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**WORKING DOCUMENT**

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From: SE Delegation  
To: Working Party on Trade Questions

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Subject: Anti-Coercion Instrument (ACI) - Sweden's comments on clusters 1 and 2

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## SE comments and questions on clusters 1 and 2 of the EU's proposed Anti-Coercion Instrument (ACI)

Although SE recognise that coercion as such is indeed problematic, the proposed instrument raises several questions, ranging from the proposals decision-making structure and legal basis to its effects from a trade policy perspective. Our main concern with the proposal as such is that it risks undermining respect globally for a rules-based trading order, without actually preventing the type of coercive behaviour that we are targeting.

### Comments and questions on clusters 1 and 2 of the proposal

#### Preamble text

In order to give more weight to the general goals of the Common Commercial Policy (stated in Articles 206 and 207), the preamble should include the following reference: "Whereas the objectives of the Community include contributing to the harmonious development of world trade and to the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers." We note that a similar reference is made in the preamble of the EU's Blocking Statute.

Preamble 8 states that MS as distinct actors under international may not be entitled under international law to respond to economic coercion directed against the Union. We believe this to be an overinterpretation of the limits that international law puts on any sovereign state to act, not only against economic coercion against the Union, but in general.

Preamble 10 talks about the need to apply measures in a way that complies with the Unions obligations under international law. We believe MS obligations under international law should also be mentioned here.

We have concerns as to the interpretation of international law on coercion in preamble 11. This preamble is connected to article 4 which, when read together, means that any decision by the Commission to take action under article 4 is also a determination by the Union itself as to whether the action in questions amounts to such a breach of international law. This will have consequences in the broader context as concerns the development of customary international law.

Preamble 23 proposes that implementing powers should be conferred on the Commission. We believe that the subject matter of the regulation as such, as well as the close connection to foreign policy of the instrument itself, is such that conferral of powers to the Council according to article TFEU 291 p 2 is warranted. Preamble 23 should therefore state the reasons for this, and here we would welcome suggestions from the Council Legal Service on wording.

### **Art 1, Subject-matter**

According to art. 1(2), any action taken under the proposed regulation shall be consistent with the Union's obligations under international law. As in the preamble, MS obligations should also be mentioned.

Obligations under the WTO-agreement, as well as obligations under other trade agreements (FTA) and EU and bilateral investment treaties, are of course part and parcel of the EU's (and MS) international obligations. However, it is clear from Annex I that envisaged measures are "the suspension" of these very obligations. Hence the obligations are envisaged to be suspended so as to create the possibility for the Union to act in a way that would otherwise breach our international obligations. To remain within the remits of our international obligations, it seems to us the only way we can "suspend our obligations" are when the agreements where we have undertaken the obligations permits this suspension. However, we understand that the proposal suggests to allow the EU to suspend its obligations, also when no such possibility is given for example within the WTO-agreement, and the sole defence of this (otherwise) violation of our international obligations is to be built on Article 22 and 49-53 of the "Responsibility of States for Internationally Wrongful Acts" as expressed in preamble 10. This

defence is in turn built on the notion that the coercing state is “in breach of international law” and that our measures are aimed at “obtaining the cessation of the breach” (preamble 10).

In art 1(1) it should therefore be clarified what is meant by “measures affecting trade or investment” to understand when the regulation is applicable. Does it always mean a “wrongful act” under international law? If not, how may the EU invoke Article 22 and 49-53 of the “Responsibility of States for Internationally Wrongful Acts” (2001) of the UN in defence of its measure?). Could it also target third country measures that do not necessarily breach WTO rules?

### **Art 2, Scope**

Art. 2(1) – see comments and questions on art. 1(1) regarding the need to clarify what is meant by “measures affecting trade or investment”. Why is the proposal restricted to coercion affecting trade and investment, and why does the proposal not cover other forms of economic coercion?

What is meant by “legitimate sovereign choices” and who decides what is legitimate?

Does Art 2 also cover informal restrictions applied by private actors under the unofficial direction of a foreign government (silent coercion and boycotts)?

Art. 2 should further clarify the need for a causal relationship between the coercion and the third country’s measures affecting trade or investment. In cases of disguised or silent coercion, does the Commission assess that there could be difficulties to find out if there is a causal relationship between the third country measures affecting trade or investment and the coercion?

### **Art 3, Examination of third-country measures**

*No comments at this stage*

### **Art 4, Determination with regard to the third-country measure**

We note that article 4 tasks the Commission with making a formal decision as to whether a measure falls within article 2 p 1 or not. We presume such

decisions, as other Commission decisions, will be made public. We believe that article 4, read in conjunction with article 1 p 1, article 2 p 1 and preamble 10 and 11 means that the Commission will need to make a formal decision on interpretation of international law with regards to whether a certain action by third countries constitutes a breach of international law. This might be problematic not only when a positive determination is done, but also when a negative determination is done for example if the Commission were to find that a certain choice by an MS wants to make is not “legitimate”. Invariably, any decision also entails making a decision also as to the legitimacy of the sovereign choice that the third country coercion is interfering with by its coercion.

Increased participation of MS in adopting this type of decisions should therefore be considered. The Commission should have a duty to inform directly concerned MS about the developments, or even consult or obtain consent, before the steps taken by the Commission. MS concerned should also be informed before the third country concerned.

According to the proposal, the Commission shall notify the third country and request it to cease the economic coercion, and where appropriate, repair the injury, if a third country’s measure is found to be coercive. It is not clear what a reparation of an injury could be. If it regards payment of pecuniary compensation it goes beyond what is regulated by the WTO main rules and also beyond the scope of a State-State Dispute under an FTA.

The proposal may also raise issues as to how the consent from the third country for adjudication on the dispute could be obtained, and what forum and which rules could be relevant. The injury that the third country has caused to the Union may also be difficult to estimate, at least without any indications of criteria.

**Art 5, Engagement with the third country concerned** Article 5 foresees direction negotiations (presumably without any other mandate than the Regulation itself) to “explore options” with a view to ending the coercion. Given that the coercion, to be covered by the regulation, need to interfere with the legitimate sovereign choice of inter alia a MS, to what extent can these negotiations “explore options” that do not in and by themselves touch upon those legitimate choices that the MS concerned want to make? How

can negotiations under article 5 be anything but the request that the third country should stop its coercion?

Article 5 should clarify that negotiation and mediation is the first-hand option. It is not clear what kind of international adjudication or other international forum the matter could be referred to. This affects what rules are applicable and what arguments are relevant.

Competence issues could be further analysed in relation to Article 5. If all the elements of this article are to be seen as within the exclusive competence of the EU, increased participation of Member States could still be considered for issues such as negotiations, mediation and submitting the matter to international adjudication. Currently, there is only a requirement to inform the European Parliament and the Council of relevant developments.

#### **Art 6, International cooperation**

*No comments at this stage.*