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WORKING DOCUMENT

From:	SE Delegation
To:	Working Party on Trade Questions
Subject:	SE comments on the Presidency compromise for the text of the anti-coercion instrument (WK 6814/2022)

SE comments on the presidency compromise for the text of the anti-coercion instrument

SE would like to thank the Presidency for preparing a draft compromise text on the proposal for the Anti-Coercion Instrument (ACI). SE believes the presidency text goes in the right direction, and in a useful manner addresses several concerns raised in the discussions at the Working Party level. However, SE believes further contributions, legally or orally, from the Council Legal Service, are needed before the substantial discussions can continue. SE would like to offer the following comments and drafting suggestions already at this stage, reflecting the positions put already put forward in SEs written and oral contribution. These are still only preliminary positions from the SE side.

In the text below, PRES suggestions are marked **in bold purple**, whereas SE suggestions are marked **in bold and underlined red** and SE comments are marked in *in red italics*.

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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Pursuant to Article 3(5) of the Treaty on European Union (**TEU**), in its relations with the wider world, the Union is to uphold and promote its values and interests and contribute to the protection of its citizens and **is to contribute**, among other things, to solidarity and mutual respect among peoples and the strict observance and the development of international law, including respect for the principles of the United Nations Charter (**the “UN Charter”**).
- (2) Pursuant to Article 21(1) of the **TEU**, the Union's action on the international scene is to be guided by principles such as the rule of law, equality and solidarity, and respect for the principles of the **UN** Charter and international law. It also states that the Union is to promote multilateral solutions to common problems.

- (3) Pursuant to Article 1 of the UN Charter, **one of** the purpose of the United Nations **is** to develop friendly relations among nations based on, **among other things**, respect for the principle of equal rights.
- (4) Article 21(2) of the TEU requires the Union to define and pursue common policies and actions, and work for a high degree of cooperation in all fields of international relations in order to, **among other things**, safeguard its values, fundamental interests, independence and integrity, consolidate and support the rule of law, and the principles of international law.
- (5) The modern interconnected world economy increases **the** risk of, and opportunity for, economic coercion, as it provides countries with enhanced, including hybrid, means to deploy such coercion. It is desirable that the Union contribute to the creation, development and clarification of international frameworks for the prevention and elimination of situations of economic coercion.
- (6) Whilst always acting within the framework of international law, it is essential that the Union possess an appropriate instrument to deter and counteract economic coercion by third countries in order to safeguard its rights and interests and those of its Member States. This is particularly the case where third countries take measures affecting trade or investment that interfere 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. Such measures affecting trade or investment may include not only actions taken on, and having effects within, the territory of the third country **concerned**, but also actions taken by the third country, including through entities controlled or directed by the third country and present in the Union, that cause harm to economic activities in the Union.
- (7) This Regulation aims to ensure an effective, efficient and swift Union response to economic coercion, including deterrence of economic coercion of the Union or a Member State and, **as a last resort**, countermeasures. **This Regulation should be without prejudice to other existing Union instruments, including Regulation (EU) 2021/167 of the European Parliament and of the Council¹, given the specificity of the objectives pursued by this Regulation and the legal consequences deriving from the third-country action that could lead to the application of this Regulation.**
- (8) The objectives of this Regulation, in particular counteracting third countries' economic coercion of the Union or a Member State, cannot be sufficiently achieved by Member States acting on their own. This is because Member States as distinct actors under international law may not be entitled under international law to respond to economic coercion directed against the Union. Additionally, **given** the exclusive competence conferred on the Union by Article 207 of the Treaty on the Functioning of the European Union (TFEU), Member States are prevented from taking common commercial policy measures as a response to economic coercion. Therefore, those objectives can be achieved with greater effectiveness at Union level.
- (9) In accordance with the principle of proportionality, it is necessary and appropriate, for creating an effective and comprehensive framework for Union action against economic

¹ Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules (OJ L 49, 12.2.2021, p. 1).

coercion, to lay down rules on the examination, determination and counteraction with regard to third countries' measures of economic coercion. In particular, the Union's response measures should be preceded by an examination of the facts, a determination of the existence of economic coercion, and, wherever possible, efforts to find a solution in cooperation with the third country concerned. Any measures imposed by the Union should be commensurate with the injury caused by the third countries' measures of economic coercion. The criteria for defining the Union response measures should take into account in particular the need to avoid or minimise collateral effects, administrative burdens and costs imposed on Union economic operators as well as the Union's interest. Therefore, this Regulation does not go beyond what is necessary in order to achieve the objectives pursued, in accordance with Article 5(4) TEU.

