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WORKING DOCUMENT

From:	AT Delegation
To:	Working Party on Trade Questions
Subject:	Anti-Coercion Instrument (ACI) - Austria's comments on clusters 3 and 4

AT comments on Articles 7 to 17 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

- 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.

As COM states correctly in the introductory part of its proposal, the definition of coercion is very broad, as is the margin of discretion for COM, in which areas to enact “Union response measures”.

COM bases the proposal on Art 207(2) TFEU and thereby on the common trade policy (CTP), where the EU has exclusive competence. That way, COM grants itself a right to determine possible anti-coercion measures in a variety of areas for a potentially unlimited duration.

The Impact Assessment states that „coercion“ as such, as well as the possible counter-measures could concern a wide range of subject matters, such as environment, climate action, transport, innovation, intellectual property or energy, where the question of competence is quite different to the one in the CTP. The wording „interferes“, „seeking to“, „threatening to apply measures affecting trade or investment“ give COM a wide margin of discretion in areas which are, in our view, not entirely subject to the CTP.

Special clarification is also necessary with regard to obligations of the EU and its MS, deriving from international law, such as, but not limited to, the freedom of navigation on the river Danube, as stated in the Belgrade Convention of 1948.

- The proposal foresees a delegation of power to COM to amend its Annexes by Delegated Acts. Austria has serious doubts if the elements specified in the Annexes to the proposal can be regarded as „non-essential elements“ of the area to be regulated, especially if the COM uses the power to amend Annex I in order to introduce a possibility for COM to enact countermeasures (“Union response measures”) in further areas, in which COM does not have exclusive competence. Are we sure that the kind of „Union response measure“ to be applied shall be stipulated in the Annex of the legislative text, and not in the main body? In the Trade Enforcement Regulation, there was a hierarchy of measures and their duration and evaluation circumscribed in the main body of the legislative text by the Union legislator. Why has Commission decided to draft this proposal using a different approach, with less detail in the main body of the proposed legislative text? How would CLS evaluate advantages and drawbacks of this approach?

The proposal foresees that Member States control COM’s exercise of implementing powers through an examination procedure, as described in Art 5 of Regulation (EU) Nr. 182/2011. However, the broad definition of what constitutes economic coercion and the broad discretion to COM in which areas COM counters this economic coercion with “Union response measures”, a close involvement of Member States’ experts in the relevant regulatory fields is important. Experts of MS concerned by a coercive measure and experts of MS whose economy is particularly affected by “Union response measures” need to be properly

consulted, as a sharp distinction between the the area, in which economic coercion is exercised, the area, in which COM enacts a “Union Reaction measure” and the CTP in every case appears very difficult.

Art. 7 para. 5 and 6

- Both para. provide for certain urgency procedures. What is the relationship between the two? Do they have to be applied in parallel? Or can there be situations in which only one of them has to apply?

	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
32	Article 7 Union response measures		
33	1. The Commission shall adopt an implementing act determining that it shall take a Union response measure where:	Instead of having an “implementing act” determining that a Union response measure shall be taken and within this act the appropriate response is determined, the provision should be simplified: Under the precondition that the circumstances of Art. 7 (1) letter a) to c) are met, the Commission shall adopt the appropriate Union response by way of an implementing act.	The Commission shall adopt an implementing act determining that it shall <u>taking</u> a Union response measure where:
34	(a) action pursuant to the Articles 4 and 5 has not resulted in the cessation of the economic coercion and reparation of the injury it has caused to the Union or a Member State within a reasonable period of time;	Do these conditions apply cumulatively? May countermeasures be applied if the third country concerned has ceased the coercion, but not completely repaired the injury caused? How long is a “reasonable period of time”? At least in a recital this “reasonable period of time” should be specified in terms of a minimum and maximum.	(a) action pursuant to the Articles 4 and 5 has not resulted in the cessation of the economic coercion and reparation of the injury it has caused to the Union or a Member State within a period of six months which can be prolonged once by a maximum of another three months. ”

35	(b) action is necessary to protect the interests and rights of the Union and its Member States in that particular case, and		
36	(c) action is in the Union's interest.	The Commission argued during discussion in Trade Questions' Working Party to have deliberately decided against a definition of "Union's interest" in order to be able to consider all relevant factors in each situation. In Austria's view, it should however be possible to define a clear set of criteria that have to be applied in the determination of the Union interest (like in the Antidumping and Antisubsidy Basic Regulations or in the IPI, see e.g. Recital 19a). Such an approach would both provide for better legal clarity and allow for the necessary degree of flexibility.	
37	In the implementing act, the Commission shall also determine the appropriate Union response from among the measures provided for in Annex I. Such measures may also apply with regard to natural or legal persons designated in accordance with Article 8. The Commission may also adopt measures, which it can take pursuant to other legal instruments.	Second subpara: Would CLS classify possible the areas in which „Union response measures“ can be taken pursuant to Annex I as „essential“ or „non-essential elements“ of the area this new instrument covers (see also our general comments)? What conclusions would CLS draw from this classification? Should „Union response measures“ be stipulated in an Annex to this new instrument, or should they not rather be stipulated or at least circumscribed in the main body of this new instrument? Regulation (EU) 2021/167 („Trade Enforcement Regulation“) circumscribes the kind of countermeasures that may be enacted (suspension of obligations regarding trade in services and the imposition of restrictions on trade in services or suspension of	

		obligations with respect to trade-related aspects of intellectual property rights) and provides much more legal certainty in this regard. Inasmuch as Annex I of this instrument and the Trade Enforcement Regulation cover the same areas in which COM may enact countermeasures, is the wording here broader, allowing COM to take more countermeasures in these areas as compared to Trade Enforcement Regulation (e.g. on intellectual property)? Last sentence: Under this provision it is in the unconditional (!!!) discretion of the Commission („may“) to also adopt measures pursuant to other legal instruments. What is CLS’ opinion as to the legality of this discretion? According to CLS, is Commission legally allowed to take action under this new instrument that is foreseen by another act of Union legislation? If there are measures under other legal instruments are available, why is there a need to apply the new instrument as well? Which other instruments are meant? In which situations could there be a necessity to apply several measures in parallel? What are the criteria for such a parallel application? If the “appropriate response” results in “cross-sector” responses (for ex. problems in trade in services shall be leveraged by measures in the field of procurement) this may be problematic in the light of the Unions obligations under WTO commitments. It must be ensured that the “appropriate Union response” is in accordance	
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		with the Unions obligations under international law and international treaties.	
38	The implementing act shall be adopted in accordance with the examination procedure referred to in Article 15(2).	We advocate that the relevant implementing act be adopted in accordance with the "no opinion - no action procedure" pursuant to Art. 5(4) of the Comitology Regulation - analogous to the provision in Art. 8(2) of the Trade Enforcement Regulation.	
39	2. The Union response measures shall apply from a specified date after the adoption of the implementing act referred to in paragraph 1. The Commission shall set this date of application, taking into account the circumstances, to allow for the notification of the third country concerned pursuant to paragraph 3 and for it to cease the economic coercion.		
40	3. The Commission shall, upon adoption of the implementing act, notify the third country concerned of the Union response measures adopted pursuant to paragraph 1. In the notification, the Commission shall, on behalf of the Union, call on the third country concerned to promptly cease the economic coercion, offer to negotiate a solution, and inform the third country concerned that the Union response measure will apply, unless the economic coercion ceases.	Will the Commission (on a regular basis) set a time limit within which the 3rd country concerned has to cease the economic coercion otherwise the Union adopts response measures? How will this time limit look like? From an AT view, such a deadline must be (very) short!	
41	4. The implementing act referred to in paragraph 1 shall state that the application of the Union response measures shall be deferred for a period specified in that implementing act,	Why is it up to Commission to decide if an adopted measure is not applied? Would it not necessitate at least that Member States authorize ex post the non-application of a measure in the adoption of which they were ex	

