



Council of the  
European Union

Brussels, 10 December 2021  
(OR. en)

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**Interinstitutional File:**  
**2021/0406(COD)**

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14943/21  
ADD 3

COMER 113  
IA 204  
CODEC 1634

## PROPOSAL

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From: Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director

date of receipt: 9 December 2021

To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

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No. Cion doc.: SWD(2021) 371 final

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Subject: COMMISSION STAFF WORKING DOCUMENT  
IMPACT ASSESSMENT REPORT  
*Accompanying the document*  
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

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Delegations will find attached document SWD(2021) 371 final.

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Encl.: SWD(2021) 371 final



Brussels, 8.12.2021  
SWD(2021) 371 final

**COMMISSION STAFF WORKING DOCUMENT**

**IMPACT ASSESSMENT REPORT**

*Accompanying the document*

**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**

{COM(2021) 775 final} - {SEC(2021) 418 final} - {SWD(2021) 372 final}

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## Glossary

| <i>Term or acronym</i>          | <i>Meaning or definition</i>  |
|---------------------------------|---|
| Blocking Statute                | Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, OJ L 309, 29.11.1996, p. 1–6; as last amended, OJ L 199I, 7.8.2018, p. 1–6; <a href="#">consolidated text</a> . |
| EBRD                            | European Bank for Reconstruction and Development  |
| ECFR                            | European Council for Foreign Relations  |
| EESC                            | European Economic and Social Committee  |
| EEAS                            | European External Action Service  |
| EIB                             | European Investment Bank  |
| EU Trade Enforcement Regulation | Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules, OJ L 189, 27.6.2014, p. 50–58; as amended, OJ L 49, 12.2.2021, p. 1–5; <a href="#">consolidated text</a> .                     |
| EU or Union                     | European Union  |
| HS                              | Harmonized System   |
| DG TRADE                        | Directorate General for Trade   |
| GDP                             | Gross Domestic Product  |
| INTA                            | Committee on International Trade of the European Parliament   |
| ISG                             | Interservice (steering) group   |
| MFF                             | The Multiannual Financial Framework of the European Union   |
| Member States                   | The Member States of the European Union   |
| NGOs                            | Non-government organisations  |
| SMEs                            | Small- and medium-size enterprises  |
| TEU                             | Treaty of the European Union  |
| TFEU                            | Treaty on the Functioning of the European Union   |
| REACH Regulation                | Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals, OJ L 396 30.12.2006, p. 1, as amended; <a href="#">consolidated text</a> .  |

|                 |  |
|-----------------|--|
| CTEO            | The Chief Trade Enforcement Officer at the Directorate-General for Trade |
| UN              | The United Nations   |
| US              | The United States of America   |
| WTO             | World Trade Organization   |
| WTO Agreement   | Marrakech Agreement Establishing the World Trade Organization            |
| GATT 1994       | WTO General Agreement on Tariffs and Trade 1994                          |
| GATS            | WTO General Agreement on Trade in Services                               |
| TRIPS Agreement | WTO Agreement on Trade-Related Intellectual Property Rights              |

## 1. INTRODUCTION: POLITICAL AND LEGAL CONTEXT

The initiative for the creation of an anti-coercion instrument originates in the legislative process during 2020 to amend the EU Trade Enforcement Regulation, where the European Parliament and a number of Member States raised concerns about the issue of coercion.

This led to a political agreement on a [Joint Declaration](#) of the Commission, the Council and the European Parliament,<sup>1</sup> to create a new legislative instrument to deter and counteract coercion. The Joint Declaration contains the Commission's commitment to make a legislative proposal by the end of 2021 at the latest. In particular, the Commission stated its intention to examine further a possible instrument, which could be adopted in order to dissuade or offset coercive actions by third countries and which would allow the expeditious adoption of countermeasures triggered by such actions, in a manner consistent with international law. The Commission shared the view that the practices to seek to coerce the EU and/or its Member States to take or withdraw particular policy measures were of a concern. The European Parliament and the Council committed to consider the proposal in a timely manner.

These concerns surfaced in the light of the possible imposition of trade-restrictive measures by the US pursuant to Section 301 of the US Trade Act of 1974 following an investigation into the digital services tax adopted by France, a taxation policy which the US viewed and continues to view unfavourably. Such tariffs could have affected French exports to the US of cosmetics and handbags of an estimated trade value of approximately \$1.3 billion in 2019.<sup>2</sup> The US did not proceed with measures at the time but this possible action has contributed to increased uncertainty for economic operators and pressure on policy makers.<sup>3</sup> Other examples of coercion, for example involving EU economic operators active in China, are also relevant. Consequently, the issue of economic coercion is of broad concern, as the analysis undertaken in the context of this impact assessment confirms.

The Commission President henceforth announced the initiative in her [Letter of Intent to the President of the Parliament and President in office of the Council](#) of 16 September 2020 under the heading "An economy that works for people". The [Commission Work Programme 2021](#) identifies the initiative as a key one for the referenced period.

The issue of economic coercion features in the EU's future trade policy. The [Trade Policy Review Communication](#) of February 2021<sup>4</sup> aims at shaping a new consensus for an open, sustainable and assertive trade policy in a challenging economic and geopolitical context. The Communication mentions the need to navigate rising global tensions with trade increasingly weaponised in a geo-economic context. The Communication specifically refers to a future Commission proposal for an anti-coercion instrument.

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<sup>1</sup> OJ C 49 of 12.2.2021, p.1.

<sup>2</sup> Office of the United States Trade representative, [Notice of Action in the Section 301 Investigation of France's Digital Services Tax](#).

<sup>3</sup> Subsequently, the investigation continued and, on 2 June 2021, the new US Administration announced tariffs but decided to suspend them for 180 days and, subsequently, for an indefinite period of time. This is discussed in more detail in section 3.1.

<sup>4</sup> Communication from the Commission of February 2021 on the Trade Policy Review - An Open, Sustainable and Assertive Trade Policy, COM(2021) 66 final.

As set out in the Communication, the current geopolitical environment is characterised by uncertainty, rising tensions between major players and a resort to unilateral measures. The Covid-19 pandemic accelerated these trends while highlighting the interconnected nature of the EU's economy with third country economies and the need for global cooperation.

The present initiative is complementary to other, more structural initiatives to enhance the resilience of the EU economy against external pressures. The [update of the EU Industrial Strategy](#) of May 2021 aims at strengthening the single market's resilience.<sup>5</sup> This strategy now plays a key role in the recovery supported by robust competition and trade policies.<sup>6</sup>

Furthermore, in January 2021, the Commission announced in its communication "[The European economic and financial system: fostering openness, strength and resilience](#)" a strategy to promote the EU's resilience in economic and financial matters.<sup>7</sup> This includes *inter alia* considering additional policy options to further deter and counteract the unlawful extra-territorial application of third-country sanctions to EU operators, notably by amending the EU Blocking Statute. The amendment to the Blocking Statute would (i) include additional deterrence mechanisms and (ii) streamline its application, including by reducing compliance costs for EU persons and businesses. A legislative proposal is foreseen for the second quarter 2022.<sup>8</sup> That initiative is distinct but also related to the present initiative. There could be a potential partial overlap between problems identified by the two initiatives, if there were a situation where unlawful extra-territorial third-country sanctions are applied with coercive effect on the EU or the Member States.

## 2. ILLUSTRATIVE EXAMPLE

To facilitate the reading of this document, the following is a fictitious example which illustrates the problem and the preferred option – as will be elaborated throughout the remainder of this report:

**Hypothetical example of economic coercion targeting the EU and of possible EU reaction under an anti-coercion instrument:**

The Commission makes a proposal to the European Parliament and Council to adopt a new regulation to protect the environment in some important respect. This new policy is fully compliant with international law. Country X, however, dislikes it because it harms some of its commercial interests. It therefore imposes an import ban on all widgets from the EU. The explicit motivation of Country X is to force the EU not to adopt or to abandon the new policy. The EU widget industry is a significant source of employment and GDP in the EU and Country X an important export market. The import ban therefore makes it difficult for the EU legislator to adopt or maintain the new policy despite there being a clear political majority in its favour.

The EU intends to defend its right and ability to adopt and maintain the new policy. It

<sup>5</sup> Communication from the Commission "Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery" of May 2021, COM(2021) 350 final.

<sup>6</sup> In this context, the Commission has identified a list of 137 possible strategic dependencies (out of 5200 products). For 34 of these products, risk are higher because it is not possible to produce internally and there are few suppliers at global level

<sup>7</sup> COM/2021/32 final.

<sup>8</sup> The inception impact assessment and the public consultation were published subsequently to submission of this report to the Regulatory Scrutiny Board, in August and September 2021, respectively.



notifies X that it objects to this interference. It first offers (without success) talks on resolving the matter amicably, then sets a deadline for the removal of the coercive import ban, combined with the warning that the EU will otherwise resort to the adoption of countermeasures (given there is a violation of international law). After expiry, the EU implements prohibitive import duties on certain products originating in Country X, selected after stakeholder consultation and to minimise detrimental economic effects in the EU, at a nearly equivalent value as the widget trade loss, demanding that Country X stop its actions. Country X after few weeks enters into talks with the EU. Both sides first agree to suspend both measures for six months while the talks are ongoing; then agree on the definitive lifting of both measures.

### 3. PROBLEM DEFINITION

#### 3.1. What is the problem?

The above-referenced [Joint Declaration](#) of the Commission, the Council and the European Parliament on this initiative expressly referred to “practices of certain third countries to seek to coerce the Union and/or its Member States to take or withdraw particular policy measures”. The initiative therefore aims to address this problem and those concerns.

#### *Definition*

The initiative is concerned with economic coercion defined as follows:

pressure which foreign countries exercise towards the EU and/or its Member States through most often a trade or investment restriction with the objective of attaining a specific outcome falling within the legitimate policymaking space of the EU or a Member State.

It is defined as economic because of the use of economic means for the coercion.<sup>9</sup> The definition is a reformulation of the provisional definition, which stakeholders commented on in the public consultation. Substantively, the meaning is unchanged.<sup>10</sup>

Coercion, so defined, can be observed in current international relations in various forms on a broad spectrum of intensity, formality and nature, as also confirmed in the consultation process. At one end of this spectrum regarding formality, the foreign government’s involvement may be very informal, unofficial or implicit, not always easily discernible, but unquestionably existing because it is the impulse giving rise to the coercive measure that aims to put pressure on a foreign actors and hence their home governments.<sup>11</sup> At the other

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<sup>9</sup> Coercion through the use of force or the threat of its use is not part of this dimension.

