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The Commission Publishes Regulation to Counter Economic Coercion

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On 8 December 2020, the European Commission (“**Commission**”) published its [proposal](#) for a Regulation on the protection of the EU and its Member States from economic coercion by third countries (“**proposed Anti-coercion Regulation**”).¹ The proposal aims at deterring third countries from pressuring the EU or a Member State through trade or investment-related measures by empowering the Commission to strike back with a wide range of countermeasures. This Client Alert provides a first glance at the proposal and offers some initial comments.

Key features of the proposed Anti-coercion Regulation

The proposed Anti-coercion Regulation would be triggered by a Commission decision determining that a third-country measure is coercive. This requires a finding that the measure seeks “to prevent or obtain the cessation, modification or adoption of a particular act by the Union or a Member State” by “applying or threatening to apply measures affecting trade or investment”, following an examination initiated on the Commission’s own initiative or following a complaint.² This determination of economic coercion would then trigger a two-tiered procedure:

- (i) the Commission notifies and engages the third country to put an end to the economic coercion through, *inter alia*, negotiation, mediation, and international dispute settlement;³ and
- (ii) if engagement fails to end the coercion within a reasonable period and action is needed to protect the interests and rights of the Union and its Member States, the Commission may adopt a broad range of “response measures”, provided that resorting to such measures suit the Union interest.⁴

The “response measures” at the Commission’s disposal include measures targeting both the coercing third country, as well as designated natural or legal persons “connected or linked” to the government of that country.⁵ An [Annex](#) to the proposal provides a broad range of measures targeting goods, services and investment originating in the coercing country, including the imposition of retaliatory tariffs and quotas, restricting access to EU public procurement and EU funded research programs, tighter controls on exports of dual-use items, restricting foreign direct investment as well as the provision of financial services within the EU. In addition, the proposal suggests that designated natural or legal persons would be liable towards EU persons for “damage caused to them by the measures of economic coercion to the extent of their contribution to such measures”.⁶

The proposed Regulation grants the Commission broad discretion to determine appropriate response measures. Overall, the response should not exceed a level that is “commensurate with the injury suffered” by the EU due to the coercive measure as determined unilaterally by the Commission.⁷

1 European Commission, “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” (8 December 2021) COM(2021) 775 final, available [here](#).

2 Art. 2(1), 3(2) and 4 of the proposed Anti-coercion Regulation.

3 Art. 5 of the proposed Anti-coercion Regulation.

4 Art. 7(1) of the proposed Anti-coercion Regulation.

5 Art. 8(2) of the proposed Anti-coercion Regulation.

6 Art. 8(1)(b) of the proposed Anti-coercion Regulation.

7 Art. 9(1) of the proposed Anti-coercion Regulation.

In addition to this proportionality requirement, the Regulation requires the Commission to consider several criteria, including the effectiveness of the measures to end economic coercion, the minimization of negative effects on Union operators, and proportionality of administrative complexity and costs.⁸

Initial takeaways

The proposed Anti-coercion Regulation presents the most far-reaching and overt example to date of the EU's willingness to use its exclusive competence under the Common Commercial Policy to assert its "open strategic autonomy". While the Commission has [explained](#) that the "creation of the instrument in itself is expected to deter economic intimidation", the prospect of its adoption and future application raises legal questions relating to both the relationship between the EU and third countries, as well as between the EU and its Member States.

With regard to the external implications of the proposal, questions arise regarding the compatibility of the proposed Regulation with international trade rules. As noted in the [Opinion](#) of the EU Regulatory Scrutiny Board, the legality of the proposed Anti-coercion Regulation is based on the assumption that coercion is a breach of public international law not covered by international treaties and their settlement mechanisms. However, it seems that the response measures that the Commission may adopt under the Proposal could potentially fall in the scope of the rules of the World Trade Organization, as well as of the rules set out in bilateral Free Trade and Investment Agreements concluded by the Union. Therefore, it cannot be ruled out that certain response measures, such as the imposition of duties and/or restrictions on foreign direct investment, would be subject to these disciplines and would therefore require an adequate justification to suspend previous commitments taken at international level. In addition, the Commission's response measures may also fall in the scope of the dispute settlement mechanisms foreseen in these agreements, thus exposing the Union to long and costly international litigation.

With regard to the internal implications of the proposal, the question which arises is whether the proposed Regulation oversteps the allocation of competences between the EU and its Member States. According to the Commission, because third country measures resulting in economic coercion affect trade and investment (*i.e.*, policy areas where the Union has exclusive competence), the Union is exclusively competent to adopt countermeasures as well. However, several Member States have voiced the opinion that the extensive foreign policy implications of the proposal should rather make it fall, at least partially, within the Common Foreign and Security Policy which is still competence of the Member States. For instance, the power to adopt sanctions currently resides with the Council. Hence, a different legal basis should be used to adopt the proposal, and Member States should decide by unanimity when applying response measures under the Anti-coercion Regulation.

It is now for the European Parliament and the Council to agree on a final text, if any. Due to its controversial nature, any final text is expected to diverge from the proposal. However, the publication of the proposal is in line with recent legislative efforts to use the EU's trade clout to pursue geopolitical objectives. Third country operators are advised to closely follow the legislative process.

8 Art. 9(2) of the proposed Anti-coercion Regulation.

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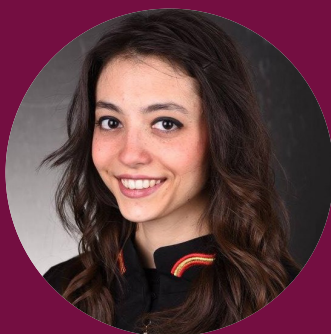
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