	where the Commission has credible information that the third country has ceased the economic coercion before the start of application of the adopted Union response measures. In that event, the Commission shall publish a notice in the Official Journal of the European Union indicating that there is such information and the date from which the deferral shall apply. If the third country ceases the economic coercion before the Union response measures start to apply, the Commission shall terminate the Union response measures in accordance with Article 10.	ante involved via comitology (using the same comitology procedure, which was used ex ante to adopt the measure in the first place)?	
42	5. Notwithstanding paragraphs 2, 3 and 4, the Union response measures may apply without the Commission, on behalf of the Union, first calling, once more, on the third country concerned to cease the economic coercion or without the Commission first notifying it that Union response measure will apply, where this is necessary for the preservation of the rights and interests of the Union or Member States, notably of the effectiveness of Union response measures.	Could the Commission provide some examples when Union response measures may apply without the Commission first calling once more (besides cases of urgency addressed in paragraph 6)?	
43	6. On duly justified imperative grounds of urgency to avoid irreparable damage to the Union or its Member States by the measures of economic coercion the Commission shall adopt immediately applicable implementing acts imposing Union response measures, in accordance with the procedure referred to in Article 15(3). The requirements set out in paragraphs 2 to 5 shall apply. Those acts shall	Can't paragraphs 5 and 6 not be merged? At least in a Recital the concept of „duly justified imperative grounds of urgency“ should be further explained. What happens after the three months if the 3rd country concerned has not ceased the economic coercion – Art. 10 addresses the “amendment, suspension and termination” of a response measure; would a prolongation be considered as an amendment?	

	remain in force for a period not exceeding three months.	Could the Commission explain the reason(s) why the period is limited to “three months”? AT considers that a longer maximum period (for ex. six months) would be more appropriate in such cases.	
44	7. The Commission is empowered to adopt delegated acts in accordance with Article 14 to amend the list provided for in Annex I in order to provide additional types of measures to respond to a third country’s measure. The Commission may adopt such delegated acts where the types of response measures would:	We should like to point out once again that we do not at all think that the extension of the list of „Union response measures“ is a „non-essential element“ of the Regulation. Therefore we do not think that the choice of Delegated Acts is compatible with Art. 290 TFEU.	
45	(a) be as effective or more effective than the response measures already provided for in terms of inducing the cessation of measures of economic coercion;		
46	(b) provide as effective or more effective relief to economic operators within the Union affected by the measures of economic coercion;		
47	(c) avoid or minimise the negative impact on affected actors; or		(c) avoid or minimise the negative impact on affected Union actors; or
48	(d) avoid or minimise administrative complexity and costs.		
49	Article 8 Union response measures with regard to natural or legal persons		
50	1. The Commission may provide, in the implementing act referred to in Article 7(1), or in a separate implementing act, that:		
51	(a) legal or natural persons designated in accordance with paragraph 2 point (a) shall be subject to Union response measures; or	Could “legal or natural persons” addressed in letter a) also be “Union legal or natural persons” (for ex. Union companies which are daughter companies of the respective 3rd country)? AT considers that to be the case – see Art. 9 (3) 1st	

		sentence! Therefore the proposed regime will also have an impact on certain Union economic operators, which shows the need, that the provisions must be drafted as clearly as possible.	
52	(b) without prejudice to the responsibility of the third country under international law, Union natural or legal persons affected by the third country's measures of economic coercion shall be entitled to recover, from persons designated pursuant to paragraph 2, point (b), any damage caused to them by the measures of economic coercion up to the extent of the designated persons' contribution to such measures of economic coercion.	The concept of b) is not aligned with the civil law concepts for damages in the MS! So far courts decide on claims for damages on the basis of legal provisions (and not on the basis of implementing acts of the COM) and the injured parties must prove that their claims are justified (the latter would be substituted by the implementing act?). This new approach raises several questions: Who can/will determine the "extent of the designated person's contribution" – the Commission, the MS, the "union persons affected", (Union) courts? The "entitlement to recover": would this constitute a (separate and own) legal basis on which the "affected persons" can directly claim damages? If multiple affected persons are entitled – how shall their claims be satisfied ("first come first served", in an aliquot/equal manner,)? How can this be sorted out in an EU context (where multiple national courts have to decide on damages)? AT is not convinced, that the proposed provision is useful; it would lead to very problematic court cases! Article 8, paragraph 1(b), of the Proposal allows the Commission to grant Union natural or legal persons affected by a third country's economic coercion the right to recover damages from persons "connected or linked to the government" of the third country, when they	Delete b) without prejudice to the responsibility of the third country under international law, Union natural or legal persons affected by the third country's measures of economic coercion shall be entitled to recover, from persons designated pursuant to paragraph 2, point (b), any damage caused to them by the measures of economic coercion up to the extent of the designated persons' contribution to such measures of economic coercion.

		have “caused or been involved in or connected with the economic coercion”. This would not only lead to the unusual creation of individual financial responsibility for internationally wrongful acts of a state, but may also cover persons whose involvement may not be sufficient to establish their responsibility for those acts. It may also be inconsistent with the „no claims clause” recommended in the EU Sanctions Guidelines, according to which indemnity claims of designated persons for damages suffered due to the implementation of sanctions shall not be satisfied. Through the ACI, the EU now intends to create that option for its own citizens in the context of economic coercion. Due to these reasons and in light of a potential reciprocal creation of such mechanisms against EU persons by other states, Austria seeks clarification of the following questions: - What is the legal basis for the creation of individual financial responsibility for the act of a state as outlined in Article 8 of the Proposal? - What is meant by “connected or linked to the government” in Art. 8(2)(b)? What is meant by “caused”, “involved in”, or “connected with” the economic coercion? How do these definitions, and the subsequent listing of persons based on them, correspond to the EU Sanctions Guidelines and their goal to minimise adverse consequences for those not responsible for the act in question?	
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53	Those measures shall apply as of the same date of application as the Union response measures adopted pursuant to Article 7, or as of a later date specified in the implementing act pursuant to this paragraph.	This concept doesn’t work if there is no measure according to Art. 7; if there is no such measure which “later date” (in comparison to what) is envisaged?	Those measures shall apply as of the same date of application as the Union response measures adopted pursuant to Article 7, or as of a later date specified in the implementing act pursuant to this paragraph.
54	Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 15(2).	We suggest here the same procedure as in Line 38. We advocate that the relevant implementing act be adopted in accordance with the "no opinion - no action procedure" pursuant to Art. 5(4) of the Comitology Regulation - analogous to the provision in Art. 8(2) of the Trade Enforcement Regulation.	
55	2. The Commission may designate a natural or legal person where it finds:	The alternatives in lit. a and b are no real alternatives, as lit. a provides for certain conditions and lit. b repeats exactly these conditions adding some more in cumulation. We explicitly welcome the provisions made in Article 8 regarding the claim of civil damages against persons defined in Article 8 (2).	
56	(a) that such person is connected or linked to the government of the third country concerned; or,	Could lit. a not be deleted? If a person is „only“ linked to a government of a country applying coercive measures without any proof that this person is also involved in the coercive acts, countermeasures against such person could not be justified.	