<sup>10</sup> That provisional definition was: “Coercive practices by non-EU countries are measures which seek to coerce public authorities in the EU to take, not take, or withdraw, particular policy measures. These practices may include the use or threat of coercion, often in the form of trade or investment restrictions. The coercion may or may not be based on existing legislation, and can affect any field in which the EU or its Member State are active.” Participating stakeholders across the groups largely agreed with the definition. Those who partly agreed argued that in most cases the definition should extend to coercion against private actors and in general should be broader than narrower for the instrument to work.

<sup>11</sup> Cf. Darren Lim and Victor Ferguson, [‘Informal economic sanctions: the political economy of Chinese coercion during the THAAD dispute’](#), Review of International Political Economy, advanced publication.

end of this spectrum, the government may be acting openly, officially and through formal measures, such as legislation.

Coercive measures by third countries targeting the EU or Member States can be considered a breach of customary international law, which prohibits certain forms of interference in the affairs of another subject of international law when there is no basis in international law for doing so.<sup>12</sup> Whether specific coercive measures constitute a breach would depend on the concrete circumstance in individual cases and will be a matter of case-specific analysis.

In such an event, the EU and the Member States have the right to respond to the measures in question with the means which international law allows. These means include the right under customary international law, as codified in Articles 49 et seq. of the [International Law Commission's Articles on State Responsibility](#),<sup>13</sup> to take countermeasures if the coercive act breaches international law. If this is not the case, the EU (or its Member States) is always entitled to resort to a retorsion,<sup>14</sup> i.e. an act *per se* not inconsistent with international law. In all instances, the EU (or its Member States) can resort to standard diplomatic means, i.e. make representations to the foreign government in question. However, the principle of conferred powers means that the EU and its institutions can deploy the means existing under international law only when empowered to do so.

Presently, there is no legal framework in any of the existing instruments to permit EU action against a third country to respond specifically to coercive measures of third countries. Existing instruments do not address situations of coercion as identified and defined above and thus are neither suitable, nor capable as a response to coercion. It follows that the EU is unable to respond to coercion in a timely and effective manner, should a need arise, even less so to provide any deterrence effect or legal predictability. The EU has so far not adopted any instruments against coercion. Section 6.1.2 (the baseline) presents the analysis of any other possibilities for a response.

#### *Individual elements*

Deconstructing coercion as defined above leads to the following key elements:

Coercive intention – the third country's objective of attaining a specific outcome lying within the legitimate policymaking space of the EU or Member State; it may affect any area of competence of the EU or a Member States;

Target – pressure on private actors as a conduit to public authorities of the EU or Member States (also as subjects of international law);

Author of the coercive measure – this can be any government agent or other agent whose conduct is attributable to the country in question. It includes state-owned and state-controlled enterprises.

Type of coercive measure – these may be explicit, disguised or silent.

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<sup>12</sup> Mohamed S. Helal, On Coercion in International Law, 52 N.Y.U. J. Int'l L. & Pol. (2019); Maziar Jamnejad & Michael Wood, The Principle of Non-Intervention, 22 Leiden J. Int'l L. 345 (2009).

<sup>13</sup> Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly.

<sup>14</sup> "Retorsion" is the accepted term in international law scholarship to designate a state's response to another state's action when the response is not in departure from international obligations which the responding state has.

Manifestation – predominantly trade or investment restrictions, including also restrictions on financial flows.<sup>15</sup>

*Explicit* coercion would be the use of formal measures for coercion. A well-known example is parts of Section 301 of the US Trade Act of 1974, on the basis of which the US takes or threatens to take trade-restrictive actions because a third country maintains a measure which the US regards as unreasonable and unfairly harming commercial interests of US companies without it being in breach of international obligations.

*Disguised* coercion is the abuse of an instrument which per se could have a legitimate purpose. An observed example is the abusive resort by China to trade defence instruments or the selective stepping up of border checks against goods from a particular country or region.<sup>16</sup> Another example is excessive or discriminatory sanitary and phytosanitary (SPS) measures that are introduced with a coercive intention, rather than being introduced on health protection grounds.<sup>17</sup> The internationally illegal coercion in these cases is unrelated to the question of the possible WTO-illegality of the trade-restrictive measures chosen.<sup>18</sup>

*Silent* coercion and *boycotts* do not come in the form of legislative or regulatory actions but result from informal restrictions applied by private actors under the unofficial direction of the foreign government (e.g. a boycott of goods or services from certain origins, fomented for example via government-controlled media or through informal instructions) in order to influence a foreign government's policy. This was for instance the case in Turkey which saw the boycott of French products,<sup>19</sup> or China in respect of a number of European,<sup>20</sup> American,<sup>21</sup> Korean<sup>22</sup> and Japanese<sup>23</sup> companies.

Extra-territorial sanctions are formal measures imposed to foreclose commercial activities of foreign operators in another third country. Extra-territorial sanctions are directed at EU (and other) operators with the intention to avoid that these operators might undermine the foreign policy of a third country by continuing to engage in business activities there and by even replacing economic operators of that third country in an environment sanctioned by that third country ("backfilling"). They have the purpose of maximising the effectiveness of the sanctions imposed by the third country. An example is the US sanctions on economic operators active in/with Cuba and Iran.<sup>24</sup> However, they also frequently have the effect of coercing the EU or the Member State in the sense that they create pressure for the EU or the

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<sup>15</sup> There also can be other restrictions, for example, restrictions imposed on individuals, notably EU decision-makers. This initiative however focuses on trade and investment restrictions, therefore such other measures will not be referred to in the remainder of the document.

<sup>16</sup> Al Jazeera, [China 'blocks' Mongolian border after Dalai Lama visit](#), 10 December 2016; Reuters, [China slaps new fees on Mongolian exporters amid Dalai Lama row](#), 1 December 2016; see also below footnotes 52-54 and accompanying text.

<sup>17</sup> E.g. Kesha West, [Banana crisis blamed on Philippines-China dispute](#), ABC News, 29 June 2012.

<sup>18</sup> Accordingly, any anti-coercion action would not rely on any potential WTO-incompatibility of the action.

<sup>19</sup> BBC, [Turkey's Erdogan urges French goods boycott amid Islam row](#), 26 October 2020.

<sup>20</sup> Stuart Lau, [China's new bogeyman: Europe, Beijing turns to invective and boycotts to dissuade Europe from closer coordination with Washington](#), Politico, 29 March 2021.

<sup>21</sup> Consumer boycotts against US and Japanese (cf. footnote 23) companies clearly existed; less evident was the role of the state in fomenting these.

<sup>22</sup> Darren Lim and Victor Ferguson, footnote 11 above.

<sup>23</sup> Yoko Kubota, [Japan carmakers face \\$250 million in lost China output, new risk](#), Reuters, 12 September 2012; Chester Dawson And Yoshio Takahashi, [Japanese Car Sales Plunge Amid China Rage](#), The Wall Street Journal, 9 October 2012.

<sup>24</sup> [Study: extraterritorial Sanctions on trade and investment and European responses](#), requested by the INTA committee of the European Parliament, November 2020.

Member State to align its policy vis-à-vis the sanctioned third country with the country imposing the sanctions. Where such extra-territorial sanctions simultaneously coerce the home government of the economic operators they fall under the definition of this initiative.

If extra-territorial sanctions do not also coerce the home government of the economic operators in question, they do not fit within the definition of coercion with which this initiative has been launched. However, irrespective of this, businesses and other stakeholders voiced strong concerns about coercion of this type. As noted, extra-territorial sanctions are covered under the EU's Blocking Statute, which is in the process of being amended so as to deter such practices and better protect EU operators.

#### *What falls outside the definition?*

Extra-territorial sanctions will fall outside the definition where they do not have coercive effects towards the EU or Member States. The definition also does not cover coercion against private actors where the conduct which the third country government desires to obtain from private actors is purely related to these operators' activities in that third country and unrelated to the public policy of the EU or a Member State. Examples would be attempts to pressure a foreign company into surrendering its assets, to transfer technology or to support certain domestic or international policies of that government, abusive anti-trust or anti-corruption investigations, the arbitrary withholding of licences, or the targeting of specific companies for the positions they or their employees are taking or not taking on any matter of legitimate public interest (e.g. on Hong Kong<sup>25</sup> or Taiwan<sup>26</sup>).

A number of business associations suggested that the provisional definition for coercion in the public consultation be broadened in these respects. A recurring argument has been that foreign governments can at times achieve their goal directly by pressuring private operators only, rather than going through and pressuring the economic operators' home government. Other arguments have been that the coercion against private operators nevertheless amounts to coercion against a government, or that one should not, and sometimes cannot, separate and distinguish the two types of coercion precisely.

Private actors can in such cases feel coerced in much a similar way as far as their position and interests are concerned. Legally, however, there is a decisive difference compared with situations of coercion falling under the definition above. In the case of coercion against private actors related to these operators' activities in the third country in question, this does not amount to prohibited interference in the affairs of another state, on the one hand, but is government conduct that is arbitrary, discriminatory, at odds with the rule of law and, internationally, infringing on human rights, the law of aliens or relevant treaties, e.g. those protecting foreign investors.<sup>27</sup> In the case of extra-territorial sanctions that do not also coerce EU public authorities, the difference is precisely the latter absence of a threat to those authorities' decision-making autonomy, even if both cases amount to a transgression of the limits imposed by international law on the exercise of territorial sovereignty. This

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<sup>25</sup> Sumeet Chatterjee & Engen Tham, [How Beijing humbled Britain's mighty HSBC](#), Reuters, 28 June 2021; Ben Cohen & James T. Areddy, [One Year After China Banned the NBA, Basketball Returns to Chinese TV](#), The Wall Street Journal, 9 October 2020.

<sup>26</sup> Ed Bryan, Taiwan: [How airlines are being dragged into China's bitter dispute over the island's sovereignty](#), The Conversation, 6 August 2018.

