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From:	AT Delegation
To:	Working Party on Trade Questions
Subject:	Anti-Coercion Instrument (ACI) - Austria's comments on clusters 1 and 2

AT comments on Art.1 to 6 of the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of the Union and its Member States from economic coercion by third countries

General remarks

Purpose and application of the new instrument

- We welcome the proposal for this new instrument as there are situations of economic coercion that cannot be remedied by existing trade instruments.
- It is however important that the new instrument is strictly restricted to measures preventing and - as a last resort - counteracting unlawful coercive measures by third countries. It may not be used as a protectionist tool.
- Against this context it is important that clear substantive and procedural rules guarantee the use of the instrument in the above sense.
- We understand that cases of economic coercion might be very different and therefore a certain margin of discretion is necessary. Nevertheless we think that there should be clearer criteria how to exercise the flexibility provided for as measures under this instrument may have far-reaching consequences for bilateral relations to third countries, the international reputation of the EU in general and also for stakeholders in the EU itself.
- Besides, it is necessary to provide for a close involvement of the Member States and all affected stakeholders in the decision-making.

Compatibility of the proposals with the Union's obligations under international law

- In several parts of the Regulation itself, the recitals, the explanatory memorandum and the Impact Assessment it is pointed out, that the Regulation and all measures taken in its implementation have to be in accordance with the Union's obligations under international law. However, we still have doubts that this instrument and its implementation are and can always be in line with these obligations.
- According to Art. 49 para. 1 of the ILC Articles on State Responsibility, the precondition for a countermeasure is an internationally wrongful act consisting of a violation of international law attributable to the respective state. Therefore, it should be clarified that only third country measures violating international law can lead to the application of the proposed Regulation (see also comments and textual proposals to the relevant Articles).
- To establish such a violation, the regulation and its supplementary documents appear to rely mainly on the principle of non-intervention. In cases where the use of coercion by the third state violates an additional rule of international law (e.g. by violating a treaty), the use of countermeasures is unproblematic. However, in cases of sole reliance on the prohibition of intervention difficulties may arise as violations of the customary principle of non-intervention, and its constitutive element of coercion, are difficult to establish in practice. Moreover, not every coercive measure of economic nature may automatically constitute a violation of international law.

- The legislative proposal should thus contain further explanations or differentiations as to when economic coercion would be contrary to international law. In particular, the application of the principle of non-intervention to cases of "disguised coercion" (Impact Assessment, p. 9) will require further clarification. According to the legislative proposal, such coercion is defined as an "abuse of an instrument which per se could have a legitimate purpose", which is a very broad interpretation of the prohibition of intervention and could potentially lead to the EU's countermeasures violating international law.
- According to Art. 49 para. 1 of the ILC Articles, only an "injured state" has the right to take countermeasures. Problems could thus arise for situations in which measures taken by third states do not cause any damage to the legal position of the EU itself, but only violate the rights of (individual) member states.
- According to Art. 2 of the legislative proposal, the instrument applies when a third country interferes with the "legitimate sovereign choices of the Union or a Member State". However, not every interference in the sovereign choices of a member state will have adverse effect on the EU's legal position, which is why the right of the EU to take countermeasures in such cases is questionable. Here, at least a differentiation of these scenarios would be useful (e.g. limitation of the EU's countermeasures to interferences in its competences).
- Moreover, the ILC Articles on State Responsibility refer - as the title suggests - to the responsibility of states. Their applicability to international organisations (and therefore, for example, to countermeasures taken by an international organisation that would otherwise violate international law, but are justified as a reaction to a previous violation) is therefore questionable. The legislative proposal should at least address whether there are rules of customary international law on which the taking of countermeasures by an international organisation may be based, and whether, for example, the ILC Articles on the Responsibility of International Organisations may be invoked (which, however, only rarely refer to violations of international law by states against international organisations).
- Furthermore, the planned EU measures would only fall within the scope of the ILC Articles or the secondary norms of state responsibility, if without the justification as a countermeasure they would constitute a breach of international law. If a third state measure violates a common treaty, either the treaty itself or the Vienna Convention on the Law of Treaties (e.g. Art. 60 of the Vienna Convention on the Law of Treaties) may provide for options of response within the treaty subsystem that would not violate international law in the first place. One example would be the contractual right to suspend the performance of the treaty or a treaty penalty as a reaction to a material breach of the treaty by the other side. Such responses provided for in treaties would then not be considered countermeasures pursuant to the secondary norms of state responsibility, but as a measure permitted under treaty law and therefore in conformity with primary norms of international law.

