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From: SE Delegation
To: Working Party on Trade Questions

Subject: Anti-Coercion Instrument (ACI) - Sweden's comments on clusters 3 and 4

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SE comments and questions on clusters 3 and 4 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 3 and 4 of the proposal – Articles 7-17, Annex I-II

Art 7, Union response measures

Art 7 proposes to delegate implementing powers to the Commission to take union response measures to third country coercion. Since such measures are **inextricably linked to the EU's foreign and security policy**, the **implementing power should be delegated to the Council** itself, in line with **art 291 of the TFEU**.

Art 7(1) stipulates the requirements for adopting response measures. According to Article 7(1)(a), response measures could be imposed if contacts with the third country has not resulted in the cessation of the economic coercion and reparation of the injury that it has caused to the EU. The fact that the requirements on cessation of the economic coercion and reparation of the injury seems to be applicable cumulative (“and”), will likely point to a need of Union response measures in many cases. Instead of “and”, it could state “where appropriate”, which seems to be in line with Article 4.

Art 7(1) states that “The Commission may also adopt measures which it can take pursuant to other legal instruments”. What is meant by this sentence and how do we ensure that the same coercion is not met with duplicated measures?

7(1)(b) refers to “interests and rights”. This should be specified or explained, including from which legal ground they stem.

7(1)(c) states that action should be in the Union’s interest. For this, see comments below regarding Article 9. This article should state the **need for an assessment of whether the third country’s measure have infringed international law, and a specification of how, before a response measure that suspends international obligations could be initiated**. As an alternative, this could be mentioned in Article 9 or Annex 1.

Art 7(5) talks about the possibility to take measures without calling on the third party to cease coercion, when this is “necessary for the preservation of the rights and interests of the Union or the Member states”. What is meant by “rights and interests” and who determines the interests of the Member States? Is it also the Commission? According to article 7 (1) (b) response measures can only be taken when it is “necessary to protect the interests and rights of the Union and its Member States. **Therefore, article 7(5) seems superfluous in our view.**

From a WTO systemic perspective, the EU should use the Dispute Settlement System before countering economic coercion. There may also be competence issues in relation to this Article and Annex I (list of response measures). **Regardless of competence issues, Member States should have more influence than is the case through implementing acts.**

Art 8, Union response measures in relation to natural or legal persons

Article 8 and the possibility to take union response measures with regard to natural or legal persons raises several legal questions. The most problematic from a civil law perspective seems to be that those affected by coercion should be “entitled to recover... any damage caused”. How should this entitlement be created? It sounds like a punishment or penalty, is this the intention? And if so, which legal procedure does the Commission envisage for this? Do Member States need to create their own system of recovery, or would the implementing act create the entitlement?

Article 8 raises questions concerning the risk for lawsuits if the Commission takes a decision that negatively affects a natural or legal persons investment, as this, by definition, could be an infringement according to Article 25 of the International Law Convention. **With regards to Article 8 we suggest that the WPTQ should meet in an investment session to clarify questions.**

Article 8 (and Annex II) on possibilities to impose response measures in relation to natural persons is not completely clear, especially whether they could be imposed in relation to services provided by natural persons with permanent residence in the EU. However, the fact that Article 9(3) stipulates that response measures targeting services (or direct investments) could be applied to *legal persons* established *within* the EU, may mean that this is not possible in relation to natural persons. This should however be clarified. Natural or legal persons within the EU affected by the third country's economic coercion, shall be entitled to recover any damage caused to them by natural or legal persons involved in the third country measure. This is without prejudice to the responsibility of the third country under international law. The Commission should explain the legal ground, fora and applicable rules, as well as how this could be enforced.

Art 9, criteria for selecting and designing Union response measures

According to Article 9(1), any response measure should not exceed the level that is commensurate with the injury suffered by the Union or a Member State, taking account of the gravity of the third country's measures and the rights in question.

To include further elements of proportionality, it could also be stated that alternative measures for achieving the cessation of the economic coercion, which are less restrictive as regards trade and other international commitments, should be considered. The current writing implies that this proportionality principle is only relevant regarding restrictions for investment and services in the third paragraph of the article. **This addition would emphasize that the EU should select and design response measures with the least negative effects on trade.**

As regards art 9(1), it is not clear whether the "injury" suffered by the Union or a Member State refers to economic injury or injury for the coercion as such, or both.

Regarding art 9(2), it should state that the Union's interests also include **effects on the EU economy as a whole** (for instance welfare and productivity, competitiveness and effects on consumers). The risk of third country escalation and countermeasures from is also relevant. An alternative suggestion would be a separate article on the elements of the Union interests to be considered.