<sup>27</sup> Where these inconsistencies exist, there may on that basis be means of redress available to the private actor in question or to the EU or Member State. These means of redress include local remedies and diplomatic protection and may include investment protection and may or may not be effective in a given instance.

might not be easy to distinguish in all cases, and this would require a determination on a case-by-case basis.

### *Who is affected and what is the impact of the coercion?*

Coercion affects the addressees of the coercion, i.e. the public authorities of the EU and/or Member States, by exerting pressure on them to change policy. That can undermine the EU's open strategic autonomy and the freedom of action for the EU and/or its Member States to regulate within their own jurisdictions. The great majority of the participating stakeholders recognised these effects.

At the same time, there is an economic and social impact. The non-EU country channels its pressure through EU private actors. Those businesses engaged in trade or investment in the non-EU country in question are affected directly. In line with what stakeholders report in the consultation, depending on the concrete coercive measure, most often there could be direct economic costs such as loss of jobs and business (opportunities) or investment (opportunities) in the non-EU country in question. That may lead to long-term effects as regards businesses growth and development. Ultimately, economic costs may distort competition and have a spill over effect on the markets. Some stakeholders reported that coercion through trade-restrictive measures contributes to the rise of illicit trade. Additionally, stakeholders reported that even temporary coercive acts influence the purchasing behaviour of local consumers substantially. Stakeholders also report that mere threats of coercion give rise to serious concerns and uncertainties among exporters, destabilising their business strategy even before coercive practices actually occur, and that threats are sufficient to disrupt and jeopardise commercial contractual relations. They add that uncertainty associated with the coercion has a negative impact on innovation and economic development as a whole. Moreover, instances of coercion and their impact remain unreported for fear of retaliation or further coercive measures. Similarly, many companies and even sectors reported experience of coercive conduct by third country governments but would not speak openly about specific experiences.

Coercion may affect any area or sector as it has been observed. Stakeholders stated that there are a variety of areas and sectors that the non-EU country may decide to use for its coercion. They reported a large number of such examples with potentially significant negative impact, among which energy, (new) technology, ICT area, raw materials, financial sector and (critical) infrastructure, R&D, transport, equipment, seeds, ceramics, tiles, furniture, IT/digital industries, textile, footwear, agricultural production, manufacturing, aerospace and defence, chemical, health, retail, product registration, public tenders, public procurement, technical regulations and cooperation with authorities in third countries, services in general, and so on (see results of the public consultation and replies to question 9, in particular, [here](#)).

Furthermore, stakeholders observed that a non-EU country may have the means to apply coercive measures instantly or in a very short timeframe, depending on the legal base and domestic system of governance. The speed the coercion may take reinforces the potential negative consequences for the EU public authorities and economic operators concerned as the time for a possible advance reaction is reduced or inexistent.

Finally, some coercive measures of the non-EU countries could affect consumers within the EU indirectly if they would produce effects on the EU market.

### *Size and cost of coercion – illustrative examples*

To illustrate the size and cost of coercion, the report relies on a few selected examples. Those examples were also put forward by stakeholders and are in the public domain.<sup>28</sup> They are by no means exhaustive nor statistically representative.

- In 2020, following an earlier investigation into Australia's trade practices and at the time of Australia's advocacy for an independent investigation into the origins and early handling of the Covid-19 outbreak, China reacted in various ways.<sup>29</sup> It levied an 80% anti-dumping and countervailing duty on Australian barley. The Australian national association of grain producers estimated that the tariffs stopped an annual trade worth AUD 1.2 billion (around €750 million)<sup>30</sup> and could cause total costs to the industry of AUD 2.5 billion (€1.6 billion) over the initial five-year period of the tariffs. Around the same time, China applied anti-dumping and countervailing measures on wine from Australia<sup>31</sup> (2019 value of trade of over €700 million). Australian coal was said to disrespect environmental standards, while seafood, beef, copper, cotton, sugar and timber also faced entry barriers.<sup>32</sup> Collectively, these targeted exports to China were worth roughly €15.5 billion in 2019, or 1.3% of Australian GDP.<sup>33</sup> Trade in services is also targeted. Chinese tourism and students were big sources of income for Australia before the pandemic and were singled out as targets.<sup>34</sup>
- In late December 2019, Indonesia “silently” blocked imports of spirits, wine and dairy products from the EU in response to the EU's regulatory treatment of palm oil as fuel for transportation. With respect to alcohol, Indonesian authorities either refused to grant import licences, or granted partial licences for non-EU products only. The situation started to improve in quarter 4 of 2020, however, only 40% of requested import amounts for 2020 were granted. As a result, EU exports of beer, wine, vermouth and spirits fell by over 60% (€5.9 million) in 2019 and were still 30% less than the pre-ban value in 2020.<sup>35</sup>
- In 2015, Russian authorities threatened to impose a ban on flowers from The Netherlands, which at that time was exporting up to 5% of its flower sales to Russia. Russia alleged that Dutch flowers contained organisms that the EU had failed to recognise as dangerous. This happened at the same time as the Netherlands pointed at Moscow-backed separatists for shooting down Malaysia Airlines flight MH17 with a Russian-made missile and co-sponsored a resolution to set up a UN-backed tribunal to prosecute the culprits. The value of affected Dutch exports was €162 million (HS 0603; in 2014) and they fell by one quarter in 2015 alone, to fully recover only in 2019.

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<sup>28</sup> The examples reported by stakeholders are found in the factual report of the public consultation ([here](#)).

<sup>29</sup> Victor Ferguson and Darren Lim, 'Economic Power and Vulnerability in Sino-Australian Relations', in Linda Jaivin, Jane Golley, and Sharon Strange (eds), *China Story Yearbook 2020: Crisis* (Canberra: ANU Press, 2021).

<sup>30</sup> <https://grdc.com.au/resources-and-publications/grdc-update-papers/tab-content/grdc-update-papers/2021/02/in-the-wake-of-the-china-barley-tariffs>

<sup>31</sup> <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/602-1.pdf&Open=True>

<sup>32</sup> <https://www.reuters.com/article/us-australia-trade-china-commodities-tim-idUSKBN28L0D8>

<sup>33</sup> Estimated by [Lowy Institute](#).

<sup>34</sup> Levi Parsons, [Chinese ambassador warns Australia's education and tourism industries could be next on the chopping block after ban hammered wineries](#), Daily Mail Australia, 30 April 2021; Benedict Brook, [China tourism warning against Australia 'just the tip of the iceberg'](#), news.com.au, 8 June 2020.

<sup>35</sup> Comext and the business association.

- US tariffs under Section 301 of the US Trade Act of 1974: on 2 June 2021, the US concluded investigations initiated by the preceding US administration under Section 301 into the digital services taxes of Austria, Spain and Italy (and investigations of India, Turkey and the UK),<sup>36</sup> in addition to the previous investigation of France.<sup>37</sup> It opted to enact additional *ad valorem* import duties of 25% on \$3.18 billion worth of goods imported from these four EU Member States<sup>38</sup> because the US considers that each of those countries' taxes regarding digital services providers is "unreasonable or discriminatory and burdens or restricts U.S. commerce".<sup>39</sup> At the same time, the application of the tariffs on products from Austria, Spain and Italy was postponed for 180 days, until 29 November 2021,<sup>40</sup> and those on products from France for an indefinite period,<sup>41</sup> with the objective to provide the time necessary to find a multilateral solution at the Organisation for Economic Co-operation and Development. Legally, however, the suspension may be ended at any moment, thus exerting leverage in the tax discussions at the Organisation for Economic Co-operation and Development, or intending to influence the three Member States' current tax policies or the EU's or other Member States' plans for the development of digital services levies.<sup>42</sup>
- As vaccines against the COVID-19 pandemic emerged, two vaccine-producing countries, Russia and China, were described as engaging in "vaccine diplomacy", meaning that they accompanied vaccine supplies with soft power messages to support their standing or positions.<sup>43</sup> In June 2021, China reportedly succeeded in demanding that Ukraine withdraw from a statement at the UN Human Rights Council in Geneva calling for immediate access for independent observers to Xinjiang, by blocking a large shipment of COVID vaccines until Ukraine do so.<sup>44</sup>

*Why is this a general problem?*

Coercive measures restrict policy space in the targeted countries or impose costs on the legitimate use of that policy space. They may affect any area of competence of the EU or a Member States and any sector of the economy, as observed and as reported by stakeholders.

<sup>36</sup> See USTR, [Section 301 – Digital Services Taxes](#).

<sup>37</sup> See USTR, [Section 301-France's Digital Services Tax](#).

<sup>38</sup> Seafood, handbags, belts, footwear and some glassware from Spain; caviar, perfumes, suits, sweaters, ties, jackets, footwear and lenses from Italy; ceramics, glassware, copper alloys, fridges, optical parts and projection screens from Austria; handbags, make-up and cosmetics from France, see USTR, Notices of Action in the Section 301 Investigation of [Spain's](#), [Italy's](#) and [Austria's](#) Digital Services Taxes, 7 June 2021 and [France's Digital Services Tax](#), 16 July 2020; USTR terminated its investigations into inter alia the [Czech Republic and the EU](#) itself, because neither actually had digital services taxes.

<sup>39</sup> USTR, *ibidem*.

<sup>40</sup> This will be subject to developments before the publication of this report.

<sup>41</sup> USTR, [Notice of Modification of Section 301 Action: Investigation of France's Digital Services Tax](#), 12 January 2021.

<sup>42</sup> Stakeholders reported that only the threat of the US tariffs has caused supply chain disruptions and cancellation of orders. For instance, the proposal specifies an increase of tariffs on 15 types of footwear coming from Spain and the industry has already been affected. The Spanish footwear association estimates that 3000 jobs could be lost immediately.

<sup>43</sup> Michael Leigh, '[Vaccine diplomacy: soft power lessons from China and Russia?](#)' Bruegel Blog, 27 April 2021.

<sup>44</sup> Yevhen Solonyna and Reid Standish, [China Used Vaccines, Trade To Get Ukraine To Drop Support For Xinjiang Scrutiny](#), Radio Free Europe Radio Liberty, 28 July 2021; Jamey Keaten, [Diplomats say China puts squeeze on Ukraine](#), AP News, 25 June 2021.