		Can the COM provide examples for this specific link/connection? A clarification should at least be provided in a Recital.	
57	(b) that such person is connected or linked to the government of the third country concerned and has additionally caused or been involved in or connected with the economic coercion.	Can the COM provide examples for this specific link/connection (see a)? Which kind of causal relationship (“caused”) or “connection” to the coercion is envisaged. This should at least be explained in a Recital. Would it suffice for an entitlement according to paragraph 1 b) that the mother company (established in the 3rd country) of a union legal person participated (voluntarily or not) in the economic coercion (for ex. by putting pressure on its Union trading partners)?	
58	3. In making this designation the Commission shall examine all relevant criteria and available information, including whether the persons concerned are known to effectively act on behalf of, or are beneficially owned or otherwise effectively controlled by the government of the third country.	In making a designation of natural or legal persons that fall under the definition of para. 2 the Commission shall examine „all relevant criteria“. However, apart from the definition in para. 2, there are no clear criteria mentioned for such a designation.	
59	4. Where the Commission has grounds to consider that persons should be designated pursuant to paragraph 2, point (a) or point (b) it shall publish a provisional list of persons and, where relevant, the possible measures pursuant to Annex I that they would be subject to. Before deciding on designation, it shall give any persons provisionally designated and other interested parties the opportunity to submit comments on the possible designation, in particular whether they fall under the conditions of paragraph 2, point (a) or point (b). The Commission may also	We have serious doubts that the publication of a provisional list of persons that are considered to fall under para. 2 (but without any proof that they really fulfil the relevant conditions!) is compatible with the GDPR. Who are or may be the „other interested parties“ mentioned in this para.? COM said in the Trade Questions Working Party on 2nd March 2022, that they do not see a connection to Article 12 in this case. AT still wonders why the COM shares this opinion and how this publication is in line with the	4. Where the Commission has grounds to consider that persons should be designated pursuant to paragraph 2, point (a) or point (b) it shall publish a provisional list of persons and, where relevant, the possible measures pursuant to Annex I that they would be subject to. Before deciding on designation, it shall give any persons provisionally designated and other interested parties the opportunity to submit comments within 20 days on the possible designation, in particular whether they fall under the conditions of paragraph 2, point (a) or point (b). The

	seek additional information it considers pertinent concerning the potential designation.	confidentiality requirements pursuant to Article 12. For ex: the business relationship btw various companies might be regarded as sensible information ("silent partner"). Additionally a deadline should be set for the submission of comments.	Commission may also seek additional information it considers pertinent concerning the potential designation.
60	Article 9 Criteria for selecting and designing Union response measures		
61	1. Any Union response measure shall not exceed the level that is commensurate with the injury suffered by the Union or a Member State due to the third country's measures of economic coercion, taking into account the gravity of the third country's measures and the rights in question.	What are the criteria for the determination, if a countermeasure is „commensurate“ with the injury suffered by the Union or a Member State? Is immaterial damage taken into account? How and under which conditions? As not only one, but several Member States might be affected by a coercive measure of a third country we would suggest the following language: „injury suffered by the Union or by one or more certain Member States“. How does the Commission determine whether the level that is commensurate is exceeded or not? The injury suffered will affect not only the "Union or a MS" but mostly "Union natural or legal persons" (see Art. 8 (1) b) and para 2 b) below); such injuries must also be taken into account.	1. Any Union response measure shall not exceed the level that is commensurate with the injury suffered by the Union, a Member State or an Union natural or legal person due to the third country's measures of economic coercion, taking into account the gravity of the third country's measures and the rights in question.
62	2. The Commission shall select and design an appropriate response measure taking into account the determination made pursuant to Article 4, the criteria set out in Article 2(2) and the Union's interest, on the basis of available information, including as collected pursuant to Article 11, and the following criteria:	The criteria leave it completely unclear if countermeasures may only be taken in the same sector as the coercive measures or also in other sectors (example: may restrictions to the public procurement market of the EU only be imposed if the third country uses restrictions to its own procurement market as a coercive measure? Or may the EU also introduce additional tariffs	

		against goods originating in the third country concerned if these are more in line with the criteria under this para.?)? If measures in other sectors are possible, how can the determination be made that they are commensurate as required under para. 1? Regarding “Union’s interest”, see our comments in line 36.	
63	(a) the effectiveness of the measures in inducing the cessation of the economic coercion;	AT considers that a “cross sector response” (for ex. coercion in the area of chemicals – response in the area of procurement) would be possible – can the Commission confirm? That would in some cases not be in line with the WTO regime where cross retaliation is not always admissible! If “cross-retaliation” is envisaged, it must be in line with the Unions obligations under international law.	
64	(b) the potential of the measures to provide relief to economic operators within the Union affected by the economic coercion;		
65	(c) the avoidance or minimisation of negative impacts on affected actors by Union response measures, including the availability of alternatives for affected actors, for example alternative sources of supply for goods or services;		(c) the avoidance or minimisation of negative impacts on affected Union actors by Union response measures, including the availability of alternatives for affected such actors, for example alternative sources of supply for goods or services;
66	(d) the avoidance or minimisation of negative effects on other Union policies or objectives;		
67	(e) the avoidance of disproportionate administrative complexity and costs in the application of the Union response measures;		
68	(f) the existence and nature of any response measures enacted by other countries affected	What is meant by similar measures? Must these be measures in the same sector as those	

	by the same or similar measures of economic coercion, including where relevant any coordination pursuant to Article 6;	targeted as the EU or its Member States? Must the reason for the coercion be the same? Can similar measures also be measures of another third country, if two countries exert coercion in a coordinated way? Can the Commission can give examples of rules of international law relevant in this regard?	
69	(g) any other relevant criteria established in international law.	Can Commission give examples of “any other criteria established in international law”?	
70	3. The Commission may decide to apply Union response measures under Articles 7 or 8 consisting of restrictions on foreign direct investment or on trade in services also with regard to services supplied, or direct investments made, within the Union by one or more legal persons established in the Union and owned or controlled by persons of the third country concerned where necessary to achieve the objectives of this Regulation. The Commission may decide on such application where Union response measures not covering such situations would be insufficient to effectively achieve the objectives of this Regulation, in particular where such measures could be avoided. In assessing whether to adopt such a decision the Commission shall consider, in addition to the criteria in paragraphs 1 and 2, amongst other things:	The Measures („intra-Union restrictions“) under this para. may lead to severe restrictions of the fundamental freedoms on the single market (see also general remarks). Do the persons of the third country concerned „owning or controlling“ the legal persons established in the Union have to be persons fulfilling the criteria under Art. 8 para. 2? If not, how can such severe restrictions be justified against these persons? What does „persons of the third country concerned“ mean, especially with regard to natural persons? Are only persons covered, who have the nationality of the third country concerned or also persons having permanent residence there? How are these „Union response measures“ imposing "intra-Union restrictions" on services already provided or foreign direct investment already made compatible with legal certainty or fundamental freedoms? To what extent are Union response measures imposing "internal Union restrictions" on foreign direct investment already made (completed) compatible with	3. The Commission may decide to apply Union response measures under Articles 7 or 8 consisting of restrictions on foreign direct investment or on trade in services also with regard to services supplied, or direct investments made, within the Union by one or more legal persons established in the Union and owned or controlled and which are under a dominant influence by persons of the third country concerned where necessary to achieve the objectives of this Regulation.