- (10) Any action undertaken by the Union on the basis of this Regulation should **be consistent with the Union's rights and obligations under international law, which encompass all rights and obligations deriving from international agreements concluded by the Union, as well as those applicable by virtue of customary international law. Such rights and obligations in large part match the Member States' rights and obligations under international law. Among the international agreements concluded by the Union and the Member States, the Agreement establishing the World Trade Organization (WTO) is the cornerstone of the rules-based multilateral trading system. The Union should continue to support that system, with the WTO at its core.**

(10bis) Customary international law, as reflected in Articles 22 and 49 to 53 of the Articles on Responsibility of States for Internationally Wrongful Acts ("ARSIWA"), adopted by the United Nations' International Law Commission at its fifty-third session in 2001 and taken note of by the United Nations General Assembly in resolution 56/83, allows, under certain conditions, such as proportionality and prior notice, the imposition of countermeasures, that is to say of measures that would otherwise be contrary to the international obligations of an injured party vis-à-vis the country responsible for a breach of international law, and that are aimed at obtaining the cessation of the breach or reparation for it. Accordingly, Union response measures could consist, as necessary, not only in measures adhering to the Union's international obligations, but also in the non-performance of international obligations towards the third country concerned insofar as the measures of the third country constitute an internationally wrongful act. Under international law, and in accordance with the principle of proportionality, they should not exceed a 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 Union's rights and interests in question. In this respect, injury to the Union or a Member State is understood under international law to include injury to Union economic operators.

(10ter) Where a third country is responsible for an internationally wrongful act that has caused injury to the Union or a Member State, the Union is entitled to request the third country concerned to repair such injury, in accordance with Articles 31 and 34-39 of the ARSIWA.

- (11) Coercion is ~~prohibited and therefore a wrongful act~~ **a wrongful act and therefore prohibited** under international law when a country deploys measures such as trade or investment restrictions in order to obtain from another country an action or inaction

which that country is not internationally obliged to perform and which falls within its sovereignty, when the coercion reaches a certain qualitative or quantitative threshold, depending on both the ends pursued and the means deployed. The Commission should examine the third-country action on the basis of qualitative and quantitative criteria that help in determining whether the third country interferes in the legitimate sovereign choices of the Union or a Member State and whether its action constitutes economic coercion which requires a Union response. **Among those criteria should be elements that characterise, both qualitatively and quantitatively, notably the form, the effects and the aim of the measures which the third country is deploying. In addition, the Commission should examine closely whether the third country pursues a legitimate cause, because its objective is to uphold a concern that is internationally recognised, such as among other things the maintenance of international peace and security, the protection of human rights, and the protection of the environment, notably the fight against climate change.**

- (12) Acts by third countries are understood under customary international law to include all forms of action **or omission** that are attributable to a State under customary international law. **Articles 2(a) and 4-11 of the ARSIWA confirm that customary** international law qualifies as an act of a State, in particular: the conduct of any State organ, of a person or entity which is not an organ of the State but which is empowered by the law of that State to exercise elements of governmental authority, an organ placed at the disposal of a State by another State, a person or group of persons that are acting on the instructions of, or under the direction or control of, that State in carrying out the conduct, a person or group of persons that are exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority, and conduct that the State acknowledges and adopts as its own.
- (13) The Commission should examine whether third-country measures are coercive, on its own initiative or **upon a reasoned request of a Member state. The Commission could carry out such examination on the basis of** information received from any **reliable** source, including legal and natural persons or a Member State. Following this examination, the Commission should determine in a decision whether the third-country measure is coercive, **following the advisory examination procedure, given the sequential logic in relation to the adoption of Union response measures. The Commission should decide on the decision to be adopted, taking the utmost account of the conclusions drawn from the discussions within the committee and of the opinion delivered, in application of Article 4(2) of Regulation (EU) No 182/2011 of the European Parliament and of the Council².** The Commission should communicate any affirmative determination to the third country concerned, together with a request **to cease the economic coercion and, where appropriate, repair any injury.**
- (13bis) In an effort to secure the cessation of economic coercion, the Union should seek an early and just settlement of the matter. Accordingly, the Commission should, on behalf of the Union, afford adequate opportunity for consultations with the third country concerned and, when that third country is ready to enter consultations in good faith, engage with it expeditiously. In the course of such consultations, the**

² Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

Commission should endeavour to resort to means such as mediation, conciliation, or international adjudication, without prejudice to the delimitation of competence of the Union and Member States. In particular, when the third country suspends its actions and agrees to submit the matter to international adjudication, an international agreement with the third country should be concluded, as necessary. Such an international agreement could be concluded by the Member State concerned or by the Union, where the Treaties so provide and following the procedure laid down in Article 218 TFEU and in respect of the Council's policy making and coordinating functions.