They do not allow governments to exercise governmental authority in the interest of the governed people and independently from the demands of the coercing government and without incurring the cost imposed by the coercion. This also has to be seen in the context of the weaponisation of trade, where large economies are taking coercive measures, which have the effect of forcing other countries to act in one way or another trapping EU companies between the two camps.<sup>45</sup>

There is large-scale scholarly work that identifies the use and threat of coercion in the current era of global transformation and an increasingly globalized and interdependent world.<sup>46</sup> It has been noted that some actors such as China and Russia are using economic coercion as a foreign policy tool more frequently than they used to,<sup>47</sup> whilst other countries have continued to resort to economic coercion.<sup>48</sup>

The ECFR policy brief “[Measured response: How to design a European instrument against economic coercion](#)” of June 2021<sup>49</sup> argues that Europe is at ever greater risk of economic coercion coming from several sources, that there is increased coercion of private actors, and points to the use of extra-territoriality and of informal coercion. In illustrating the risk and the problem, it refers to several incidents and types of coercion, such as China’s use of economic punishment to EU businesses and other actors in March 2021 following EU (and US) sanctions on Chinese officials for human rights violations; Russia’s use of public health concerns to ban Polish imports of fruits and vegetables in 2014, following EU sanctions over the war in Ukraine; Turkey’s boycott on French origin goods following France’s announcement of policies to combat extremism; US sanctions on the Nord Stream 2 gas pipeline; US’ use of Section 301 trade restrictions in relation to certain EU Member States’ digital taxation policies; and others.<sup>50</sup> The paper puts forward that the problem lies in the use of economic tools for geopolitical power and geopolitics for economic gain. It argues that there is a gap in the EU’s defence that must be filled. It makes the case for a new legal instrument as a priority.

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<sup>45</sup> Henry Farrell, Abraham L. Newman, [Weaponized Interdependence: How Global Economic Networks Shape State Coercion](#), 44 *International Security* 42–79 (2019), Daniel W. Drezner, Henry Farrell, and Abraham L. Newman (eds) *The Uses and Abuses of Weaponized Interdependence*, Brookings Institution Press (2021), Anthea Roberts, Triple R (Risk, Reward, Resilience) Framework (publication pending) (2021), Benjamin Herscovitch, *Assessing Policy Responses to Economic Coercion: Balancing Risk and Reward and Navigating Complexity* (publication pending) (2021).

<sup>46</sup> See i.a. Ketian Vivian Zhang, ‘[Chinese non-military coercion—Tactics and rationale](#)’, 22 January 2019; Julian Gewirtz, ‘[The Chinese Reassessment of Interdependence](#)’, 1 June 2020, *China Leadership Monitor*, (64); Elizabeth Rosenberg, Peter E. Harrell, and Ashley Feng, ‘[A New Arsenal for Competition, Coercive Economic Measures in the U.S.-China Relationship](#)’, April 2020.

<sup>47</sup> Bryan R. Early and Menevis Cilizoglu, ‘[Economic Sanctions in Flux: Enduring Challenges, New Policies, and Defining the Future Research Agenda](#)’, 21 *International Studies Perspectives* 438–477 (2020).

<sup>48</sup> Dawid, Walentek, ‘[Economic Peace Revisited, Coercion in a Liberal Order](#)’, APSA Preprints 2020.

<sup>49</sup> The policy brief of June 2021 is based on the work of ECFR’s Task Force for Strengthening Europe against Economic coercion that brings together high-level representatives from six Member State governments (the Czech Republic, France, Germany, the Netherlands, Spain, and Sweden) and private sectors (although the report does not necessarily represent their views). ECFR has been very active on the issue of economic coercion. An earlier report entitled “[Defending Europe’s economic sovereignty: New ways to resist economic coercion](#)” of October 2020 presented eleven policy options for the EU to tackle economic coercion; a type of an anti-coercion instrument is among these, but also a reform of the Blocking Statute, creation of European export bank, building digital currency, creation of EU resilience office and EU resilience fund, etc. An earlier policy brief “[Redefining Europe’s economic sovereignty](#)” also discusses an agenda to strengthen the economic sovereignty.

<sup>50</sup> An overview of the examples is contained in the policy brief.



Furthermore, the public consultation showed that economic coercion is a widespread concern for the EU, across the Member States. All stakeholder groups clearly acknowledge the issue and advocate for an appropriate solution.<sup>51</sup> In support of their position, they refer to a number of coercive practices, that affect a variety of sectors and areas (see the results of the public consultation [here](#), [in particular replies to questions 1-14](#), and a [summary factual report here](#)).

#### *Other countries' standpoint as regards the problem*

As demonstrated by the stakeholder consultation and as can be observed in the public domain, economic coercion is not a problem faced exclusively by the EU. It is of a wider concern. The sources and subjects of coercion are multiple. In general, other countries' standpoint as regards the issue of coercion varies. It may also depend on whether the particular jurisdiction contains an available instrument for a specific anti-coercion action or it does not need a specific legislation in order to act against coercion (see results of the public consultation, in particular replies to question 4 on evidence of legislation or unwritten measures that can be used for coercion, [here](#)). Some countries which have been subjected to coercion chose to accept the coercion and sought to minimise the commercial losses suffered. Others may have disguised their responses and kept them outside a rules-based framework. In any event, contrary to other jurisdictions, which may take anti-coercion measures rapidly and without the need for a framework legislation put in place first, the principle of conferred powers requires the establishment of a legal basis in the EU legal order for the EU to act in specific cases such as coercion.

Concrete examples of other countries' actions are presented below.

- [Australia](#) has so far chosen to raise concerns about coercive practices in WTO bodies<sup>52</sup> and to bring WTO disputes against coercive measures when these allegedly infringe WTO rules (barley, wine).<sup>53</sup> Such WTO disputes can only deal with the WTO-inconsistency of the measures in question, not the separate infringement of general international law that lies in the coercive act and intention. The latter does not fall in the remit of the WTO dispute settlement system. Australia does not possess a dedicated anti-coercion instrument.
- [Canada](#) has similarly launched a WTO dispute against China in a case involving import restrictions on canola.<sup>54</sup> Canada does not possess a dedicated anti-coercion instrument.
- [The US](#) has started to be active on the issue of economic coercion including by seeking alliances. Secretary of State Blinken mentioned this in certain speeches.<sup>55</sup> The US does not possess a dedicated anti-coercion instrument.

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<sup>51</sup> There are some differences within the groups, where a small share seems to suggest that existing instrument could at least partly deal with the problem and another small share calls for caution with any solution.

<sup>52</sup> Most recently in the WTO Council for Trade in Goods meeting on 8-9 July 2021, see footnote 59 below.

<sup>53</sup> [China — Anti-Dumping and Countervailing Duty Measures on Wine from Australia](#), WT/DS602; [China — Anti-dumping and countervailing duty measures on barley from Australia](#), WT/DS598.

<sup>54</sup> [China — Measures Concerning the Importation of Canola Seed from Canada](#), WT/DS589.

<sup>55</sup> See e.g. Antony J. Blinken, [Reaffirming and Reimagining America's Alliances](#), 24 March 2021: "We've seen how Beijing and Moscow are increasingly using access to critical resources, markets, and technologies to pressure our allies and drive wedges between us. Of course, each state's decision is its own, but we must not separate economic coercion from other forms of pressure. When one of us is coerced, we

- China: In June 2021, China adopted a law on countering foreign sanctions. It largely codifies already existing practices but it is expected to give the Chinese government clearer authority to penalise compliance with foreign government's sanctions on Chinese entities and individuals. Accordingly, the law provides legal support and guarantees for Chinese companies against the measures imposed in third countries' jurisdictions. Additionally, however, it provides for possible countermeasures applicable to a broad pool of targets: any individual and organization directly or indirectly involved in the formulation, adoption and implementation of the foreign sanctions. This could include the foreign legislators, government officials, law enforcement officers, or even banks, or companies that formulate or implement foreign sanctions. It goes even further, by covering the spouses and immediate family members for individuals, and the management or related companies of sanctioned entities or individuals. The possible countermeasures are of a very broad range that includes the denial/revocation of visa, the denial of entry, deportation, the freezing of assets, and the prohibition or restriction on transactions with listed persons, among others.

The law complements the existing legislation on related subjects, such as the Export Control Law,<sup>56</sup> the Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures<sup>57</sup> (modelled after the EU Blocking Statute) and the Unreliable Entity List Regulations.<sup>58</sup> This is not a tool, however, to respond to coercion.

### *International forums*

In May 2021, the G7 [Foreign and Development Ministers' Meeting Statement](#) concluded that the G7 members would work collectively to foster global economic resilience against arbitrary, coercive economic policies and practices. In June 2021, the EU-US Summit concluded with a [Statement towards a renewed Transatlantic partnership](#) on, among other things, plans to increase cooperation and information and expertise exchange to enhance resilience against, and counter all forms of, coercion including economic pressure.

In July 2021, at a regular meeting of the WTO Council for Trade in Goods, the EU made a statement as regards a point raised by Australia concerning Chinese trade measures.<sup>59</sup> Noting and respecting Australia's preference to treat the long list of Chinese measures raised on their individual technical merits, including raising them in technical WTO Committees and WTO dispute settlement, the EU expressed concerns as regards the coercive dimension to the matter raised by Australia. The EU noted that, as it appeared, the underlying true reason for the alleged Chinese resort to those measures, that may be formal or informal, is an intention to put pressure on or sanction Australia for policy choices. The EU further noted that such coercion raises questions of international legality beyond and apart from the WTO-consistency.

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should respond as allies and work together to reduce our vulnerability by ensuring our economies are more integrated with each other than they are with our principal competitors.”

<sup>56</sup> <http://www.npc.gov.cn/npc/c30834/202010/cf4e0455f6424a38b5aacf8001712c43.shtml>

<sup>57</sup> <http://tfs.mofcom.gov.cn/article/bc/202101/20210103029710.shtml>

<sup>58</sup> <http://tfs.mofcom.gov.cn/article/bc/202009/20200903002593.shtml>

<sup>59</sup> China – Implementation of Trade Disruptive and Restrictive Measures – Request from Australia, see item 22 of the Proposed Agenda for the Meeting of the Council for Trade in Goods of 8 and 9 July 2021, WTO document G/C/W/795, 2 July 2021. Minutes of the meeting are not yet available, but will be, in due course, as WTO document G/C/M/140, and will be derestricted 45 days after their circulation.