		Regulation (EU) 2019/452 („FDI Screening Regulation“)? Regarding Article 9 (3), Austria believes it to be questionable whether, based on Article 207 of the TFEU, restrictions on direct investment and services supplied within the single market for persons established in the EU may be made, especially if these persons are not listed themselves pursuant to Article 8 (2), but are merely under the economic (majority) ownership or under the control of a listed third-country person. Ownership or control by persons established in the Union must not be a final criterion for encroaching upon such persons’ freedom of ownership and freedom to do business in the EU. Austria therefore proposes a review to determine if restrictions pursuant to Article 9 (3) of the Regulation Proposal violate European or constitutional provisions and, in case they do not, to determine if these restrictions are permissible under Article 207 of the TFEU or if they require another basis in Union law. If these are restrictions or the prevention of new FDIs or investments by nationals of third countries to be made or are they or are they countermeasures and restrictions on investments that have already been made? Should subject matter be restrictions on investments already made by third country nationals in the EU, this raises questions of conformity with investment protection agreements of the EU with third countries.	
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		Para 3 1st sentence grants the COM a leeway to adopt response measures against certain union actors (“may”). Since the evaluation of the necessity to act is already a precondition for the adoption of an implementing act (see Art. 7 (1)) and para 3 a) to c) provide additional criteria it is unclear which additional criteria may play a role in this context. Can COM clarify? The concept of “owned or controlled”: should be aligned with the concept of IPI (“dominant influence”) which encompasses the criteria of ownership and control as well (see in this regard the non-IPI-aligned wording in Annex II point 2 b) ii) as well)? A clear and harmonized concept is needed and this concept must be aligned with IPI since both instruments are part of the Unions commercial policy. The last part of the 1st sentence should be deleted: According to Art. 7 a Union interest test and an examination of the necessity of the action already takes place (see Art. 7 (1)). Therefore, it is not necessary to reiterate that the response measure is “necessary to achieve the objectives of this Regulation”.	
71	(a) the patterns of trade in services and investment in the sector targeted by the envisaged Union response measures and the risk of avoidance of any Union response measures not applying to services supplied, or direct investments made, within the Union;		
72	(b) the effective contribution of such intra-Union restrictions to the objective of obtaining		

	the cessation of the measure of economic coercion;		
73	(c) the existence of alternative measures capable of achieving the objective of obtaining the cessation of the measure of economic coercion that are reasonably available and less restrictive of trade in services or investment within the Union.		
74	Any decision to apply restrictions with regard to services supplied, or direct investments made, within the Union by one or more legal persons established in the Union shall be duly justified in the implementing act referred to in paragraph 1 of Article 7 in light of the above criteria.		
75	Article 10 Amendment, suspension and termination of Union response measures		
76	1. The Commission shall keep under review the measures of economic coercion deployed by a third country that have triggered the Union response measures, the effectiveness of the Union response measures adopted and their effects on the Union's interests and shall keep the European Parliament and the Council informed thereof.	In which way, and how often shall the Commission keep the EP and the Council informed?	
77	2. Where the third country concerned suspends the economic coercion, or where it is necessary in the Union's interest, the Commission may suspend the application of the respective Union response measure for the duration of the third country's suspension, or as long as necessary in light of the Union's interest. The Commission shall suspend the Union response measures if the third country concerned has offered, and	As there are no clear criteria for the determination of the Union interest (see also remarks to Art. 7 para. 1) it is completely left to the discretion (the Commission „may“!! suspend) of the Commission in which situations and how long they suspend a counter-measure in the Union interest. Clear rules in this regard are necessary.	“The Commission shall, by means of an implementing act, decide to suspend the Union response measure at least until the proceedings have been finished. ”

	the Union has concluded, an agreement to submit the matter to binding international third-party adjudication and the third country is also suspending its measures of economic coercion. The Commission shall, by means of an implementing act, decide to suspend the Union response measure. These implementing acts shall be adopted in accordance with the examination procedure referred to in Article 15(2).	Which kinds of „binding international third party adjudication“ does the Commission have in mind? Do the WTO dispute settlement system, or a dispute settlement mechanism under an FTA fall under this provision though such adjudication does not deal with the question if the coercion violates international law? Can COM clarify that “adjudication” includes “conciliation and arbitration”? The timeline for the suspension should be clarified. The COM, in exercising its powers to <i>suspend</i> “Union response measure”, shall be controlled by Member States in the same comitology procedure as was used when COM adopted the implementing act in the first place (i.e. "no opinion - no action procedure" pursuant to Art. 5(4) of the Comitology Regulation, see AT comments line 38).	
78	3. Where it is necessary to make adjustments to Union response measures taking into account the conditions and criteria laid down in Articles 2 and 9(2), or further developments, including the third country’s reaction, the Commission may, as appropriate, amend Union response measures adopted in accordance with Article 7, by means of an implementing act, in accordance with the examination procedure referred to in Article 15(2).	Does „the third country’s reaction“ mean retaliation measures by this country? Are reactions by other third countries, that might be negatively affected by the EU’s countermeasures (e.g. suppliers of important inputs to goods originating in the coercing third country that are targeted by higher tariffs) also taken into account? Reference should also be made to Art. 9 (3) which contains criteria as well! The 2nd sentence should also apply to response measures according to Art. 8 (see Art. 8 (1) “separate implementing act”)! Any <i>amendment</i> of the Union response measures adopted in accordance with Article 7	3. Where it is necessary to make adjustments to Union response measures taking into account the conditions and criteria laid down in Articles 2 and 9(2) or (3), or further developments, including the third country’s reaction, the Commission may, as appropriate, amend Union response measures adopted in accordance with Article 7 or 8, by means of an implementing act, in accordance with the examination procedure referred to in Article 15(2).

