when choosing the most appropriate response measures + COM statement on examination procedure under the EU Anti-coercion instrument expressing the commitment of the Commission to seek for solutions which command the widest possible support and in case of no-opinion result of voting in the committee, to strive for and prioritise modifications of that draft act, in order to ensure the widest possible support and on that basis will submit a revised draft to the committee.¹

¹ The Commission is currently looking at options to finetune this statement. This version will be shared ahead of WPTQ meeting taking place on 25/10.



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Illustration of decision-making procedure and involvement of MS





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Question:

- Do Member States see their involvement as adequate and sufficient, or do they see the need for other assurances regarding their involvement?