### 3.2. What are the problem drivers?

The use of economic coercion for geopolitical ends has increased recently, blurring economic and geopolitical lines. Most recently, power conflicts are re-emerging in a more tense geopolitical environment.

*Foreign countries' desire to impose their own economic or political preferences to their benefit (different preferences as to economic policies)*

In certain instances, this is an expression of foreign countries' desire to impose on others their own economic or political preferences. The motives can be commercial, in the sense of furthering or protecting economic gains for the country's economic operators. The motives can also be political and related to divergences of views on issues of international relations. In that sense, the coercion can relate to matters of both internal policy and external relations. The objective of influencing partner countries is not illegitimate in itself, and, certainly, there are legitimate means by which to see to do so. However, the (mis)use of trade or investment restrictions with the objective of attaining a specific outcome lying within the legitimate policymaking space of the EU or Member State goes beyond and should be differentiated from the ordinary use of soft powers to influence partner countries.

*Geopolitical instability with increased tensions over economic governance*

A separate global trend is recent geopolitical instability with increased tensions between various countries, of varying intensity, and where some of these tensions give rise to measures of economic coercion. As a result, restrictions on trade or investment are being used by various players with the aim of pressurising other countries to modify their policies, even though international law permits those policies and gives no right to other countries to demand those policies change.

*Interconnectedness of the world economy and enhanced ability to disrupt economic activities in other countries through restrictions on trade, investment or financial flows*

What has also changed over the last few decades is the closer integration of the world economy in the form, inter alia, of more complex value chains in the manufacturing sector, overseas investment and intensively interconnected financial systems. These aspects have contributed to an enhanced ability of certain governments to disrupt economic activities by imposing restrictions on trade or investment.<sup>60</sup> Second, as the examples, have demonstrated, there is a recent trend of more frequent recourse to informal or unofficial restrictions. Third, the interconnection of the world economy has given rise to enhanced recourse, and ability to have recourse, to extra-territorial restrictions, because of at least two reasons: the presence of internationally active economic operators in the market of the coercing country, giving the latter the ability to enforce at home concerns relating to activities abroad; and the ability to control certain elements of the international banking system and thereby to prevent or sanction banking activities abroad.<sup>61</sup>

*Insufficient deterrence on the part of the EU*

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<sup>60</sup> Cf. Daniel W. Drezner, Introduction in: Daniel W. Drezner et al., *The Uses and Abuses of Weaponized Interdependence* (2021); Henry Farrell & Abraham Newman, *Weaponized Interdependence, International Security*, 44 *International Security* 42-79 (2019), <https://direct.mit.edu/isec/article/44/1/42/12237/Weaponized-Interdependence-How-Global-Economic>.

<sup>61</sup> Cf. Darren Lim and Victor Ferguson, footnote 11 above.

The fact that there is so far on the side of the EU and its Member States no credible and effective instrument or policy of deterrence and response to economic coercion contributes to the ability of other countries to deploy such means. They may be tempted to assume that there will be no reaction and hence that their action is relatively cost-free. For instance, the mere availability of legal means to apply restrictions on EU market access as a response to coercion could be a powerful deterrent but it is currently lacking.

In the public consultation, stakeholders largely confirmed that the existing gap plays a role in driving third countries' recourse to economic coercion. Some highlighted the impossibility to deal with the problem through standard diplomatic means. Additionally, across stakeholder groups, there is convergence that non-EU countries' use of coercion is often a means for attempting to avoid political, economic or other effects of actions by the EU and Member States, for preventing these from regulating, for imposing the commercial interests of their national companies abroad, as well as for limiting or influencing the conduct of other countries' economic operators elsewhere in the world.

### 3.3. How will the problem evolve?

The geo-economic tensions that the international order is currently experiencing are unlikely to dissipate in the coming years. On the contrary, there is no objective reason to assume that they will recede in the near future. There are a number of tensions and standoffs in international relations, which are likely to continue to drive coercive policies.

The ECFR policy brief "[Measured response: How to design a European instrument against economic coercion](#)" of June 2021<sup>62</sup> argues that Europe is at ever greater risk of economic coercion coming from several sources. From a number of countries, including China, Russia and Turkey, the rhetoric in the direction of other countries often takes on coercive tones (see examples reported in section 3.1. and by stakeholders in the public consultation). It has been noted that some actors such as China and Russia are using economic coercion as a foreign policy tool more frequently than they used to,<sup>63</sup> whilst other countries have continued to resort to economic coercion.<sup>64</sup> The US has a new administration that has changed the tone and atmosphere in international interactions and adopted a more cooperative approach towards partners in multilateral frameworks. There is however still legislation in place, such as Section 301 of the Trade Act (and the investigations into digital services taxation ongoing at the time of the public consultation) or several instances of legislation applying sanctions affecting EU operators. It is impossible to tell the approach of future US administrations to international cooperation.

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<sup>62</sup> The policy brief of June 2021 is based on the work of ECFR's Task Force for Strengthening Europe against Economic coercion that brings together high-level representatives from six Member State governments (the Czech Republic, France, Germany, the Netherlands, Spain, and Sweden) and private sectors (although the report does not necessarily represent their views). ECFR has been very active on the issue of economic coercion. An earlier report entitled "[Defending Europe's economic sovereignty: New ways to resist economic coercion](#)" of October 2020 presented eleven policy options for the EU to tackle economic coercion; a type of an anti-coercion instrument is among these, but also a reform of the Blocking Statute, creation of European export bank, building digital currency, creation of EU resilience office and EU resilience fund, etc. An earlier policy brief "[Redefining Europe's economic sovereignty](#)" also discusses an agenda to strengthen the economic sovereignty.

<sup>63</sup> Bryan R. Early and Menevis Cilizoglu, '[Economic Sanctions in Flux: Enduring Challenges, New Policies, and Defining the Future Research Agenda](#)', 21 *International Studies Perspectives* 438–477 (2020).

<sup>64</sup> Dawid, Walentek, '[Economic Peace Revisited, Coercion in a Liberal Order](#)', APSA Preprints 2020.

There is also a clear tendency to revert to disguised or silent economic coercion,<sup>65</sup> especially by countries whose domestic governance structures enable the respective leadership to transmit instructions to the private sector and state-owned enterprises, without recourse to formal legal acts. In some instances, they rely on the possibility of plausible deniability of their involvement. This trend poses additional challenges because of the more difficult attribution of the action to the government. It, simultaneously, highlights the necessity of holding such governments to account to safeguard the normative force of international law.

Stakeholders observe that instances of coercion have been multiplying in recent years and the EU and Member States have been regular targets of coercion. Stakeholders further report cases representing an imminent or medium- to long-term threat, highlighting the expectation that coercion would not subside on its own.<sup>66</sup> Business associations, in particular, but also other stakeholders, give a pessimistic prognosis that the rise of coercive measures will continue. Even the minority stakeholders, which do not appear convinced about a direct need for an EU policy intervention and consequently called for further analysis, yet recognise the existence of the problem, also in the foreseeable future, and that the EU may or should respond and preferably deter potential coercion from third countries.

Accordingly, it is considered unlikely that coercion would disappear on its own or even would recede to the more manageable level that tended to prevail in the past. On the contrary, it is expected that it continues unless addressed appropriately.

#### **4. WHY SHOULD THE EU ACT?**

##### **4.1. Legal basis**

A possible legal basis for the EU intervention is Article 207(2) TFEU.

Article 207(2) TFEU provides for the adoption of measures defining the framework for implementing the common commercial policy. Article 207(1) TFEU defines the scope of the common commercial policy, which refers to, *inter alia*, trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, export policy and measures to protect trade. The initiative is concerned with foreign countries' measures that take the form of trade or investment restrictions towards the EU economic operators. The initiative is also concerned with providing a response to foreign countries' measures primarily in the area of the common commercial policy.

##### **4.2. Article 207(2) TFEU is expected to be a sufficient legal basis for the purposes of a policy intervention in the situations of economic coercion, as described below. Subsidiarity: Necessity of EU action**

Article 5(3) TEU provides that the principle of subsidiarity applies in areas which do not fall within the exclusive competence of the EU. Article 3(1)(e) TFEU provides that the EU has exclusive competence in the area of common commercial policy. The possible legal basis, Article 207(2) TFEU, falls into the category of exclusive competences. Therefore, the

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<sup>65</sup> See, for instance, Darren Lim and Victor Ferguson, footnote 11 above. The ECFR policy brief "[Measured response: How to design a European instrument against economic coercion](#)" of June 2021 highlights the rise of informal coercion, in particular.

<sup>66</sup> See the results of stakeholders' replies to questions 6 and 8 in the public consultation [here](#), and a summary factual report [here](#).

question of subsidiarity does not arise insofar as the third countries' coercive measures and/or the EU response falls under the common commercial policy.

In any event, only an action at EU level would ensure a uniform EU solution to a problem of concern to the EU as a whole. Member States remain, of course, responsible and able to act in defence of their rights under international law; this includes their right to counteract international coercion, as long as they do so without taking measures for which the EU is exclusively competent. However, it is not possible for the Member States to put in place national legislation in order to cover coercion that is targeted against the EU and not against that Member State. Also, national legislation would not be capable of providing an effective solution in the situation of concern to the EU as a whole or across the Member States. EU action remains the sole option under which the EU can implement its obligation to define and conduct the common commercial policy.

#### **4.3. Subsidiarity: Added value of EU action**

The added value of an action at EU level lies in the achievement of benefits that cannot be achieved sufficiently, if at all, at Member State level. These benefits relate to deterrence and counteraction against coercion by third countries to defend and protect the EU's and Member States' autonomy in policy-making and against trade and investment restrictions used for coercion.

### **5. OBJECTIVES: WHAT IS TO BE ACHIEVED?**

#### **5.1. General objectives**

In a context of geopolitical instability, the EU aims to safeguard its open strategic autonomy, that is its ability to make its own choices by remaining open and connected to the world whilst protecting itself from economic coercion.

The general objectives of the initiative are the following:

- Contribute to preserving the legitimate policymaking space of the EU and Member States;
- Protect the international rights and interests of the EU and its Member States;
- Protect the economic interests of EU economic operators by preventing or limiting economic losses as a result of foreign countries' coercive actions.