As regards Article 9(3), we note that these kinds of measures, depending on the circumstances, could breach the GATS, GPA or investment treaties. Concerning investment treaties, this could be the case if there is no specific clause in the treaty that gives the country such a right. It is also not clear if it falls within the competence of the Commission to put restrictions on a specific investor in a Member State.

Member States should have direct influence over deciding “the appropriate Union response”, especially those affected by the third country's measure.

Art 10, Amendment, suspension and termination of response measures

Paragraph 2 states that the Commission shall suspend the Union response measures if the third country concerned has offered, and the Union has concluded, an agreement to submit the matter to binding international third-party adjudication. According to article 10 (4) c the Commission shall terminate the response measure if a decision in a third-party adjudication requires the withdrawal of the response measure. The only international third-party adjudication able to issue binding decision to which the EU is a party appears to be the WTO Dispute Settlement Body. Therefore, we assume that this is what the article is referring to.

If the WTO decides that a response measure must be withdrawn for the EU to be WTO-compliant, the Commission should terminate the measure without having to go through the examination procedure.

Art 11 (4) a

What is meant by “union competitors”? We understand that the Union industry might have competitors, but surely the Union as such does not have “competitors”?

Art. 12, Confidentiality

SE has a general, horizontal problem with the originator control provisions of article 12 p 2, which means that the originator shall have the final say in whether information may be revealed. How does this relate to the general rules on public access to documents?

Art 14, Delegated Acts

Art. 15, Committee procedure

Article 15 refers to the power that is conferred to the Commission to adopt measures via implementing acts. As stated in our comments on art. 7 above, we consider that such implementing powers should be conferred to the Council, rather than the Commission (in line with art 291 of the TFEU), as the decisions concern foreign and security policy. We request the legal service to clarify if such delegated powers would be suitable in this case.

Article 16, Review

We note that there are no explicit requirements that the evaluation report should consider other elements in Article 9(2) and 10, e.g., the effects on EU interests.

Annex I

The Annex lists possible response measures for the EU to counter third country economic coercion. Several of these could in some cases infringe WTO rules, FTA commitments or BITs. The Annex also specifically states that a suspension of applicable international obligations is an option, if deemed necessary. This could possibly include WTO rules and other international obligations such as FTAs or BITs, which may be infringed by the EU measure. For WTO and FTA consistency, **the relevant trade agreements for settling disputes should be the first-hand option.**

Some of the restrictions may also affect other countries than the targeted and could be seen as discriminatory. For example, possible restrictions regarding public procurement, may affect goods, services or suppliers from other third countries. This could be the case for example if goods from a targeted country are supplied by a supplier from another third country. It

could also affect EU suppliers who offer goods from a third country, or EU goods offered by a supplier from a targeted third country. We also note that there is overlapping with the International Procurement Instrument (IPI).

Restrictions on trade-related aspects of intellectual property rights are also contrary *per se* to the WTO TRIPS Agreement, and not depending on the market access commitments made for the non-discrimination rules to apply. Such restrictions would have to be justified by the possibility for exceptions in TRIPS. We would like to emphasize that restricting intellectual property rights would be to restrict ownership in intangible assets, which could harm the innovation and investment climate. Intellectual property rights are also referred to in the EU's Charter of Fundamental Rights (Article 17).

In general, the list of possible response measures needs to be analysed in relation to competence issues and limited to trade policy as such. We welcome further explanations and exemplifications from the Commission to clarify this.

Both natural and legal persons can be targeted. As regards restrictions on financial services and banking, access to Union capital markets etc, there may be overlapping with other instruments, such as sanctions. Could this mean restriction on the free movement of capital (Art 63 of the TFEU)? If that would be the case, Article 64.3 of the TFEU could be relevant. The latter states that the Council, acting in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament, adopt measures which constitute a step *backwards* in Union law as regards the liberalisation of the movement of capital to or from third countries. If restrictions on the free movement of capital would be the case, how would this relate to the fact that the Commission may impose restrictions?

In general, the restrictions in the Annex should be analysed in relation to the European Charter of Fundamental rights.

Annex II, Rules of origin

With regards to origin of services, it is not clear whether nationality or permanent residence will determine the origin for services for natural persons as the first-hand option. As regards legal persons, the relationship and hierarchy between point 2 (ii) and (iii) needs to be clarified. The derogation regarding investments in point 3 (e) also needs clarification.

There seems to be a risk that legal persons with commercial presence within the EU, which are engaged in substantive business operations within the EU and has a direct and effective link with that economy, is seen as originating from a third country. This is due to the nationality or place of permanent residence of the natural or legal person who owns or control it