- (14) The Union should support and cooperate with third countries affected by the same or similar measures of economic coercion or other interested third countries. The Union should participate in international coordination in bilateral, plurilateral or multilateral fora that are geared towards the prevention or elimination of economic coercion. **The Commission should represent the Union and express its position as established by the Council, in accordance with the Treaties.**
- (15) The Union should only impose countermeasures **if** other means such as negotiations, mediation or adjudication do not lead to the prompt and effective cessation of the economic coercion and to reparation of the injury it has caused to the Union or its Member States, and where action is necessary to protect the interests and rights of the Union and its Member States and it is in the Union's interest **to take such action**. It is appropriate that the Regulation sets out the applicable rules and procedures for the imposition and application of Union response measures and permits expeditious action where necessary to preserve the effectiveness of any Union response measures.
- (16) Union response measures adopted in accordance with this Regulation should be selected and designed on the basis of objective criteria, including: the effectiveness of the measures in inducing the cessation of coercion by the third country; the potential to provide relief to economic operators within the Union affected by the third-country measures of economic coercion; the aim of avoiding or minimising negative economic and other effects on the Union; and the avoidance of disproportionate administrative complexity and costs. It is also essential that the selection and design of Union response measures take account of the Union's interest. Union response measures should be selected from a wide array of options in order to allow the adoption of the most suitable measures in any given case.
- (16bis) As part of the Union response in order to induce the cessation of economic coercion by third countries, the Commission could ~~also~~ adopt measures pursuant to other legal instruments that confer specific powers to the Commission, for example with regard to the granting of Union funding, following the applicable procedures set out therein. Measures adopted by the Commission pursuant to such other legal instruments should be synchronised with actions taken under this Regulation and be consistent with the Union's obligations under international law. In particular, such measures, together with Union response measures adopted under this Regulation, as the case may be, should be commensurate with the injury caused by the third countries' measures of economic coercion. This Regulation is without prejudice to rules and procedures under such other legal instruments.**
- (17) It is appropriate to set out rules on the origin or nationality of goods, services and service providers, investment and holders of intellectual property rights, for the purposes of

determining the Union response measures. The rules of origin **and** of nationality should be determined in the light of the prevailing rules for non-preferential trade and investment that are applicable under Union law and the Union's international agreements.

- (18) In pursuing the objective of obtaining the cessation of **a** measure of economic coercion, Union response measures consisting of restrictions on foreign direct investment or on trade in services should apply **only** with regard to services supplied, or direct investments made, within the Union by one or more legal persons established in the Union **and** which are owned or controlled by persons of the third country concerned where necessary to ensure the effectiveness of Union response measures and in particular to prevent their avoidance. The decision to impose any such restrictions **should** be duly justified in implementing acts adopted pursuant to this Regulation in the light of the criteria specified in this Regulation.
- (19) After the adoption of Union response measures, the Commission should continuously assess the situation in relation to the third-country measures of economic coercion, the effectiveness of the Union response measures and their effects, with a view to adjusting, suspending or terminating the response measures accordingly. It is therefore necessary to set out the rules and procedures for amending, suspending and terminating Union response measures and the situations in which they are appropriate.
- (20) It is essential to provide for opportunities for stakeholder involvement for the purposes of adoption and amendment of Union response measures and, **where** relevant, for the purposes of suspension and termination, in view of the potential impact on such stakeholders.
- (21) It is important to ensure effective communication and **an** exchange of views and information between the Commission on the one hand, and the European Parliament and the Council, on the other, in particular on efforts to **enter into consultations** with the third country concerned to explore options with a view to obtaining the cessation of the economic coercion and on matters that may lead to the adoption of Union response measures under this Regulation.
- (22) In order to allow the adjustment of the rules of origin **and nationality** or of other technical rules, the power to adopt acts in accordance with Article 290 **TFEU** should be delegated to the Commission to amend rules of origin **and nationality** laid down in Annex II. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council should receive all documents at the same time as Member States' experts, and their experts systematically should have access to meetings of Commission expert groups dealing with the preparation of delegated acts.
- (23) **Given the foreign policy element of this instrument, as well as the need to ensure that the instrument is consistent with the Union's and its Member States obligations under international law and is conducted in the context of the principles and objectives of the Unions' external action,** in order to ensure uniform conditions for the implementation of this Regulation, implementing powers **to adopt**

Union response measures should be conferred on the **Commission-Council**. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council.

Comment: SE welcomes CLS drafting suggestions on how to in a legally correct way motivate a delegation of implementing powers to the Council.

- (24) ~~The examination procedure should be used for the adoption of Union response measures and their amendment, suspension or termination given that those acts determine the Union's responses to economic coercion falling within the scope of this Regulation. Considering the specific nature of this regulation, Article 5(4) of Regulation (EU) No 182/2011 should apply where the competent Committee delivers no opinion. In the case where Commission calls for an appeal committee to examine its draft implementing act, special attention should be given to solutions which command the widest possible support within the appeal committee, in full application of article 6 of Regulation (EU) No 182/2011.~~
- (25) ~~The Commission should adopt immediately applicable implementing acts of limited duration where, in duly justified cases relating to the adoption, amendment, suspension or termination of Union response measures, imperative grounds of urgency require expedited action to avoid irreparable damage or to ensure consistency with international law. Such expedited action could prevent the coercion from causing or worsening any economic damage, notably with a view to protecting acute and vital interests of the Union or a Member State.~~
- (25bis) Any processing of personal data pursuant to this Regulation should be consistent with the applicable rules on the protection of personal data. Processing of personal data by Committee members representing Member States should be carried out in accordance with Regulation (EU) 2016/679 of the European Parliament and of the Council³. Processing of personal data by the Commission should be carried out in accordance with Regulation (EU) 2018/1725 of the European Parliament and of the Council⁴.
- (26) The Commission should evaluate measures adopted under this Regulation as to their effectiveness and operation and as to possible conclusions for future measures. The Commission should also review this Regulation after gaining sufficient experience with the existence or application of this Regulation. **This review should cover the scope, functioning, efficiency and effectiveness of this Regulation and also its relationship to other existing Union instruments.** The Commission should report on its assessment to the European Parliament and the Council,

³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

⁴ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

HAVE ADOPTED THIS REGULATION:

Article 1

Subject-matter

1. This Regulation lays down rules and procedures 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.
2. This Regulation **establishes** 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 **enabling** the Union, **as a** last resort, to counteract such actions.
3. Any action taken under this Regulation ~~shall~~ **must** be consistent with the Union's **and it's Member States** obligations under international law and **be** conducted in the context of the principles and objectives of the Union's external action.