		by means of an implementing act shall follow the same comitology procedure as was used when COM adopted the implementing act in the first place (i.e. "no opinion - no action procedure" pursuant to Art. 5(4) of the Comitology Regulation, see AT comments line 38).	
79	4. The Commission shall terminate Union response measures under any of the following circumstances:		
80	(a) where the economic coercion has ceased;		
81	(b) where a mutually agreed solution has otherwise been reached;		
82	(c) where a binding decision in international third-party adjudication in a dispute between the third country concerned and the Union or a Member State requires the withdrawal of the Union response measure;	As regards "adjudication" see comments above regarding Art. 10 par. 2!	
83	(d) where it is appropriate in light of the Union's interest.		
84	The termination of Union response measures adopted in accordance with Article 7 shall be decided, by means of an implementing act, in accordance with the examination procedure referred to in Article 15(2).	Art. 8 should be included here as well ("separate implementing act"). The <i>termination</i> of the Union response measures shall follow the same comitology procedure as was used when COM adopted the implementing act in the first place (i.e. "no opinion - no action procedure" pursuant to Art. 5(4) of the Comitology Regulation, see AT comments line 38).	The termination of Union response measures adopted in accordance with Article 7 or 8 shall be decided, by means of an implementing act, in accordance with the examination procedure referred to in Article 15(2).
85	5. On duly justified imperative grounds of urgency, the Commission shall adopt immediately applicable implementing	What are duly justified imperative grounds of urgency mentioned here? Can the Commission give examples?	5. On duly justified imperative grounds of urgency, the Commission shall adopt immediately applicable implementing

	acts suspending, amending or terminating Union response measures adopted in accordance with Article 7. Those implementing acts shall be adopted in accordance with the procedure referred to in Article 15(3) and they shall remain in force for a period not exceeding two months.	The system btw Art. 7 (6) and Art. 10 (5) is not quite clear: In case of urgency an implementing act may be adopted which remains only in force for a limited period of time and which – also in case of urgency (which cases might that be?) – may be suspended, amended or terminated by another implementing act (which as such also remains only for a limited period of time in force)! The “termination” of a Union response for a period of XX months seems rather odd – what happens after this period (the “terminated response” “rises” again)? Paragraph 5 should be limited to the suspension or amendment of Union responses! The termination is sufficiently dealt with in para 4. What was the reason to limit the period to “two months”?	acts suspending or amending or terminating Union response measures adopted in accordance with Article 7.
86	Article 11 Information gathering related to Union response measures	Here again clear rules for the initiation of information gathering are missing. How does the „Information gathering related to Union response measures“, under this new instrument compare to information gathering under Regulation (EU) 2021/167 (the „Trade Enforcement Regulation“)? What Commission experiences in information gathering under the Trade Enforcement Regulation are the provisions on information gathering under this new instrument based on? What happened to the “hierarchy of countermeasures” as applied in the “Trade Enforcement Regulation”?	
87	1. Before the adoption of Union response measures or the amendment of such measures, the Commission shall, and before the suspension or termination of such measures,	A formal notice is only necessary if the Commission seeks views of stakeholders and information before taking a decision. However, in the case of suspension or termination of	1. Before the adoption of Union response measures or the amendment of such measures, the Commission shall, and before the suspension or termination of such measures,

	respectively, the Commission may, seek information and views regarding the economic impact on Union operators and Union's interest, through a notice published in the Official Journal of the European Union or through other suitable public communication means. The notice shall indicate the period within which the input is to be submitted.	measures, they are not obliged to do so the initiation of such a procedure is completely left to the discretion of the Commission. An information gathering procedure with a clear formal initiation should be foreseen in <u>all</u> cases. At least there should be clear and transparent criteria for such an obligation in suspension or termination cases. What are „other suitable communication means“? How can sufficient transparency be guaranteed by such other means? Para. 1 should clearly refer to the concrete provisions in this instrument (e.g. Art. 7 para. 1, Art. 8 para. 1 etc.) that enable Commission to adopt Union response measures. Commission should be obliged to seek information and views regarding the economic impact of the „Union response measure“ on Union operators in all those cases. Given the importance of the information gathering it seems appropriate to have a mandatory publication in the OJ. An undetermined alternative publication only through “other suitable means” is not acceptable.	respectively, the Commission may, seek information and views regarding the economic impact on Union operators and Union's interest, through a notice published in the Official Journal of the European Union or and, if appropriate, through other suitable public communication means.
88	2. The Commission may start the information gathering at any time it deems appropriate.	There should be clear criteria for a Commission decision, if and when to start the information gathering. The provision as it stands leaves this decision to a nearly unlimited discretion of the Commission („appropriate“ is very vague).	
89	3. In conducting the information gathering under paragraph 1, the Commission shall inform and consult stakeholders, in particular industry	Who are the „Member States involved“? Only those particularly targeted by a third country measure? What about Member States in which	3. In conducting the information gathering under paragraph 1, the Commission shall inform and consult stakeholders, in particular industry

	associations, affected by possible Union response measures, and Member States involved in the preparation or implementation of legislation regulating the affected fields.	companies are affected by the countermeasures or „Union response measures“? How can the Commission know in advance all those Member States? We therefore would prefer to have <u>all</u> Member States involved. In paragraph 3, industry associations must be replaced by business associations. Coercive measures can equally affect all economic sectors (trade, banking, transit, etc.). Member States should always be involved (and all MS not only those COM considers involved in the preparation a.s.o.); the term “in the preparation or implementation of legislation regulating the affected fields” should thus be deleted.	business associations, affected by possible Union response measures, and Member States involved in the preparation or implementation of legislation regulating the affected fields.
90	4. Without unduly delaying the adoption of Union response measures, the Commission shall, in particular, seek information on:		
91	(a) the impact of such measures on third-country actors or Union competitors, users or consumers or on Union employees, business partners or clients of such actors;		
92	(b) the interaction of such measures with relevant Member State legislation;		
93	(c) the administrative burden which may be occasioned by such measures;		
94	(d) the Union’s interest.	There should be clear criteria to determine the Union interest (see also comments on Art. 7 para. 1 lit. c).	
95	5. The Commission shall take utmost account of the information gathered during the information gathering exercise. An analysis of	The reference here need to refer to the comitology procedure that was used when COM adopted the implementing act in the first place (i.e. "no opinion - no action procedure"	

	the envisaged measures shall accompany the draft implementing act when submitted to the committee in the context of the examination procedure referred to in Article 15(2).	pursuant to Art. 5(4) of the Comitology Regulation, see AT comments line 38).	
96	6. Prior to the adoption of an implementing act in accordance with Article 7(6) or Article 10(5), the Commission shall seek information and views from relevant stakeholders in a targeted manner, unless the imperative grounds of urgency are such that information seeking and consultations are not possible or not needed for objective reasons, for instance to ensure compliance with international obligations of the Union.	What are „imperative grounds of urgency“? There should be clear criteria for those grounds. There should be also clear criteria for situations in which consultations are regarded as not possible or as „not needed for objective reasons“. What are those objective reasons and who decides whether they prevail in a certain urgency situation? Which international obligation the Union can only comply with by not seeking information and by not consulting? What about Art. 10 (4)? In cases of termination according to Art. 10 (4) –esp. in cases concerning a), b) and d) –the stakeholders should be involved as well (because their feedback is valuable if for ex the “mutually agreed solution” is sufficient or the termination is “in the Union’s interest”)! It is rather strange that stakeholders should be involved in urgent situations but not in “regular” situations.	6. Prior to the adoption of an implementing act in accordance with Article 7(6) or Article 10(4) or (5), the Commission shall seek information and views from relevant stakeholders in a targeted manner, unless the imperative grounds of urgency are such that information seeking and consultations are not possible or not needed for objective reasons, for instance to ensure compliance with international obligations of the Union.
97	Article 12 Confidentiality		
98	1. Information received pursuant to this Regulation shall be used only for the purpose for which it was requested.		
99	2. The supplier of information may request that information supplied be treated as confidential. In such cases, it shall be accompanied by a non-confidential summary or a statement of the reasons why the information cannot be		