#### **5.2. Specific objectives**

The analysis of the drivers of the economic coercion shows that it is primarily the choice of non-EU countries to seek to impose their own policy preferences and their enhanced ability to disrupt economic activities mediated by the interconnectedness of the world economy, tied with geopolitical instability, which drives coercion. At the same time, there is insufficient deterrence exerted by the EU or Member States towards those non-EU countries. There are broader efforts by the EU in managing the geopolitical instability and increasing the EU's resilience.<sup>67</sup> The present initiative focuses specifically on the issue of economic coercion and the EU's possible response.

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<sup>67</sup> As noted earlier: Commission Communications on Trade Policy Review, the European economic and financial system: fostering openness, strength and resilience, the Industrial Strategy update, and also more generally the Commission's upcoming 2021 Strategic Foresight Report.

It has the following four specific objectives:

1) Deter coercion

The prime objective is to deter coercion so that it does not take place in the first place. The deterrence effect will arise from the mere existence of an EU framework to tackle coercion specifically, provided that it is effective, credible and can be deployed quickly.<sup>68</sup> Averting coercion, and thus averting harm and the need for counteraction, is the best-case scenario for this initiative. Nearly all stakeholders recognise and support this key objective.

2) Provide for de-escalation

Where coercion nevertheless takes place, the objective is to de-escalate the situation such that the coercion is withdrawn without the need for counteracting it directly. This implies that the initiative may involve the use of a first range of responses rather than leading directly to countermeasures. A majority of the stakeholders strongly supports this objective.

3) Induce the discontinuation of specific coercive measures

This implies using a range of responses that are capable of inducing the discontinuation of coercive measures.

4) Counteract specific coercive measures (and/or their effects)

As a last resort, where all other avenues are exhausted, the EU may decide to counteract the harm which the coercing country is causing.

The table below illustrates the intervention logic, notably the relation between the problem, its drivers, the objectives and the envisaged intervention and outcome.

Table 1 Intervention logic

|  |  |  |   |
|--|--|--|---|
| <p><b>Problem</b></p> <p>The pressure which foreign countries exercise towards the EU and/or its Member States through most often a trade or investment restriction with the objective of attaining a specific outcome falling within the legitimate policymaking space of the EU or a Member State.</p> | <p><b>General objectives</b></p> <p>Contribute to preserving the legitimate policymaking space of the EU and Member States;</p> <p>Protect the international rights and interests of the EU and Member States;</p> <p>Protect the economic interests of EU economic operators;</p> | <p><b>Envisaged intervention</b></p> <p>Creation of a framework to tackle coercion specifically;</p> | <p><b>Envisaged outcome or intended change</b></p> <p>Foreign countries do not resort to coercion in the first place;</p> <p>The foreign country ends its coercive measures quickly without EU countermeasures;</p> |
| <p><b>Drivers</b></p> <p>Foreign countries' desire to impose their own policy preferences</p>  | <p><b>Specific objectives</b></p> <p>Deter coercion in a wider sense;</p>  | <p>Range of responses without countermeasures to choose from in individual cases;</p>                | <p>The foreign country ends its coercive measures quickly as a result of the EU countermeasures;</p>  |

<sup>68</sup> Thomas C. Schelling, *Arms and Influence*, Yale University Press (1966).

|  |   |   |   |
|--|---|---|---|
| <p>to their benefit;</p> <p>Enhanced ability to disrupt economic activities in other countries through restrictions on trade, investment or financial flows;</p> <p>Interconnectedness of the world economy;</p> <p>Geopolitical instability with increased tensions over economic governance;</p> <p>Insufficient deterrence on the part of the EU.</p> | <p>De-escalate specific coercive measures</p> <p>Induce discontinuation of specific coercive measures;</p> <p>Counteract specific coercive measures (and/or their effects).</p> | <p>Range of countermeasures to choose from in individual cases;</p> | <p>Consequently, the interests of the EU and of the Member States are protected from coercion</p> |
|--|---|---|---|

## 6. WHAT ARE THE AVAILABLE POLICY OPTIONS?

In light of the objectives, the report considers the following types of policy options:

- Option 1: no policy change (baseline);
- Option 2: a new legal instrument based on several design parameters; and
- Option 3: a “resilience” office.

Options 1 and 3 have been considered but are discarded at an early stage, for the reasons explained below. The report retains for further consideration and thus focuses on option 2 as a suitable option and the various parameters for the design of a legal instrument.

### 6.1. Options discarded at an early stage – Option 1: No policy change (also the baseline from which other options are assessed) and Option 3: A “Resilience Office”

#### 6.1.1. No policy change (also the baseline from which other options are assessed) – discarded at an early stage

The no-policy option presents the currently available framework and relation to international law, and discusses whether possibilities for response to the problem exist. The option is discarded because it is found inadequate to address the problem. As a baseline, it reveals a gap in the current legislative framework and accordingly in the EU’s ability to protect its interests and those of Member States from coercion. The following framework as belonging to the baseline is identified:

#### ➤ International law

As pointed out in section 3.1, when facing coercion from third countries, the EU and the Member States have the right to respond to this coercion with the means which **international law** allows. These means include the right under customary international law, as codified in Articles 49 et seq. of the [International Law Commission’s Articles on](#)



[State Responsibility](#),<sup>69</sup> to take countermeasures if the coercive act breaches international law. If this is not the case, the EU (or its Member States) is always entitled to resort to a retorsion,<sup>70</sup> i.e. an act *per se* not inconsistent with international law. However, the principle of conferred powers means that the EU and its institutions can deploy the means existing under international law only when empowered to do so. There is currently no such framework specific to an anti-coercion response.

### ➤ **Dispute settlement**

The possibility to file a lawsuit under international law before **an international tribunal** does not exist by default because such avenue of adjudication must first be created through agreement between the EU and the third country concerned. The **WTO dispute settlement system and the bilateral dispute settlement systems** of trade agreements concluded by the EU are available only for addressing breaches and, in the WTO's case, other cases of nullification or impairment of benefits under the respective agreement.<sup>71</sup> Coercion in breach of customary international law does not feature among the possible claims that can be submitted to these treaty-made dispute settlement systems.

There can be instances in which the third country's coercive measure is both coercive and represents a breach of substantial commitments under the WTO Agreement. For example, if a third country arbitrarily or selectively initiated an anti-dumping investigation against certain EU exports, for instance without there being any evidence of dumping, this would be an example of coercion and simultaneously a substantive breach of the WTO Anti-Dumping Agreement. Likewise, the coercive action could take the form of excessive and discriminatory border checks for sanitary or phytosanitary purposes, or, a selective import ban or higher-than-bound import duties on products from a particular Member State. All such cases can be challenged successfully in the WTO dispute settlement system, and certain countries (Canada, Australia) are bringing such cases at present.<sup>72</sup>

However, such WTO cases, where only the WTO breach forms the basis (and claim) for the legal assessment, do not tackle the question of coercion and its illegality under customary international law. WTO dispute settlement, therefore, is no substitute to the creation of an anti-coercion instrument whose purpose is the EU's defence not against the infringements of its rights under the WTO Agreement, but of its right, distinct under international law, that third countries do not coercively interfere in the EU's internal or external affairs. However, as already noted, the principle of conferred powers means that the EU and its institutions can deploy the means existing under international law only when empowered to do so, and currently there is no such framework.

### ➤ **Standard diplomatic means**

**Standard diplomatic means** are available and can be deployed but they are not sufficiently effective in all cases. In particular, they may not, and have not, effectively

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<sup>69</sup> Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly.

<sup>70</sup> "Retorsion" is the accepted term in international law scholarship to designate a state's response to another state's action when the response is not in departure from international obligations which the responding state has.

<sup>71</sup> Cf. Article XXIII:1 of the [GATT 1994](#), the Articles of other WTO agreements on trade in goods referring to Article XXIII:1 and the corresponding Articles of the GATS and TRIPS Agreement, the latter presently subject to a moratorium on complaints other than violation complaints.

<sup>72</sup> See footnotes 52-54.

deterred a third country from taking coercive measures or encouraged it to drop such measures.

➤ **Article 207 TFEU**

The European Parliament and the Council can act on the basis of **Article 207 TFEU** to adopt measures defining the framework for implementing the common commercial policy. Article 207 could allow for the adoption of measures on a case by case basis; however, this would be subject to the ordinary legislative procedure which takes considerable time. A case-by-case approach under Article 207 TFEU would not permit to address economic coercion in individual instances in a swift manner, providing a deterrent effect. Framework legislation, which would provide for swift implementing or delegated acts, does not exist.

➤ **Article 215 TFEU**

The Council can act pursuant to **Article 215 TFEU** to take restrictive measures against third countries and against natural and legal persons, based on a decision in the area of the common foreign and security policy under Article 29 TEU. Article 29 TEU, in turn, is the basis for upholding the values laid down in Article 21 TEU. However, Article 215 TFEU is not a dedicated instrument dealing specifically with the issue of economic coercion, setting out the EU's overall approach to it and the conditions under which the EU can counteract coercion. It follows that Article 215 TFEU is not an appropriate legal basis to achieve the objectives of this initiative.

➤ **Other existing instruments**

**The Blocking Statute** is the EU's principal tool to counteract the extra-territorial application of laws, regulations, and other legislative instruments of non-EU countries that purport to regulate activities of natural and legal persons under the jurisdiction of the Member States.<sup>73</sup> It applies exclusively to the legal acts listed in its annex (currently only to measures of the US concerning Cuba and Iran although it can be adjusted by delegated act). Whenever extra-territorial sanctions are applied with the intention to coerce the EU's or Member States' public authorities, there is an overlap with problems identified by the current initiative. Stakeholders systematically referred to this overlap. It follows that consistency and coherence between the two instruments must be ensured. However, the Blocking Statute is not an option addressing this initiative's objectives. It does not have a deterrent effect as regards coercion.

The baseline scenario could consider solely the Blocking Statute as it stands today. Amendments of the Blocking Statute are under preparation (inception impact assessment published in August 2021, public consultation open until 4 November 2021) in parallel to the present initiative, so as to render it more efficient in deterring extra-territorial sanctions and in protecting EU operators from them. A possible legislative proposal for the amendment the Blocking Statute is expected for quarter 2 of 2022, thus falling outwith the timeframe for the present impact assessment.