Article 2

Scope

1. This Regulation applies where a third country in a **forceful or intimidating way**:
 - 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~~ **harms, prevents or seriously affects** trade or investment.

Comment: SE believes the scope of the instrument should be limited to only cover grave forms of coercion, and is open to other wording on this. SE is not yet convinced that threats need to be covered.

For the purposes of this Regulation, such third-country actions shall be referred to as measures of economic coercion.

2. In determining whether the conditions set out in paragraph 1 are met, the following shall be taken into account:
 - (a) the intensity, severity, frequency, duration, breadth and magnitude of the third country's measure and the pressure arising from it **on the Union or a Member State**;
 - (b) whether the third country is engaging in a pattern of interference seeking to obtain from the Union, **a** Member State or other countries particular acts;
 - (c) the extent to which the third-country measure encroaches upon an area of the Union's or **a** Member State's sovereignty;

- (d) whether the third country is acting on **the basis of** a legitimate concern that is internationally recognised;
- (e) whether and in what manner the third country, before the **application** 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.

Article 3

Examination of third-country measures

1. The Commission may, **on its own initiative or upon a reasoned request of a Member State**, 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.
2. The Commission may carry out the examination referred to in paragraph 1 **on the basis of** information received from any **reliable** source. The Commission shall ensure the protection of confidential information in **accordance** with Article 12, which may include the identity of the supplier of the information.
- 2bis. The Commission may request Member States to supply information on the impact of the measures of the third country concerned.**
- 3. Where there are reasonable grounds to suspect that the measure of the third country concerned meets the conditions set out in Article 2(1), the Commission shall expeditiously inform Member States.**
- 4. Following the information of Member States pursuant to paragraph 3, the Commission may seek information about the impact of the measures of the third country concerned, by publishing a notice in the *Official Journal of the European Union* and, where appropriate, through other suitable public communication means with an invitation to stakeholders 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.**

Article 4

Determination with regard to the third-country measure

1. Following an examination carried out in accordance with Article 3, the Commission shall **inform Member States of the relevant information gathered pursuant to Article 3 and, as the case may be, pursuant to Article 4(2) and** adopt a decision determining whether the measure of the third country concerned meets the conditions set out in Article 2(1) **in accordance with the advisory examination procedure referred to in Article 15(1bis).** The Commission shall act expeditiously.

Comment: SE sees merit in the view, expressed by the CLS, that perhaps the determination envisaged under this article should be made less formal. SE also believes that the course of

action open to the Commission after determining that a certain action constitutes economic coercion, such as general engagement with the third country so as to prevent or stop measures negatively affecting EU trade and investment, falls within the already acknowledged competence of the Commission within the EU common commercial policy, as expressed for example in the TBR-regulation (2015/1843). However, to make sure that this instrument is only used in questions relating to grave economic coercion, SE believes that should this step of the process be formalised for reasons of creating a more internationally public display of EU concern with politically motivated actions by third countries, a more formal decision-making procedure already at this stage could be warranted. In such a case, any decision would benefit from having active support from MS, which is why the examination procedure would be better than the advisory procedure.

2. Prior to adopting its decision, **where useful for the purposes of the** determination, the Commission **shall** invite the third country concerned to submit its observations **within a reasonable period of time, without prejudice to Article 5.**
3. 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.]**

[Additional discussions are needed on the reparation of the injury]

Comment: SE agrees that the issue of requesting reparation of injury, which sets this regulation apart from the process under other trade policy instruments, such as the TBR-regulation, needs further discussions. SE notes that the possibility for request reparation of injury, might create a preference for this instrument of other trade policy instruments, and create a risk that this instrument is used in more cases than those of last resort.

Article 5

Engagement with the third country concerned

1. **Following the adoption of a decision in accordance with Article 4,** the Commission shall, on behalf of the Union, **afford adequate opportunity for consultations** with the third country concerned, with a view to obtaining the cessation of the economic coercion. **If the third country concerned offers to enter into consultations with the Union in good faith, the Commission shall expeditiously enter into consultations.**

In the course of such consultations, the Commission may explore options with the third country concerned, including:

- direct negotiations;
- mediation, conciliation or good offices to assist the Union and the third country concerned in these efforts;
- submitting the matter to international adjudication.

2. The Commission shall seek to obtain the cessation of the economic coercion **also** by raising the matter in any relevant international forum, **after having informed the Council**.
3. The Commission shall keep the European Parliament and the Council informed of **any** relevant developments **pursuant to paragraphs 1 and 2**.
4. The Commission shall remain open to **enter into consultations** with the third country concerned after the adoption of Union response measures pursuant to Article 7 **and**, as the case may be, in conjunction with a suspension of any Union response measures **pursuant to Article 10(2)**.

