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Arming for a Trade War: The EU Proposes an Unprecedented Anti-Coercion Regulation

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Key Takeaways

- The proposed regulation would arm the EU with a counterstrike capability if non-EU countries take economic action against a Member State.
- Where a Member State is subject to economic interferences from non-EU states that affect its legitimate sovereign choices.
- The European Commission to take some or all of the following measures against the interfering state:
    - Impose tariffs;
    - Implement quotas;
    - Restrict access to EU financial markets; or
    - Reduce intellectual property protections[1]

Scope of the Proposed Regulation

The Regulation would apply where a third country interferes in the legitimate sovereign choices of the Union or a Member State, by applying or threatening to apply measures affecting trade or investment.[2]

The definition of coercion is particularly broad, designed to cover all of the polymorphic aspects of trade or investment restrictions that can be imposed through formal or informal measures. The Commission would consider a number of factors when determining whether a country has engaged in economic coercion, including but not limited to the intensity, severity, frequency, duration, breadth and magnitude of the third country's measures, whether the third country is engaging in a pattern of interference, whether the third country is acting based on a legitimate concern that is internationally recognized, and whether and how the third country, prior to imposing its measures, has made serious, good faith attempts to resolve the issue through international coordination or arbitration, either bilaterally or in an international forum.

Immediate Use Case: Lithuania

In December 2021, China began restrictions that effectively blocked imports from and exports to Lithuania. The action appears to be a response to Lithuania's allowing a de facto Taiwanese embassy in its capital, Vilnius, in 2021. Currently, the EU has referred the case to the WTO, but it appears to be the exact kind of economic coercion that the new regulation contemplates.

Negotiations First!

The Commission foresees that the simple existence of an anti-coercion instrument would be sufficient to deter third countries from adopting or threatening to adopt coercive measures against the EU. On the basis of the principle of proportionality, the Regulation also provides that EU's countermeasures shall exist only as a last resort.[3] The Commission notes that it will be open to engage on behalf of the EU with the third country to obtain the cessation of the economic coercion. Such engagement may include direct negotiations, mediation, or submission of the matter to international adjudication.

The Adoption of Countermeasures

In cases where negotiations with the third country have not resulted in the cessation of the economic coercion, the Regulation would require action to protect the EU's interests.[4] The Regulation requires that countermeasures must be imposed in a proportionate manner and not exceed the required level needed to reflect the injury suffered to the EU or Member States from the third country. The Commission would select the response measures based on criteria in the Regulation. The selection would take into consideration factors such as the effectiveness of the measures in inducing cessation of the coercion, avoidance of negative impact on the EU from the response measures, and the avoidance of disproportionate administrative complexity in imposing the response measures.

If taken, countermeasures would enable the Commission to temporarily suspend applicable international obligations. Annex I to the Regulation lists 12 potential countermeasures, such as:

- New or increased customs duties and quantitative restrictions on export and import of goods;
- Quantitative restrictions on imports or exports of goods through quotas, nonautomatic import or export licenses or through other measures;
- Exclusion from public procurement of suppliers of goods or services established in and operating from a third country concerned or any other restrictions of access to public procurement;
- Blocking exports of products subject to export control measures (i.e. those that would otherwise be permitted).
- Restrictions on foreign direct investments; or

- Imposition of restrictions for banking, insurance, and access to EU capital markets.

Those countermeasures may apply to any legal or natural persons, either through the implementing act that imposes the restrictions or otherwise through a separate implementing act issued by the EU. The Commission may designate a natural or legal person as subject to the response measures where that person is connected or linked to the government of the third country concerned. The Regulation does not give further guidance on what qualifies a natural or legal person as “connected” or “linked” to the government of the third country, but we expect either separate guidance of further clarification in the Regulation itself as it entry into force becomes close.

What’s Next?

The proposal will go through the ordinary legislative procedure, whereby both the European Parliament and the Council of the EU would have to adopt it for this new regime to become law. During this process, amendments can be proposed by the European Parliament and the Council of the EU. Some states such as Sweden and Estonia are expressing concern about the current version text, arguing that the regulation could lead to greater economic protectionism and trade wars, which will result in breaches of WTO rules. On the other hand, France, which now holds the EU Presidency, has expressed its support for the proposed regulation, and identified it as a priority.

Over the next two months, stakeholders as well as EU citizens are invited to provide further comments, on which the Commission will report to the Council and Parliament.

Nour Bey also contributed to this article.

FOOTNOTES

[1] Excuse a bit of oversimplification.

[2] Article 2 of the Proposed Regulation.

[3] Id., Article 5.

[4] Id., Article 7.

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