	summarised. The Commission, the Council, the European Parliament, Member States or their officials shall not reveal any information of a confidential nature received pursuant to this Regulation, without specific permission from the supplier of such information.		
100	3. Paragraph 2 shall not preclude the Commission to disclose general information in a summary form, which does not contain information allowing to identify the supplier of the information. Such disclosure shall take into account the legitimate interest of the parties concerned in not having confidential information disclosed.		
101	Article 13 Rules of origin	To ensure coherence the rules of origin for the purposes of this Regulation should be in line with those under other legal instruments (e.g. Trade Enforcement Regulation, IPI). If there are different rules it should be clearly shown, why this is necessary with regard to the different purposes of the various instruments.	
102	1. The origin or nationality of a good, service, service provider, investment or intellectual property rightholder shall be determined in accordance with Annex II.	The rules of origin in Annex II point 1 and 2 [except letter b) iii)] should be aligned with the rules of origin in IPI! A different approach must be avoided!	See wording in IPI (Art. 3 in WK 3925/22) Determination of origin The origin of an economic operator shall be deemed to be: (a) in the case of a natural person, the country of which the person is a national or where that person has a right of permanent residence; (b) in the case of a legal person either of the following: (i) the country under the laws of which the legal person is constituted or otherwise organised

		and in the territory of which the legal person is engaged in substantive business operations; (ii) if the legal person is not engaged in substantive business operations in the territory of the country in which it is constituted or otherwise organised, the origin of the legal person shall be that of the person or persons which may exercise, directly or indirectly, a dominant influence on the legal person by virtue of their ownership of it, their financial participation therein, or the rules which govern it. For the purposes of point (b) (ii) of the first subparagraph, that person or persons shall be presumed as having a dominant influence on the legal person in any of the following cases in which they, directly or indirectly: (a) hold the majority of the legal person's subscribed capital; (b) control the majority of the votes attaching to shares issued by the legal person; (c) can appoint more than half of the legal person's administrative, management or supervisory body. Where an economic operator is a group of natural or legal persons and/or of public entities, and at least one of such persons or entities originates from a third country whose economic operators and goods and services are subject to an IPI measure, that IPI measure shall equally apply to tenders submitted by that group. This shall not apply if the participation of those persons or entities in a group amounts to
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			less than 15% of the value of the tender in question, unless those persons or entities are necessary for fulfilling the majority of at least one of the selection criteria in a public procurement procedure. Contracting authorities or contracting entities may at any time during the public procurement procedure request the economic operator to submit, supplement, clarify or complete the information or documentation related to the verification of the economic operator's origin within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency. Where the economic operator without any reasonable explanation fails to provide such information or documentation, thereby preventing the verification of the economic operator's origin by contracting authorities or contracting entities or making such a verification practically impossible or very difficult, it shall be excluded from the participation in a public procurement procedure. The origin of a good shall be determined in accordance with Article 60 of the Regulation (EU) No 952/2013, while the origin of a service shall be determined on the basis of the origin of the economic operator providing it.
103	2. The Commission is empowered to adopt delegated acts in accordance with Article 14 to amend points 2 to 4 of Annex II in order to amend the rules of origin and add any other	We have doubts that the „rules of origin“ are really „non-essential“ elements of the Regulation and the use of delegated acts to amend them is in line with Art. 290 TFEU.	

	technical rules necessary for the application of the Regulation, to ensure its effectiveness and to take account of relevant developments in international instruments and experience in the application of measures under this Regulation or other Union acts.	What was the result of Commission-internal coordination to this between DG TRADE and DG TAXUD? What was DG TAXUD's assessment of this provision?	
104	Article 14 Delegated Acts	As detailed above (see comments on Art. 7 para 7 and Art. 13 para. 2) we have serious doubts that both delegations (extension of the list of „Union response measures“ in Art. 7 para. 7 and amendment of the rules of origin in Art. 13. para 2) fulfil the threshold enshrined in Art. 290 TFEU („The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power“). Therefore, in both provisions, more flesh needs to be added to the bones in the main body of the legislative text in our preliminary assessment. We would much appreciate CLS' view on this. Would it add to legal certainty to have this Article deleted, and to have the areas now contained in Annex I legislatively circumscribed in the main body of the text?	
105	1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.		
106	2. The power to adopt delegated acts referred to in Articles 7(7) and 13(2) shall be conferred on the Commission for an indeterminate period of time from [date of entry into force].		
107	3. The delegation of power referred to in Articles 7(7) and 13(2) may be revoked at any		

	time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.		
108	4. Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016.		
109	5. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.		
110	A delegated act adopted pursuant to Articles 7(7) and 13(2) shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.		
111	Article 15 Committee procedure		
112	1. The Commission shall be assisted by a Committee. That committee shall be a committee within the meaning of Article	The rules of the Committee procedure should be aligned with the rules of the Committee procedure in IPI!	The Commission shall be assisted by the Committee <u>set up by Article 7 of the Council Regulation (EU) 2015/1843 (Trade Barriers</u>

	3 of Regulation (EU) No 182/2011.		Regulation). That committee shall be a committee within the meaning of Article 3 of Regulation (EU) No 182/2011.
113	2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.	In this Article, the template reference to the "no opinion - no action procedure" pursuant to Art. 5(4) of the Comitology Regulation (referenced in lines 38, 54, 77, 78, 84 and 94 above) should be included (and lines 38, 54, 77, 78, 84 and 94 should refer to this provision).	
114	3. Where reference is made to this paragraph, Article 8 of Regulation (EU) No 182/2011 in conjunction with Article 5 thereof, shall apply.		
115	Article 16 Review		
116	1. The Commission shall evaluate any Union response measure adopted pursuant to Article 7 six months after its termination, taking into account stakeholder input and any other relevant information. The evaluation report shall examine the effectiveness and operation of the Union response measure, and draw possible conclusions for future measures.	Why does the Commission only evaluate measures adopted pursuant to Article 7 and not also measures adopted pursuant to Article 8 (which might be implemented in a separate implementing act)?	1. The Commission shall evaluate any Union response measure adopted pursuant to Article 7 or 8 six months after its termination, taking into account stakeholder input and any other relevant information.
117	2. No later than three years after the adoption of the first implementing act under this Regulation or six years after the entry into force of this Regulation, whichever is earlier, the Commission shall review this Regulation and its implementation and shall report to the European Parliament and the Council.		
118	Article 17 Entry into force		
119	This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.		

120	This Regulation shall be binding in its entirety and directly applicable in all Member States.		
	END	END	END
Table for MS comments on 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 Annexes 1 and 2			
	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
121	ANNEX I Union response measures pursuant to Articles 7 and 8	As detailed above, we are not convinced of an enumeration of „Union response measures“ in Annex I in connection with a delegation of power to Commission to amend Annex I as foreseen in Art. 7 para. 7 of Commissions proposal for the new instrument, see comments on Art. 7 para. 7. Annex I describes some of the possible response measures. These response measures include both trade and investment-related restrictions such as customs duties, customs quotas, export and import restrictions, restrictions on trade of services, direct foreign investment, tender procedures in the area of public procurement, protection of intellectual property, access to financial services including banking and insurance services, access to the EU capital market and other financial services. Another possible response measure is the restriction of collaboration with the concerned third country within the framework of the European Bank for Reconstruction.	