Article 6

International cooperation

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. **The Commission shall keep the European Parliament and the Council informed of any relevant developments.**

Article 7

Union response measures

1. The Commission shall ~~adopt~~ **propose to the Council to adopt an implementing act in accordance with the examination procedure referred to in Article 15(2) determining that it shall take a** Union response measure under this Regulation, **where:**

- (a) action pursuant to Articles 4 and 5 has not resulted in the cessation of the economic coercion and, **where appropriate, the** reparation of the injury it has caused to the Union or a Member State within a reasonable period of time;

If the Council finds that:

- (b) action is necessary to protect the interests and rights of the Union and its Member States in that particular case, and
- (c) action is in the Union's interest

it shall adopt an implementing act taking Union response measures.

In the ~~implementing act~~ **proposal** referred to in the first subparagraph, the Commission shall also ~~determine~~ **propose** the appropriate Union response **consisting in one or more** measures **pursuant to** Annex I. Such measures may also apply with regard to natural or legal persons designated in accordance with Article 8.

The Union response measures shall apply from a specified date after the adoption of the implementing act referred to in paragraph 1. The Commission **proposal shall specify the date of application of the Union response measures**, 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.

3. Upon **Council** adoption of the implementing act **referred** to in paragraph **2bis**, the Commission shall, on behalf of the Union, **notify the third country concerned thereof and:**
 - (a) call on the third country concerned to promptly cease the economic coercion;
 - (b) offer to negotiate a solution, and
 - (c) inform the third country concerned that the Union response measures will apply, unless the economic coercion ceases.
4. The implementing act referred to in paragraph 1 shall **provide** for **a deferred application of the Union response measures for a period of time** specified in that implementing act, where the Commission has credible information that the third country has ceased the economic coercion before the **date** of application of the adopted Union response measures.

In the event **that** the Commission **has the information referred to in the first subparagraph, it** 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 **date of application of the** Union response measures, the Commission shall terminate the Union response measures in accordance with Article 10.

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 **the third country concerned** that Union response measure will apply, where **in duly justified cases** this is necessary for the preservation of the rights and interests of the Union or a Member State, notably of the effectiveness of Union response measures.~~

***Comment:** SE does not believe that the use of this speedy procedure can be successfully combined with the notion of only using the instrument as a last resort, and therefor believes the option to adopt union response measures without notifying the third country should be removed.*

- 5bis. **Notwithstanding paragraphs 2 and 4, where economic coercion consists in a threat to apply measures affecting trade or investment in accordance with Article 2(1), the date of application of the Union response measures shall be the date when the third country starts applying such measures. The Commission shall specify such date of application in the implementing act referred to in paragraph 1. If the third country delays to a specific date the application of its measures, the Commission shall publish a notice in the Official Journal of the European Union indicating that the Union response measures shall apply on that date.**

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 5bis shall apply. Those acts shall remain in force for a period not exceeding three months.~~

Comment: The Urgency procedures is not needed if implementing powers are delegated to the Council, since the Council can anyway take immediate measures on a proposal from the Commission, and need not respect deadlines such as those stipulated in the Comitology regulation.

Article 8

Union response measures with regard to natural or legal persons

1. ~~Where the Commission~~ **Council adopts an** implementing act **pursuant** to Article 7(1), ~~the Commission may provide~~ **propose, and the Council decide**, **either in that implementing act** or in a separate implementing act, that:

- (a) Union response measures **pursuant to Annex I** **shall be limited to** legal or natural persons designated in accordance with paragraph 2 **of this Article** ~~shall be subject to~~

Comment: SE understands the Commissions reasoning behind this para to be to be able to limit the scope of any measures to certain legal and natural persons. However, this is not clearly stated, hence the drafting suggestion above (that also entails moving the paragraphs).

- (b) without prejudice to the responsibility of the third country **concerned** 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 **3 of this Article**, 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.

Comment: SE has a general reservation on the issue of granting civil law rights to claim damages under this instrument. We note that this would indeed create a better right to reparation, but also note that it is a novelty under EU trade policy, as well as other policies. We also note that this brings the instrument very close to the issue of freezing assets under the EU sanctions regimes, and needs more clarity from the Council Legal Service. We also note that to the extent that the same individuals/entities were to be listed under this instrument and under the EU sanction regimes that entails the freezing of assets belonging to individuals/entities, which we foresee is a likely outcome given the overlap of the criteria of individuals/entities' connections to the state, then those companies that were previously benefiting from investing or trading with the coercing/sanctioned country would have a right to recover some of those assets, whereas other stakeholders (such as those affected by war crimes/human rights violation etc that were the cause of the sanctions implemented), would not, as far as we understand the current sanction regime rules. This might give rise to unintended consequences and we believe this issue needs to be further discussed with sanctions experts, so as to create a coherent EU response.

Those measures shall apply **from** the same date of application as the Union response measures adopted pursuant to Article 7, or **from** a later date specified in the implementing act **referred to in the first subparagraph**.

The implementing act referred to in this paragraph shall be adopted in accordance with the examination procedure referred to in Article 15(2).