- Some of the scenarios mentioned in this legislative proposal could therefore already be regulated in primary norms of international law; either because the relevant primary international law provides alternative options for response, or because it provides for obligatory mechanisms within the subsystem (such as potentially WTO law or FTAs with third countries) that must be used as a priority in the event of a violation.
- On the other hand, there may be responses that are generally in conformity with international law because they do not interfere with any rights of third states protected under international law. This is the case, for example, with entry bans on foreign nationals or arms embargoes, provided that there are no treaties creating specific obligations or prohibitions in that regard.
- The legislative proposal and its supplementary documents imprecisely refers to these cases as "countermeasures" in accordance with international law, although the ILC Articles or secondary norms of state responsibility do not apply to those scenarios in the first place, since they are either permitted or not prohibited under primary law.
- With regard to the other substantive and procedural criteria for countermeasures under the ILC Articles, it is important to ensure that these do not interfere with fundamental rights (Art. 50 para. 1 lit. b of the ILC Articles) or affect persons who are not sufficiently connected to the "coercive State".
- Also, the duty to offer negotiations before taking countermeasures as required under Art. 52 para. 1 ILC Articles should be laid down more clearly in the Regulation (see our comments to Art. 5).
- In summary, the reliance on the ILC Articles on State Responsibility is not sufficiently implemented in the proposal and should be developed further in several respects. We ask the CLS to give their opinion on these aspects.

Provisions concerning restrictions in the single market

- Countermeasures may in special cases also lead to severe restrictions of the fundamental freedoms on the single market (see also comments to Art. 9 para. 3).
- We ask the CLS to examine if these provisions are compatible with EU law and if such measures can be based upon Art. 207 TFEU.

Relationship to other instruments

- The relationship of the new instrument to existing legislative acts under Union law (among others: Trade Enforcement Regulation, Trade Barriers Regulation, Blocking Statute, but also - with regard to the proposed countermeasures - Dual Use Regulation, FDI Screening Regulation or the proposed regulations concerning the International Procurement Instrument and Distorting Foreign Subsidies) should be clarified.

Use of Delegated Acts

- Amendments to the Annexes can be made by Delegated Acts. Austria has serious doubts if the elements specified therein can be regarded as „non-essential“, especially the introduction of new types of countermeasures. In the Trade Enforcement Regulation the list of possible countermeasures is considered to be an essential element and can only be amended by way of an ordinary legislative procedure.

	Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries	MS comments or questions	MS drafting suggestions
1	Article 1 Subject-matter		
2	1. This Regulation lays down rules and procedures in order to ensure the effective protection of the interests of the Union and its Member States where a third country seeks, through measures affecting trade or investment, to coerce the Union or a Member State into adopting or refraining from adopting a particular act. This Regulation provides a framework for the Union to respond in such situations with the objective to deter, or have the third country desist from such actions, whilst permitting	According to Art. 49 para. 1 of the ILC Articles on State Responsibility, the precondition for a countermeasure is an internationally wrongful act consisting of a violation of international law attributable to the respective state. Like FI, we believe that not every economically coercive measure will automatically constitute a violation of international law. The legislative proposal should lay down clear conditions under which economic coercion is to be classified as contrary to international law.	1. This Regulation lays down rules and procedures in order to ensure the effective protection of the interests of the Union and its Member States where a third country seeks, through measures affecting trade or investment, to coerce the Union or a Member State into adopting or refraining from adopting a particular act. This Regulation provides a framework for the Union to respond in such situations with the objective to deter, or have the third country desist from such actions, whilst permitting the Union, in the last resort, to counteract them . Where the economically coercive act constitutes an internationally wrongful act, this

	the Union, in the last resort, to counteract such actions.	The European Union has the exclusive competence for commercial policy, but not for external and security policy. Therefore, the new trade defence instrument is exclusively to be used as a response measure to coercive measures affecting trade or investment, but not as a response to other measures by third countries that violate international law. Response measures by the EU are only permissible within the limits defined in Article 207 of the TFEU. This means that they must be directed against specific coercive measures that immediately interfere with or threaten to interfere with European economic operators' trade or investment activities. A further clarification of this aspect at least in a recital would be useful.	Regulation authorizes the use of countermeasures by the Union.
3	2. Any action taken under this Regulation shall be consistent with the Union's obligations under international law and conducted in the context of the principles and objectives of the Union's external action.		2. Any Union response measure under this Regulation can only be taken if and inasmuch as it is consistent with the Union's obligations under international law, including in particular the customary rules on state responsibility¹ and WTO law and conducted within the framework of the principles and objectives of the Union's external action.
4	Article 2 Scope		

¹ as codified in the Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the United Nations' International Law Commission / ILC at its fifty-third session, in 2001, and taken note of by the United Nations General Assembly in resolution 56/83.