		In the opinion of the Economic Chamber, response measures are only permissible within the limits of constitutions, EU legislation, and international law. Above all, the new instrument must not interfere with the right of ownership of Union citizens and businesses established in the EU or violate WTO law. Single market trade or investment restrictions should not be the subject of response measures. In addition, it is the responsibility of member state authorities to provide or deny licenses for exporting goods within the framework of the Dual Use Regulation 2021/821 or other relevant export control provisions. In the view of the Austrian Federal Economic Chamber, it is questionable whether, within the framework of the proposed trade defense instrument, interference with export control rules, especially the Dual Use Regulation, is permissible. From a procurement perspective, several Union responses might have a direct effect on the Union procurement regime (the following examples are not exhaustive): • An additional charge on goods will have an effect on tender prices – what happens if the charge is introduced after the tender has been submitted in a procurement procedure or after the award of a contract? The Procurement Directives limit the possibilities to adjust prices in ongoing procedures (depending on the type of procedure) and after the award of a contract. Would this be considered an economic risk of the tenderer? How shall this work in a supply	
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		chain when subcontractors or suppliers are affected? • New restrictions on the import of goods might have an impact on contractual obligations resulting from a procurement procedure. If the restriction is imposed during a procurement procedure would this for ex. constitute a (mandatory) ground of exclusion regarding tenderers from the respective 3rd country (if the respective goods are the subject matter of the procurement)? Could the tenderer from the 3rd country negate the effects of ACI by using subcontractors [if no measures according to letter d) i) are adopted simultaneously]? • Does the “suspension of trade in services” or “financial services” has the effect, that subcontractors from targeted 3rd countries must (!) be excluded from procurement procedures/from supply chains? • Can IPRs (if the respective international obligations are suspended) be freely used by anyone? What happens if they are used in a procurement procedure (for ex. in an innovation partnership) and the response is lifted afterwards?	
122	Measures which may be adopted pursuant to Articles 7 and 8 are:		
123	(a) the suspension of 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;		
124	(b) the 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;		
125	(c) the 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.		
126	(d) the suspension of applicable international obligations concerning the right to participate in tender procedures in the area of public procurement, as necessary, and:	It must be ensured that “cross-retaliation” involving procurement procedures must be in conformance with international obligations (esp. GPA)! AT supports in principle the suspension of international obligations in the field of procurement in the context of coercion. However, in both cases addressed in letter d) an appropriate transparency mechanism is needed to ensure that the exclusion or the adjustment measure is applicable in practice. CA/CE in the Union must be informed as to which companies from which 3rd countries (new) exclusion grounds or adjustment measures should apply to. As in IPI a “de minimis” threshold (for contracts, lots, call-offs from framework agreements) must be established otherwise the Regulation would apply to all procurement procedures (even	

		below the Union thresholds as set out in the Procurement Directives)! This would not be acceptable for AT! At the same time it must be ensured, that such measures only apply to procurement procedures initiated after the publication of union response measures (see in this regard Art. 1 (5a) of IPI which mirrors the rule of the PP Directives – see for ex. Art. 5 (4) of Directive 2014/24/EU). A respective clarification (addition) in the text is absolutely necessary! AT also considers that the regime of letter d should be applicable both at the EU as well as at the Member State level (thus this regime should be applied both in procedures of Member States and Union institutions). A respective clarification must be included in the text! For specific circumstances exceptions to ACI must be implemented: for ex only tenderers from targeted 3rd countries submit offers, only a supplier from the targeted 3rd country exists, in exceptional cases for overriding reasons of public interests (pandemic). See in this regard IPI!	
127	(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 of goods or services of the third country concerned; and/or	It would also have to be considered whether this exclusion would be introduced on a mandatory or voluntary basis (see e.g. Art. 57 (1) and (4) of the Directive 2014/24/EU). The “percentage” should be fixed in the Regulation itself and not by the Commission in an implementing act. Alternatively a “percentage range” could be envisaged. AT	

		points to the fact, that the current wording would lead to high administrative burdens, because CA/CE would need to check the whole supply chain in every (!!) procurement procedure to verify if goods, services or suppliers of goods or services originate in the targeted 3rd country. AT points to the solution found in the context of IPI and insists that the regime of ACI and IPI must be aligned in this regard. To this effect several provisions from IPI must be incorporated in ACI.	
128	(ii) the imposition of a mandatory price evaluation weighting penalty on tenders of goods, services or suppliers of goods or services of the third country concerned.	The terminology must be aligned with IPI! A mandatory “price” adjustment would be ineffective in procedures where the price is irrelevant or of marginal importance (for ex. concessions, innovative procurement, intellectual services). That was the reason a “score adjustment mechanism” was introduced in IPI – the same approach must be taken in the current context! A right balance for the minimum/maximum margin for the adjustment measure has to be struck. Currently the proposal does not contain any indication how the adjustment measure should look like. Contrary to IPI it is not clarified, that the adjustment only applies for the purpose of the evaluation or ranking of the tenders (and does not affect the price ultimately paid to the successful tenderer). Moreover, it is quite unclear how the price adjustment measure should be applied in case of bidding consortia (groups of economic	

		operators). If such a group of economic operators is comprised of several members only one (or some) of which fall under the price adjustment measure, does the adjustment have to be applied to the price of the tender as a whole or only to the respective parts of the tender? The price adjustment measures of the Regulation will impact EU owned companies which are major but not dominant shareholders (in the EU as well as in 3rd countries) and EU owned companies whose tenders include 3rd country origin. This also means price adjustment could apply to tenders with significant EU content. Furthermore, there could be far-reaching effects on EU re-sale companies and importers, which sell goods imposed from third countries. It seems that such companies would be fully affected by the price adjustment measures even though they might be 100% European companies and have already paid import duty for the goods concerned. The Regulation might lead to a price dumping effect: since tenders affected by a price adjustment mechanism will be aware of this fact they will be forced to lower their bid-prices just to stay competitive (the price difference will be taken into account in the calculation of the 3rd country tenderer). However, this most likely will put pressure on EU tenderers to force down their prices as well. The Regulation could therefore have a downward spiralling price effect, which could be detrimental for the EU	
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		economy.	
129	1 Mandatory price evaluation weighting penalty means an obligation for contracting authorities or entities conducting public procurement procedures to increase, subject to certain exceptions, the price of goods or services falling under this paragraph that have been offered in contract award procedures.		
130	Origin shall be determined on the basis of Annex II;		
131	(e) the suspension of applicable international obligations, as necessary, and the imposition of restrictions on the exportation of goods falling under the Union export control regime;		
132	(f) the suspension of applicable international obligations regarding trade in services, as necessary, and the imposition of measures affecting trade in services;		
133	(g) the suspension of applicable international obligations, as necessary, and the imposition of measures affecting foreign direct investment;		
134	(h) the suspension of applicable international obligations with respect to trade-related aspects of intellectual property rights, 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;	What were the results of DG TRADE's consultations with Member States' intellectual property experts before adopting its proposal for this new instrument, including letter h to Annex I? What was DG GROW's assessment on the impacts on intellectual property rights of „Union response measures“ in this field? The proposal would explicitly permit the suspension of the protection of IPR as part of the EU's anti-coercion measures for natural and legal persons from third countries engaging in coercion against the EU or its MS („suspension	