1bis. To facilitate the application of paragraph 1 point (b), the Commission shall issue guidelines for Union natural or legal persons on the date of the entry into force of this regulation.

2. The Commission **may propose, and the Council decide**, to designate a natural or legal person, **for the purposes of paragraph 1 point (a)**, where it finds that such person is connected or linked to the government of the third country concerned, **including when:**

(a) **the person is empowered by the law of the third country concerned to exercise elements of governmental authority, such as enterprises granted special rights or privileges and designated monopolies;**

(b) **the person is beneficially owned or effectively controlled by the government of the third country concerned, for instance through governance structures, in accordance with Article 13, or**

(c) **the person effectively acts on behalf of the government of the third country.**

3. **The Commission may may propose, and the Council decide** to designate a natural or legal person, **for the purposes of paragraph 1 point (b)**, where it finds that such person is connected or linked to the government of the third country concerned **pursuant to paragraph 2** and **that it** has caused or **has** been involved in or **has been** connected with the economic coercion.

4. In making this **proposal on** designation the Commission shall examine relevant criteria **in the light of all** available information. Where the Commission has grounds to consider that **a** person should be designated pursuant to paragraphs 2 or 3, it shall **inform such person of its intention, including grounds for designation**, and, where relevant, the possible measures pursuant to Annex I that **it** would be subject to. **The Commission shall carry out such information by publishing a notice in the Official Journal of the European Union and, whenever possible, by communicating directly with the person concerned.**

Before **proposing a** designation, **the Commission** shall give:

(a) any persons **referred to in the first subparagraph** the opportunity to submit comments on the possible designation, in particular whether they fall under the conditions of paragraphs 2 or 3;

(b) **other interested parties the opportunity to submit comments on the possible designation.**

The Commission may also seek additional information it considers pertinent concerning the potential designation **under this Article**.

5. **Without prejudice to Article 10, the Commission shall review the measures referred to in paragraph 1 point (a) or (b) when new substantial evidence are submitted and inform the natural or legal persons concerned accordingly.**

Article 9

Criteria for selecting and designing Union response measures

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 of economic coercion** and the rights **of the Union or a Member State**.

- x. **Union response measures that constitute non-performance of the Union's or a Member States obligation under international law may only be taken when the economic coercion is clearly such a breach of international law that the coercion constitutes a wrongful act and is therefor prohibited.**

Comment: SE believes this sentence it the gist of what has been explained by the Commission and the CLS at the Working Party discussions, but is open to a different wording following suggestions by the CLS.

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:
 - (a) the effectiveness of the **Union response** measures in inducing the cessation of the economic coercion;
 - (b) the potential of the **Union response** measures to provide relief to **Union** economic operators within the Union affected by the economic coercion;
 - (c) the avoidance or minimisation of negative impacts on affected **Union** actors by Union response measures, including the availability of alternatives for **such** affected actors, for example alternative sources of supply for goods or services;
 - (d) the avoidance or minimisation of negative effects on other Union policies or objectives **by Union response measures**;
 - (e) the avoidance of disproportionate administrative complexity and costs in the application of the Union response measures;
 - (f) the existence and nature of any response measures enacted by **third** countries affected by the same or similar measures of economic coercion, including where relevant any coordination pursuant to Article 6;

(g) any other relevant criteria established in international law.

2bis. **For the purposes of paragraph 2, where Union response measures concern a procedure conducted by a governmental authority in the Union that a natural or legal person must adhere to for the purposes of trade in goods or services, foreign direct investment or the commercial aspects of intellectual property, the Commission shall apply the following hierarchy of steps, respectively:**

- (a) **the Commission shall seek to apply measures to procedures duly initiated after the entry into force of the implementing act referred to in Article 7(1) and Article 8(1), and/or, as the case may be, measures in areas where such a procedure is valid throughout the Union and based on secondary legislation;**
- (b) **if the Commission finds that measures referred to in the subparagraph (a) are not effective or practicable in the light of paragraph 2, it shall seek to apply measures relating to procedures not yet completed upon the entry into force of the implementing act referred to in Articles 7(1) and Article 8(1), and/or, as the case may be, measures in areas where extensive Union legislation exists;**
- (c) **if the Commission finds that measures referred to in the subparagraph (b) are not effective or practicable in the light of paragraph 2, it shall seek to apply measures relating to other procedures, and/or, as the case may be, measures in other areas, where the information-gathering exercise conducted pursuant to Article 11 does not indicate that there would be a disproportionate impact on the established legal environment.**

3. **Where necessary to achieve the objectives of this Regulation,** the Commission may ~~decide~~ **propose** 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. The Commission may ~~decide~~ **propose**, ~~on the application of such~~ Union response measures where not covering such situations would be insufficient to effectively achieve the objectives of this Regulation, in particular where such measures could be avoided **by the third country or the person concerned.**

In assessing whether to adopt **the decision referred to in the first subparagraph**, the Commission shall consider, in addition to the criteria **under** paragraphs 1 and 2, amongst other things:

- (a) the patterns of trade in services and investment in the sector targeted by the envisaged Union response measures and the risk of avoidance **by the third country or the person concerned** of any Union response measures not applying to services supplied, or direct investments made, within the Union;
- (b) the effective contribution of such intra-Union restrictions **referred to in the first subparagraph** to the objective of obtaining the cessation of economic coercion;

- (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.