5	This Regulation applies where a third country: – interferes in the legitimate sovereign choices of the Union or a Member State by seeking to prevent or obtain the cessation, modification or adoption of a particular act by the Union or a Member State – by applying or threatening to apply measures affecting trade or investment.	The Regulation should lay down clear criteria for the determination of what constitutes a “legitimate sovereign choice”.	
6	For the purposes of this Regulation, such third-country actions shall be referred to as measures of economic coercion.		
7	2. In determining whether the conditions set out in paragraph 1 are met, the following shall be taken into account:		
		See AT comments on Article 1 para 1: According to Art. 49 para. 1 of the ILC Articles, the precondition for a countermeasure is an internationally wrongful act. Like FI, we believe that not every economically coercive measure will automatically constitute a violation of international law. So this addition is necessary to justify the Union response measures enumerated in Annex I (b) - (l) in particular, which foresee the suspension of applicable (Union or Member States’) international obligations. AT drafting suggestion draws inspiration from Article 2 ARSIWA, which may ideally be expressly referred to in a corresponding Recital.	(aa) the extent to which the third country’s measure consists of an action or omission that - is attributable to the third country under international law; and - constitutes a breach of an international obligation of this third country, thereby constituting an internationally wrongful act of this third country.
8	(a) the intensity, severity, frequency, duration, breadth and magnitude of the third country’s measure and the pressure arising from it;		
9	(b) whether the third country is engaging in a pattern of interference seeking to obtain		

	from the Union or from Member States or other countries particular acts;		
10	(c) the extent to which the third-country measure encroaches upon an area of the Union's or Member States' sovereignty;		
11	(d) whether the third country is acting based on a legitimate concern that is internationally recognised;		
12	(e) whether and in what manner the third country, before the imposition of its measures, has made serious attempts, in good faith, to settle the matter by way of international coordination or adjudication, either bilaterally or within an international forum.		
13	Article 3 Examination of third -country measures		
14	1. The Commission may examine any measure of a third country in order to determine whether it meets the conditions set out in Article 2(1). The Commission shall act expeditiously.	The word „may“ in para. 1 would indicate that it is completely left to the discretion of the Commission if they initiate an examination or not. There should be clear criteria under which circumstances the Commission has to initiate an investigation. If a certain degree of flexibility is considered necessary, conditions for the exercise of this flexibility should be laid down as well. If an investigation is initiated this should always be done by a formal notice (like in TDI investigations). Besides there should be clear rules which stakeholders may formally ask for an initiation of an investigation (with an obligation of the Commission to initiate it if all criteria are met). We understand that a certain flexibility is also needed with regard to timeframes. Nevertheless	

		there should be minimum and maximum time limits and clear criteria how the Commission should exercise their discretion within this framework. Besides, the Commission should be obliged to proceed in close cooperation with the Member States, all affected stakeholders and as far as possible with the third country concerned.	
15	2. The Commission may carry out the examination referred to in paragraph 1 on its own initiative or following information received from any source. The Commission shall ensure the protection of confidential information in line with Article 12, which may include the identity of the supplier of the information.	There should also be clear criteria, under which circumstances the Commission has to initiate an examination ex officio.	
16	3. The Commission may seek information about the impact of the measures of the third country concerned.	Para 3 first subpara stipulates a Commission discretion as to whether or not to seek information about the impact of economic coercion by the third country concerned. This Commission discretion seems problematic against the background of Article 4 third subparagraph, according to which the Commission shall request the third country concerned „where appropriate“, to repair the injury suffered by the Union or its Member States. Any demand for third country reparation of injury suffered has to be preceded by an intra-EU assessment of the impact of the economic coercion by the third country concerned. Therefore the Commission should be obliged to gather information on the impact of a third country coercive measure.	“3. The Commission shall seek information about the impact of the measures of the third country concerned.”
17	The Commission may publish a notice in the Official Journal of the European Union or through other suitable public	The publication of a notice of initiation in the Official Journal as well as a notification to the third country concerned should also be an obligation for the	Article 3 (3) (2) should read as follows: “The Commission shall publish a notice in the Official Journal of the European Union with an invitation to