		of trade related aspects of intellectual property rights“, „restrictions on protection on IP“). It has to be borne in mind that the EU, together with other industrialized countries, repeatedly insisted on the enforcement of and respect for IPR, a line to take, which was always supported also by AT. Art 2 of the Paris Convention for the Protection of Industrial Property, prohibits the discrimination of nationals of a party to that convention – and thereby of almost any state in question – in terms of the protection of IPR. Similar obligations can be derived from Art 3 TRIPS. Suspending the obligations of the EU or its MS under the said treaties would be in contradiction to the EU’s position to insist on TRIPS-conformity even under the conditions of the current pandemic (TTRIPS-waiver“). It is our point of view that the COM-proposal in question would have to lead to a more flexible position regarding the ongoing negotiations for a TRIPS-waiver. Furthermore, the propopsal could be used against the EU by its opponents in the abovementioned negotiations in the framework of the WTO (TRIPS). It should also remembered that the protection of IPR usually is to the benefit of economically strong and highly developed economic areas, such as the EU itself. One should bear in mind that the suspension of IPR would most likely provoke reciprocal action by the third country concerned, leading to EU IPR-holders being much more affected than vice versa. Consequently, during the IA, stakeholders	
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		expressed caution about using restrictions regarding commercial aspects of intellectual property. Using the suspension of IPR should, for legal as well as practical reasons, be dealt with extreme caution.	
135	(i) the 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;		
136	(j) the 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;		
137	(k) the 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;		
138	(l) the 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.		
139	ANNEX II Rules of Origin	As already stated above, the rules of origin in point 1 and 2 [except letter b) iii)] should be aligned with the rules of origin in IPI!	See Art. 3 IPI (in WK 3925/22) Determination of origin The origin of an economic operator shall be deemed to be: (a) in the case of a natural person, the country of which the person is a national or where that person has a right of permanent residence;

		(b) in the case of a legal person either of the following: (i) the country under the laws of which the legal person is constituted or otherwise organised and in the territory of which the legal person is engaged in substantive business operations; (ii) if the legal person is not engaged in substantive business operations in the territory of the country in which it is constituted or otherwise organised, the origin of the legal person shall be that of the person or persons which may exercise, directly or indirectly, a dominant influence on the legal person by virtue of their ownership of it, their financial participation therein, or the rules which govern it. For the purposes of point (b) (ii) of the first subparagraph, that person or persons shall be presumed as having a dominant influence on the legal person in any of the following cases in which they, directly or indirectly: (a) hold the majority of the legal person's subscribed capital; (b) control the majority of the votes attaching to shares issued by the legal person; (c) can appoint more than half of the legal person's administrative, management or supervisory body. Where an economic operator is a group of natural or legal persons and/or of public entities, and at least one of such persons or entities originates from a third country whose economic operators and goods and services are
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		subject to an IPI measure, that IPI measure shall equally apply to tenders submitted by that group. This shall not apply if the participation of those persons or entities in a group amounts to less than 15% of the value of the tender in question, unless those persons or entities are necessary for fulfilling the majority of at least one of the selection criteria in a public procurement procedure. Contracting authorities or contracting entities may at any time during the public procurement procedure request the economic operator to submit, supplement, clarify or complete the information or documentation related to the verification of the economic operator's origin within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency. Where the economic operator without any reasonable explanation fails to provide such information or documentation, thereby preventing the verification of the economic operator's origin by contracting authorities or contracting entities or making such a verification practically impossible or very difficult, it shall be excluded from the participation in a public procurement procedure. The origin of a good shall be determined in accordance with Article 60 of the Regulation (EU) No 952/2013, while the origin of a service shall be determined on the basis of the origin of the economic operator providing it.
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140	1. The origin of a good shall be determined in accordance with Regulation (EU) No 952/2013 of the European Parliament and of the Council. 2		See above - for ex: IPI "Art. 60 of Regulation 952/2013" The origin of a good shall be determined in accordance with Article 60 of the Regulation (EU) No 952/2013, while the origin of a service shall be determined on the basis of the origin of the economic operator providing it.
141	2 Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269, 10.10.2013, p. 1).		See above for determination of origin in IPI.
142	2. The origin of a service, including a service supplied in the area of public procurement, shall be determined on the basis of the origin of the natural or legal person providing it. The origin of the service provider shall be deemed to be:		See above for determination of origin in IPI.
143	(a) in the case of a natural person, the country of which the person is a national or where the person has a right of permanent residence;		See above for determination of origin in IPI.
144	(b) in the case of a legal person any of the following:		See above for determination of origin in IPI.
145	(i) if the service is provided other than through a commercial presence within the Union, the country where the legal person is constituted or otherwise organised under the laws of that country and in the territory of which the legal person is engaged in substantive business operations;		See above for determination of origin in IPI.
146	(ii) if the service is provided through a commercial presence within the Union,		See above for determination of origin in IPI.
147	(a) if the legal person is engaged in substantive business operations in the territory of the Member State where the legal person is		See above for determination of origin in IPI.

	established such that it has a direct and effective link with the economy of that Member State the origin of that legal person shall be deemed to be that of the Member State in which it is established		
148	(b) if the legal person providing the service is not engaged in substantive business operations such that it has a direct and effective link with the economy of the Member State in which it is established, the origin of that legal person shall be deemed to be the origin of the natural or legal persons which own or control it. The legal person shall be considered to be "owned" by persons of a given country if more than 50 % of the equity interest in it is beneficially owned by persons of that country and "controlled" by persons of a given country if such persons have the power to name a majority of its directors or otherwise to legally direct its actions.		See above for determination of origin in IPI.
149	(iii) By derogation from sub-paragraph (ii)(a), if it is decided that Union response measures should apply to legal persons falling under subparagraph (ii)(a), the origin of that person shall be the nationality or the place of permanent residence of the natural or juridical person or persons who own or control the legal person in the Union. The legal person shall be considered to be "owned" by persons of a given country if more than 50 % of the equity interest in it is beneficially owned by persons of that country and "controlled" by persons of a given country if such persons have the power to name		

	a majority of its directors or otherwise to legally direct its actions.		
150	3. The nationality of an investment shall be:		
151	(a) if the investment is engaged in substantive business operations in the territory of the Member State where the investment is established such that it has a direct and effective link with the economy of that Member State the nationality of the investment shall be deemed to be that of the Member State in which it is established;		
152	(b) if the investment is not engaged in substantive business operations such that it has a direct and effective link with the economy of the Member State in which it is established, the nationality of the investment shall be deemed to that of the natural or legal persons which own or control it. The investment shall be considered to be "owned" by persons of a given country if more than 50 % of the equity interest in it is beneficially owned by persons of that country and "controlled" by persons of a given country if such persons have the power to name a majority of its directors or otherwise to legally direct its actions;		
153	(c) by derogation from sub-paragraph (a), if it is decided that Union response measures should apply to legal persons falling under subparagraph (a), the nationality of the investment shall be the nationality or the place of permanent residence of the natural or		

	juridical person or persons who own or control the investment in the Union. The investment shall be considered to be "owned" by persons of a given country if more than 50 % of the equity interest in it is beneficially owned by persons of that country and "controlled" by persons of a given country if such persons have the power to name a majority of its directors or otherwise to legally direct its actions.		
154	4. Regarding trade-related aspects of intellectual property rights, the term "nationals" shall be understood in the same sense as it is used in the paragraph 3 of Article 1 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights.		
	END	END	END

Austria reserves the right to submit further comments on these Articles, as well as on the Annexes I and II at a later stage.