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 **and in paragraph 1 of Article 8** in light of the criteria **referred to in the third paragraph of this Article**.

Article 9bis

Union interest

A determination as to whether it is in the Union's interest to act under this Regulation shall be based on an appreciation of all the various interests taken as a whole, including the interests of Member States and Union economic operators. The general objective of deterring, or having the third country desist from measures of economic coercion, whilst enabling the Union as a last resort to counteract such actions, shall be given special consideration. Actions under this Regulation shall be taken where the Commission **and, where relevant the Council concludes, on the basis of all the information available, that it is in the Union's interest to take such actions.**

Article 10

Amendment, suspension and termination of Union response measures

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.
2. Where the third country concerned suspends the **measures of economic coercion**, or where it is necessary in the Union's interest, the Commission **shall** suspend the application of the respective Union response measure for the duration of the suspension **of the measures of economic coercion by the third country**, or as long as necessary in light of the Union's interest.

Where the third country concerned has offered, and the Union or the Member State concerned has concluded, an agreement to submit the matter to binding international third-party adjudication and the third country also suspends its measures of economic coercion, the Commission shall suspend the Union response measures for the duration of the proceedings.

The Commission shall, by means of an implementing act **adopted in accordance with the examination advisory procedure referred to in Article 15(1bis)**, decide to suspend the Union response measure **under this paragraph**.

3. Where it is necessary to make adjustments to Union response measures taking into account the conditions and criteria laid down in Article 2 and **paragraphs 2 and 3 of**

Article 9, or further developments, including the third country's reaction, the Commission may **propose**, as appropriate, **for the Council to** amend Union response measures adopted in accordance with Articles 7 **and 8**, by means of an implementing act, in accordance with the examination procedure referred to in Article 15(2).

4. The Commission shall terminate Union response measures under any of the following circumstances:
 - (a) where the economic coercion has ceased;
 - (b) where a mutually agreed solution has otherwise been reached;
 - (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;
 - (d) where it is appropriate in light of the Union's interest.

The termination of Union response measures adopted in accordance with Articles 7 **and 8** shall be decided, by means of an implementing act, in accordance with the examination **advisory** procedure referred to in Article 15(**1bis**).

Comment: SE believes that for the instrument to be credible and used as a useful bargaining tool vis-a-vis the coercing third country, the Commission needs to be credible in its offer to suspend or terminate any Unions response measures imposed by the Council. Therefore, the Commission should be given the powers to suspend/terminate measure after using only the advisory procedure.

5. On duly justified imperative grounds of urgency, **such as avoiding irreparable damage to the Union or a Member State or continuing to ensure consistency with the Union's obligations under international law pursuant to the suspension or cessation of measures of economic coercion from the third country concerned**, the Commission shall adopt immediately applicable implementing acts suspending, amending or terminating Union response measures adopted in accordance with Articles 7 **and 8**. 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.

Article 11

Information gathering related to Union response measures

1. Before the adoption **or amendment** of Union response 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 **economic** operators and Union's interest, through a notice published in the *Official Journal of the European Union* **and, where appropriate**, through other suitable public communication means. The notice shall indicate the period within which the input is to be submitted.
2. The Commission may start the information gathering at any time it deems appropriate.

3. In conducting the information gathering under paragraph 1, the Commission shall inform and consult stakeholders, in particular associations **acting on behalf of Union economic operators**, affected by possible Union response measures, and Member States involved in the preparation or implementation of legislation regulating the affected fields.
4. Without unduly delaying the adoption of Union response measures, the Commission shall, in particular, seek information **and views** on:
 - (a) the impact of such measures on third-country actors or Union **economic operators'** competitors, users or consumers or on Union employees, business partners or clients of such actors;
 - (b) the interaction of such measures with relevant Member State legislation;
 - (c) the administrative burden which may be occasioned by such measures;
 - (d) the Union's interest.
5. The Commission shall take utmost account of the information gathered during the information gathering exercise. An analysis of 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).
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.

Article 12

Confidentiality

1. Information received pursuant to this Regulation shall be used only for the purpose for which it was requested.
2. The supplier of information may request **such** information be treated as confidential. In such cases, it shall be accompanied by a non-confidential summary **of the information concerned** or a statement of the reasons **explaining** why the information **concerned** 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.

Comment: SE has a general, horizontal problem with the originator control provisions of article 12 p 2, which means that the originator shall have the final say in whether information may be revealed and would like more information on how this relates to the general rules on public access to documents.

3. Paragraph 2 shall not preclude the Commission **from** disclosing general information in summary form, **provided that such disclosure** does not contain information allowing **the identity of** the supplier of the information **to be known**. Such disclosure shall take into account the legitimate interest of the parties concerned in not having confidential information disclosed.

Article 13

Rules of origin **and nationality**

1. The origin or nationality of a good, service, service provider, investment or intellectual property rightholder shall be determined in accordance with Annex II.
2. The Commission is empowered to adopt delegated acts in accordance with Article 14 to amend points 2 **and 3** of Annex II to amend the rules of origin **or nationality** and add any other technical rules necessary for the application of this 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.