	communication means with an invitation to submit information within a specified time limit. In that event, the Commission shall notify the third country concerned of the initiation of the examination.	Commission and not completely left to their discretion. Therefore, Article 3 (3) subpara 2 should make the publication of a notice about the formal initiation of an examination in the Official Journal of the European Union mandatory instead of optional, thereby allowing all interested parties to participate in the procedure.	interested parties to submit information within a specified time limit of no less than 15 working days prior to the examination whether definitive anti-coercion measures may be imposed."
		In addition, prior to any examination, Member States should, during a formal procedure, provide information to the European Commission about the existence or threat of coercive measures by third parties against the member state or economic operator in the member state in question, which the Commission shall assess and forward to the other member states.	The article in question could read as follows: Article 3a Examination of third-country measures against individual member states "If a third country threatens to impose or has already imposed coercive measures against an individual member state or economic operators in the respective member state, the affected member state shall inform the Commission without delay. This notification shall include all available evidence that follows from the criteria set out in Article 2 (2). The Commission shall forward this notification to all member states without delay and shall consider initiating an examination of third-country measures."
18	Article 4 Determination with regard to the third-country measure		
19	Following an examination carried out in accordance with Article 3, the Commission shall adopt a decision determining whether the measure of the third country concerned meets the conditions set out in Article 2(1). The Commission shall act expeditiously.	Here again clear procedural criteria are completely missing. To the questions of clear timeframes see our comments to Art. 3 para. 1.	
20	Prior to adopting its decision, the Commission may invite the third	The invitation to the third country to submit its observations should not be left to the discretion of the Commission, but should be an obligation.	Prior to adopting its decision, the Commission shall invite the third country concerned to submit its observations.

	country concerned to submit its observations.		
21	Where the Commission decides that the measure of the third country concerned meets the conditions set out in Article 2(1), it shall notify the third country concerned of its decision and request it to cease the economic coercion and, where appropriate, repair the injury suffered by the Union or its Member States.	This subpara obliges the Commission to request the third country to repair the injury suffered by the Union and its Member States „where appropriate“ only. There should be clear conditions under which the Commission has to request the third country concerned to repair the injury. The Commission should also be obliged to inform the third country concerned if they decide that the measure of this country does not meet the conditions set out in Article 2. Besides there should be a clear timeframe for such a decision as well. Member States should be involved in such a decision by using the examination procedure.	This subpara. should read as follows: “The Commission should decide by an implementing act, if the measure of the third country concerned meets the conditions set out in Article 2(1). If these conditions are met, it shall notify the third country concerned of its decision and request it to cease the economic coercion and, where appropriate, repair the injury suffered by the Union or its Member States. A request to repair the injury has to be made, if.... (here clear conditions shall be laid down) If the Commission determines that the measure of the third country concerned does not meet the conditions set out in Article 2, it shall notify the third country concerned of this decision.
22	Article 5 Engagement with the third country concerned		
23	The Commission shall be open to engage on behalf of the Union with the third country concerned, to explore options with a view to obtaining the cessation of the economic coercion. Such options may include:	AT drafting suggestion following Council Legal Service’s assessment in TQWP on 2 nd February of a lack of legal certainty in this provision.	The Commission shall approach the third country concerned, to offer options with a view to obtaining the cessation of the economic coercion. Such options may include:
24	– direct negotiations;		
25	– mediation, conciliation or good offices to assist the Union and the third country concerned in these efforts;		
26	– submitting the matter to international adjudication.		
27	The Commission shall seek to obtain the cessation of the economic coercion by also	What does the obligation of „also raising the matter in any relevant forum“ mean?	

	raising the matter in any relevant international forum.	If there are several international fora, in which the Commission may raise the matter - do they have an obligation to raise it in all of them? What is covered under „international fora“?	
28	The Commission shall keep the European Parliament and the Council informed of relevant developments.		
29	The Commission shall remain open to engage with the third country concerned after the adoption of Union response measures pursuant to Article 7. The Commission may pursue these efforts, as the case may be, in conjunction with a suspension, pursuant to Article 10(2), of any Union response measures.		
30	Article 6 International cooperation		
31	The Commission shall enter into consultations or cooperation, on behalf of the Union, with any other country affected by the same or similar measures of economic coercion or with any interested third country, with a view to obtaining the cessation of the coercion. This may involve, where appropriate, coordination in relevant international fora and coordination in response to the coercion.	This provision puts an obligation on the Commission to enter into consultations and to cooperate with any third country affected by the same or similar coercion measures. Does it fulfil this obligation if it cooperates by raising the matter in international fora in which the affected countries are also Members? Or do they have to enter into consultations beyond the cooperation in such fora? What is meant by „similar measures“? Does this also cover similar measures by other third countries than the country concerned by the EU examination?	

Austria reserves the right to submit further comments on these Articles at a later stage.