Some stakeholders (mainly public authorities) referred to **several existing instruments**. Such instruments would be the trade defence instruments (anti-subsidy measures and

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<sup>73</sup> As a matter of principle, the EU considers the extra-territorial application of sanctions contrary to international law. In line with this principle, EU's own sanctions apply only where the EU has jurisdiction (i.e. impact actors when active in the EU), even though these sanctions inherently aim to affect policies or activities in non-EU countries.

safeguards, in particular), the Foreign Direct Investment screening regulation, the Enforcement Regulation, the Foreign Subsidy Instrument, the International Procurement Instrument (the latter two are currently in the legislative process and thus are not in force and deployable yet). These stakeholders argued that in the presence of these instruments, the creation of a new legal instrument is not needed or justified. However, none of these instruments are either designed or able to address specifically the issue of economic coercion because they pursue different objectives and apply to different situations. The legal conditions for their application are unconnected to coercion by third countries, as defined in this document. Consequently, their use with the specific objective of countering acts of coercion would be legally impossible as a matter of EU law, and such use could also be questionable under international law, given the triggers for these instruments are not aligned with the relevant conditions under international law for responding to coercion. As a result, these instruments are not suitable for or capable of addressing economic coercion and they do not fill the gap. It follows that they do not form part of the baseline. Annex 5 contains an overview of these instruments, where potential overlap is claimed, and illustrates that they are unconnected to the problem of coercion.

### ➤ **National legislation**

Specific **national legislation** to address economic coercion towards individual Member States could not be identified. Member States can, like many third countries, adopt retorsions or reprisals (countermeasures) against other states, based on international law and in line with internal constitutional requirements, which may or may not require the passage of formal legislation. In three ways, however, this avenue is not suitable for tackling effectively the problem of coercion targeting the EU. First, where coercion is directed against the EU and the EU has, under international law, the right to respond, that right cannot automatically be exercised by individual Member States, as a matter of international law. Second, a uniform reaction of the EU would require action at EU level. Third, the exclusive competence of the EU in the area of notably the common commercial policy but also in other areas precludes action at Member State level if the response measures fall into this area.

### ➤ **International initiatives**

**International initiatives** in this area have been discussed (see section 3.1) and may offer scope for cooperation in the future. They are an important means in principle and stakeholders attached great value to those.<sup>74</sup> However, such alliances and cooperation are no substitute for the EU's ability to take action. Moreover, it is relevant to the EU's ability to take part in such cooperation to have an instrument available at EU level which permits the EU to respond. It needs to be recalled that, whilst the possibility for cooperation may develop further, specific interests may not always align and it is therefore important that the EU maintain the ability to act where cooperation is either not possible or remains too general to address some of the specific problems to be addressed by this initiative.<sup>75</sup>

The above demonstrates that the existing EU framework does not provide for instruments to deter and counter coercion in a prompt, coordinated and credible manner. As things

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<sup>74</sup> Stakeholders across the groups raise the question of international cooperation. They regard it not so much as a substitute to an EU policy intervention but as a complementary avenue and one that must be preserved and supported, and not neglected or harmed (in particular via an EU policy intervention). They suggest that the EU should make efforts to cooperate with partners that face the same problems.

<sup>75</sup> Stakeholders similarly acknowledge that reaching global solutions might be difficult in the current political environment.

stand, the current array of available instruments does not produce a strong and credible deterrence effect. Thus, there is no possibility for taking prompt, coordinated trade, investment or other policy measures or to address the evolving forms of coercion, where the need arises. There is no system to provide for de-escalation, nor to induce discontinuation, where coercion takes place. The baseline scenario is consequently inadequate to address the problem in a comprehensive and satisfactory manner. The baseline reveals a gap in the current legislative framework and accordingly in the EU's ability to protect its interests and those of Member States against coercion.

This conclusion reflects the majority view in the public consultation. The baseline scenario is an unsuitable option for most stakeholders across the groups, in particular in the long-term. They argue that it would allow the coercion to continue and damage EU businesses, including SMEs, the EU's autonomy in decision-making and the EU's credibility on the international scene.

### *6.1.2. Option 3: A "Resilience Office" – discarded at an early stage*

Option 3 proposes the creation of a dedicated entity either within the Commission or within the EU institutions (commonly referred to as a "resilience office") with specific functions in relation to the deterrence and counteraction of coercion, which would be complementary to option 2. Thus, it is not a self-standing solution to the issue of coercion, nor an alternative to the anti-coercion instrument. The option has been considered due to the considerable support among some stakeholders. However, it is not retained, at this stage and is discarded as not feasible in terms of being created in this specific instrument, for the reasons set out below.

Some business associations, some Member States, and ECFR, put forward the idea of a "resilience office" (also referred to as "watch tower", "coordination unit/cell") either within the Commission or within the EU institutions (some suggestions were about a liaison resilience committee linked to the Council as the institution to trigger the use of instrument, and so institutionally outside the Commission). The idea originates in the ECFR policy brief "[Defending Europe's economic sovereignty: New ways to resist economic coercion](#)" of October 2020.<sup>76</sup> That policy brief, and references to it in the [policy brief of June 2021](#) on the future anti-coercion instrument, suggest creating a dedicated entity, which should essentially oversee relevant policies and provide better support to EU businesses. Suggested specific functions include: monitoring, information collection and documenting, cost assessment and analysis of economic coercion, investigations, identifying deterrence and countermeasures and assessing their potential impact (across available instruments), providing a corresponding "coercion margin", contact with third countries, keeping international partners informed about developments, liaison with Member States and access point for businesses, and various assistance and support to EU businesses. There are suggestions about functions also as regards EU sanctions and other foreign economic tools. A Special Representative for Economic Coercion (similar to the Chief Trade Enforcement Officer (CTEO)) could head the office, comprising experts with various backgrounds, and using state-of-the-art analysis tools. The idea resonated with businesses and Member States and came through the public consultation contributions, although no question addressed it.

The idea has merits in pooling and coordinating relevant knowledge, expertise, action and assistance on the subject. A dedicated office may well enhance the deterrence function of

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<sup>76</sup> That policy brief presented eleven policy options for the EU to tackle economic coercion; a type of an anti-coercion instrument and EU Resilience office are amongst them.

the instrument. However, this legislative instrument would be the appropriate vehicle to create a resilience office, which, if it were to be created, is rather a question of internal organisation for the Commission or between the EU institutions. At this stage, it can be noted that if an anti-coercion instrument is created, it will fall under the operational responsibility of the Commission's CTEO. Existing structures are already capable of ensuring effective coordination of policies within the Commission and between the Commission and the EEAS, with the appropriate involvement of the other EU institutions and Member States in line with their respective responsibilities.

## 6.2. Options retained for further analysis – Option 2: A legal instrument and design parameters

Option 2 considers developing a new legal instrument to address the problem of economic coercion and fill in the identified gap. This would be a framework regulation of the European Parliament and the Council allowing EU action in situations of economic coercion under certain conditions.

The majority view of stakeholders is supportive of a new instrument. During the public consultation, in response to the specific question on whether an EU policy instrument is needed to tackle coercion, no respondent expressed disagreement; respondents agreed or strongly agreed, or were neutral. Those who were not immediately convinced about the need for a new legal instrument, welcome the approach to have an impact assessment that can examine if a new instrument is justified. Obviously, when it comes to the design of the instrument, stakeholders have various views and some concerns (as discussed below). Moreover, stakeholders defined the need for an instrument as pressing (the majority, among which mostly business associations but also other groups) or as medium- to long-term, or a possible need. The urgent/pressing need was justified *inter alia* by preserving the EU's credibility on the international stage and providing a long-term vision, the growing tendency towards the weaponisation of trade and investment measures, geopolitical tensions and tendencies towards protectionism.

In light of the four specific objectives for this initiative, presented earlier, the following components are considered to be **the main design parameters** for drawing up the instrument: **(A) Triggers for action; (B) Threshold for action; (C) Possible action; (D) Selection conditions for countermeasures; (E) Decision-making; (F) Activating the instrument; (G) Stakeholders involvement.**

This section presents the design parameters and suitable options for them, starting with an overview in Table 2. Section 8 presents the most suitable configurations of parameters and options and examines how they compare, while section 9 identifies the preferred option.

*Table 2 Overview of design parameters and options under consideration*

| Design parameter                | Options under consideration                               |  |
|---------------------------------|---|--|
| <b>(A) Triggers for action</b>  | (A1)<br>Explicit, disguised, silent coercion and boycotts | (A2)<br>(A1) without extra-territorial sanctions |
| <b>(B) Threshold for action</b> | (B1)<br>Quantitative threshold                            | (B2)<br>Qualitative threshold                    |

|                                      |   |   |   |
|--------------------------------------|---|---|---|
| <b>(C) Possible action</b>           | (C1)<br>First resort actions and Countermeasures restricting trade in goods or services, commercial aspects of intellectual property rights, access to EU public procurement market, as well as foreign direct investment | (C2)<br>(C1) and Additional countermeasures | (C3)<br>(C2) and Financial compensation |
| <b>(D) Selection conditions</b>      | Effectiveness, minimal damage, minimal administrative burden, general EU interest   |   |   |
| <b>(E) Decision-making</b>           | Treaties' framework: Delegated/Implementing acts  |   |   |
| <b>(F) Activating the instrument</b> | (F1)<br>Complaint mechanism   | (F2)<br>Ex officio                          |   |
| <b>(G) Stakeholders involvement</b>  | (G1)<br>Comprehensive approach  | (G2)<br>Case-by-case approach               |   |

### Design parameter (A) Triggers for action

The triggers for action are the specific situations of coercion where it would be appropriate for the EU to be able to respond to under the instrument. Determining which situations would trigger a response precisely means addressing the existing gap in the legislative framework. As clarified above, there is currently no legal instrument which enables the EU to act in situations of coercion as identified in this report, in order to address and respond to coercion precisely and directly. Given the multitude of sources of coercion, as discussed in the problem definition, the scope of the trigger ought to be country-neutral in all scenarios and in any option.