Article 14

Delegated Acts

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The power to adopt delegated acts referred to in Article 13(2) shall be conferred on the Commission for a period of **five years** from [date of entry into force **of this Regulation**]. **Such delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.**
3. The delegation of power referred to in Article 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.
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.
5. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

A delegated act adopted pursuant to Article 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.

Article 15

Committee procedure

1. The Commission shall be assisted by a Committee. That committee shall be a committee within the meaning of Article 3 of Regulation (EU) No 182/2011.
- 1bis. **Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.**
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

Where the Committee delivers no opinion, the Commission shall not adopt the draft implementing act and the third subparagraph of Article 5(4) of Regulation (EU) No 182/2011 shall apply.

3. Where reference is made to this paragraph, Article 8 of Regulation (EU) No 182/2011 in conjunction with Article 5 thereof, shall apply.
4. **Committee members representing Member States shall be subject to a duty of professional secrecy with regard to any confidential information which has come to their knowledge in the course of the performance of their official duties. A secure and encrypted system shall be provided by the Commission to support direct cooperation and exchange of information with Committee members.**

Article 16

Review

1. The Commission shall evaluate any Union response measure adopted pursuant to Articles **7 and 8** six months after its termination, taking into account stakeholder input and any other relevant information. The evaluation shall examine the effectiveness and operation of the Union response measure, and **possibly** draw conclusions for future **Union response** measures **and the review of this regulation pursuant to paragraph 2.**
2. No later than three years after the adoption of the first implementing act under this Regulation or **five** years after the **date of** entry into force of this Regulation, whichever is earlier, **and every five years thereafter**, the Commission shall review this Regulation and its implementation and shall report to the European Parliament and the Council. **In the course of such review, the Commission shall give particular consideration to any issues which may arise as regards the relationship of this Regulation to other existing Union instruments.**

Article 17

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

ANNEX I

Union response measures pursuant to Articles 7 and 8

Comment: SE believes the list of possible measures should be limited, and would in particular like to see the following changes but reserve our right to submit further comments.

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

- (a) the **non-performance** 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;
- ~~(b) the **non-performance** of applicable international obligations, as necessary, and the introduction or increase of restrictions on the importation or exportation of goods, whether made effective through quotas, import or export licences or other measures, or on the payment for goods;~~
- ~~(c) the **non-performance** of applicable international obligations, as necessary, and the introduction of restrictions on trade in goods made effective through measures applying to transiting goods or internal measures applying to goods.~~
- (d) the **non-performance** of applicable international obligations concerning the right to participate in tender procedures in the area of public procurement, as necessary, and:
 - (i) the exclusion from public procurement of goods, services or suppliers of goods or services of the third country concerned or the exclusion of tenders the total value of which is made up of more than **50 %** of goods or services **originating in** the third country concerned; and/or
 - (ii) the imposition of a mandatory price evaluation weighting penalty⁵ on tenders of goods, services or suppliers of goods or services of the third country concerned.

Origin shall be determined on the basis of Annex II;

- ~~(e) the **non-performance** of applicable international obligations, as necessary, and the imposition of restrictions on the exportation of goods falling under the Union export control regime;~~
- (f) the **non-performance** of applicable international obligations regarding trade in services, as necessary, and the imposition of measures affecting trade in services;
- ~~(g) the **non-performance** of applicable international obligations, as necessary, and the imposition of measures affecting foreign direct investment;~~

⁵ 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.

- ~~(h) — the **non-performance** 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;~~

Comment: SE acknowledges that measures concerning IP-rights are envisioned in the Enforcement Regulation. However, given the possibility to use Union response (ACI) measures also in cases where no breach has been established in international arbitration, we also note that we cannot exclude Union response (ACI) measures being more widely used than Enforcement Measures, we believe it would be prudent to not include IP-measures among possible measures.

- ~~(i) — the **non-performance** of applicable international obligations with respect to financial services, as necessary, and the imposition of restrictions for banking, insurance, access to Union capital markets and other financial service activities;~~
- ~~(j) — the **non-performance** of applicable international obligations with respect to the treatment of goods, as necessary, and the imposition of restrictions on registrations and authorisations under the chemicals legislation of the Union;~~
- ~~(k) — the **non-performance** of applicable international obligations with respect to the treatment of goods, as necessary, and the imposition of restrictions on registrations and authorisations related to the sanitary and phytosanitary legislation of the Union;~~
- (l) the **non-performance** 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.

ANNEX II

Rules of Origin **and Nationality**

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.⁶
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 **nationality** of the service provider shall be deemed to be:
 - (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;
 - (b) in the case of a legal person any of the following:
 - (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;
 - (ii) if the service is provided through a commercial presence within the Union,
 - (a) if the legal person is engaged in substantive business operations in the territory of the Member State where the legal person is 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
 - (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.
 - (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 **legal** 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

⁶ 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).

power to name a majority of its directors or otherwise to legally direct its actions.

3. The nationality of an investment shall be:
 - (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;
 - (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;
 - (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 **legal** 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.
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.