The parameter is highly relevant for the deterrence value of the instrument because it defines the scope of application of the instrument; the broader the scope, the broader the deterrence effect, but eventually it defines the situations where the EU may adopt countermeasures, if the need arises. The mere identification in a legal act of situations that are undesirable and would attract countermeasures where necessary, should have the effect of discouraging third countries from creating such situations in the first place because third countries are expected to want to avoid countermeasures or other negative effects.

The following alternative options are considered as suitable in the respect of establishing of an appropriate scope of application:

**(A1)** The option stands for a comprehensive scope capturing any situation where there is an intention or effect to coerce the EU or Member States into a particular policy choice, by applying any trade or investment restrictions. This can be achieved by introducing these conditions for application in the legal instrument. The fulfilment of these conditions would be assessed in any individual case, and where they are found to be met, the third country's

measure in question would fall within the scope of the instrument and so may trigger an EU response.

Therefore, the scope extends to all identified types and manifestations of economic coercion in section 3.1, notably **explicit, disguised, silent and boycotts**, as well as any other possible action satisfying the conditions. Accordingly, the option comprises instances of coercion towards the EU or Member States also through **extra-territorial sanctions** (but it does not include instances of extra-territorial sanctions merely used to pressure EU private economic operators which are exclusively addressed by the Blocking Statute). Instances of coercion through extra-territorial sanctions may fall within to the scope where their objective or effect would be to force the EU or its Member States to align their policies towards a target country with the coercing country's policy as regards that target country, by restricting trade or investment. As referred to in the baseline, the Blocking Statute (currently also being amended) is the dedicated instrument to address extra-territorial sanctions and this is irrespective of their perceived intent towards EU or Member States policies. Therefore, from the perspective of coherence, this option implies a co-existence of two instruments, where both instruments can be available to respond to the same situation, if such arises, but to address different issues (extra-territoriality and coercion). As a matter of co-existence, it could be considered that the Blocking Statute is the leading instrument in relation to extra-territorial sanctions, while the legal instrument for the present initiative can complement the EU's ability to act under the Blocking Statute in these specific cases of coercion through extra-territorial sanctions.<sup>77</sup> The specific choice of instrument in any given case, can be left for the implementation stage and should be a decision for the Commission to take in specific circumstances.

If the specific choice of an instrument is left for the implementation stage, the situation would not be novel. It should be a policy choice between two available avenues guided by the specific circumstances in individual cases taking into account that the legal instrument of the current initiative would be the only one available to address coercion and no other instrument is able to do so. In any event, coherence is achievable.

Finally, the scope does not extend to situations of coercion purely against private actors where there is no intention to coerce the EU or Member States (see section 3.1 on what falls outside the problem), but it includes situations of coercion where the third country uses private actors as vectors of coercion towards the EU or Member States.

**(A2)** This is option (A1) but explicitly **excluding extra-territorial sanctions** on the basis that they have specific distinctive features and are covered by the Blocking Statute and the upcoming amendment thereof.<sup>78</sup> From the perspective of coherence, the exclusion will ensure a delineation between the two instruments with one instrument addressing all coercive measures except extra-territorial sanctions and the other addressing only extra-territorial sanctions. An exclusion would restrict the scope of application as described under option (A1).

## **Design parameter (B) Threshold for action**

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<sup>77</sup> The majority view of stakeholders (mostly businesses but some public authorities, too) is that the two instruments must be complementary such that they both address extra-territorial sanctions in a complementary and adequate manner. There are also extreme views that one instrument must take over the other in respect of extra-territorial sanctions, and a spectrum of other suggestions in between (see the results of the public consultation [here](#), and a summary factual report [here](#)).

<sup>78</sup> Commission proposal planned for quarter 2 of 2022.

This means that the EU *may* consider responding to coercion, where the coercive action, which otherwise falls within the conditions of application of the instrument (see discussion under design parameter (A)), reaches a specific level of intensity as opposed to responding to any incident of coercion. It would complement the trigger (design parameter (A)) as it would introduce further layers in the assessment whether an individual coercive measure necessitates an action under the instrument. Reaching a certain threshold however should not result in an obligation to act. It is rather that action would not be appropriate below certain threshold. The parameter is relevant for all the specific objectives and can be particularly effective in deterring coercion. The following options are considered:

**(B1) quantitative** – monetary or economic thresholds, i.e. action considered if the harm (potential or inflicted) reaches a certain minimum monetary or economic threshold;

**(B2) qualitative** – action considered on a case-by-case basis e.g. in light of the degree of encroachment upon areas of the EU’ or Member States’ sovereignty, and the intensity, severity, frequency, duration, breadth and magnitude of the third country’s measures as relevant in individual cases. The impact is not necessarily defined in monetary or economic terms. This type of threshold can also capture a situation of patterns and series of actions and provide for flexibility in the application. This would render the instrument more effective and its use more efficient.

Stakeholders in the public consultation are divided on the question of a threshold in terms of its effectiveness and usefulness. The majority were neutral, while those in favour are slightly fewer than those against a threshold. On a related question on whether the EU should respond to each case of coercion, stakeholders were also divided with negative replies prevailing over affirmative and over neutral ones. Those who see the need for a threshold tend to prefer a flexible, case-by-case approach, based on qualitative option. Specific reasons against a threshold include the consideration that any limitation of the scope of application would invite more coercion and be counterproductive for its usefulness, timeliness and or/effectiveness. Some argued that not tolerating coercion of any size as a matter of principle.

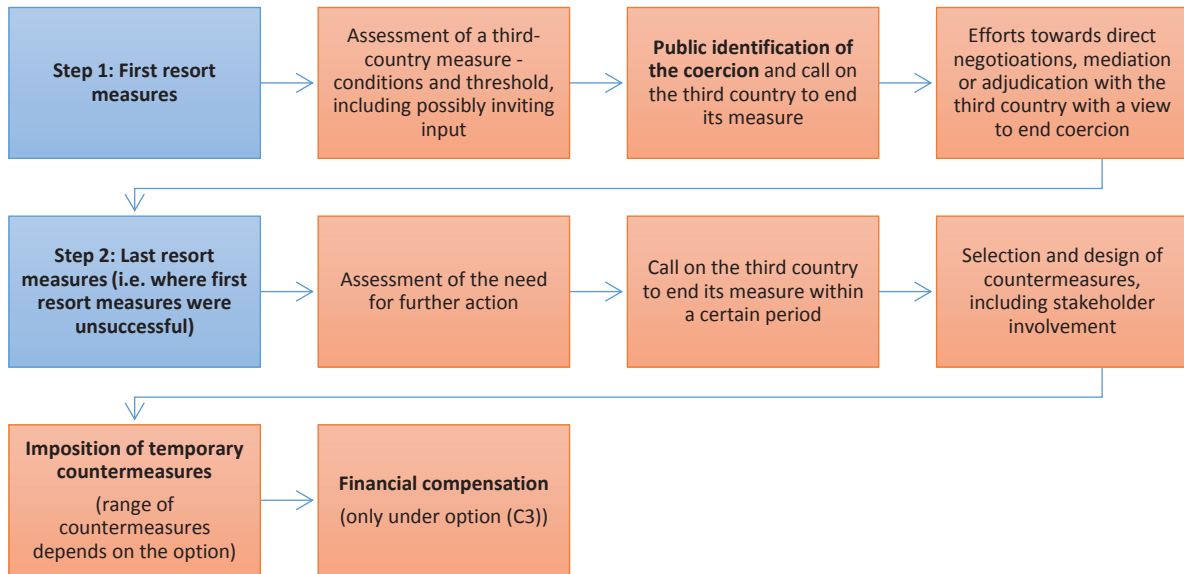
### **Design parameter (C) Possible action**

This is a fundamental design parameter as it concerns the specific action which the EU may take under the instrument and it is of fundamental importance for the effectiveness of the instrument. It is suggested to have a two-step, gradual process. The first step is the same in all options for this design parameter, and it comprises initial measures whose objective and potential is to end the coercion in a manner not involving recourse to countermeasures, without imposing costs on the coercing country or other actors. That step has the potential to be effective also as regards the objective of de-escalation. If that fails in halting the coercion, the second step becomes available (but not mandatory). This entails an array of potential countermeasures and/or financial compensation (to choose from in the concrete use of the instrument), whose objective is to counteract and whose potential is to induce discontinuation of the coercion, i.e. it is interventionist and imposes costs. The launching of each step would be a matter of assessing if the relevant substantive conditions are met and conducting respective procedural steps. Any assessment would be supported by evidence.

The figure below illustrates the sequence of the EU’s main actions in the two-step process, relevant for all options for this design parameter, bringing together the other relevant design parameters.

*Figure 1 Sequence of EU’s main actions under the two-step process*





In general, the mere availability of responses towards the third country's measure, and the range of these responses, has an important direct deterrence effect in the first place because it is reasonable to expect that the mere availability of appropriate response has the potential to discourage a third country from contemplating coercion towards the EU or Member States in the first place as the third country is expected not to want to face such countermeasures or other negative effects. The parameter is also crucial in achieving the other objectives of de-escalation, inducing discontinuation and counteracting. Thus, this parameter is of fundamental importance for the effectiveness of the instrument, as also recognised by stakeholders.

Stakeholders across the groups systematically alluded to a gradation in the process of taking action under the instrument. The two-step process corresponds to this. Stakeholders insisted that countermeasures sanctioning the third country must be a last resort. This stems from considerations of the potential costs and negative consequences of countermeasures but also from the idea to curb escalation first through diplomacy and negotiation. Dissenting views included the contention the efforts to reach a diplomatic solution may cause delays in effectively using the instrument, and the use of countermeasures should not be delayed on this account.

Accordingly, in light of their potential to bring about effectiveness, the following alternative options are considered as suitable:

**(C1) A two-step process:** initial measures of first resort involving the identification of coercion, and if they fail, measures of last resort: countermeasures.

**Step 1: Measures of first resort** do not involve countermeasures and include the following: a formal determination as regards a coercive measure on the basis of a set of conditions (design parameter (A)), space for a dialogue and negotiations, mediation, undertaking steps towards the joint submission of the dispute to third party adjudication, i.e. an independent international tribunal (while the coercive measures are suspended until at least the end of the adjudicative process). Their objective is to obtain the discontinuation of the coercion in the short term without imposing costs through EU countermeasures (costs to the coercing country and potential costs to the EU economy) and to de-escalate tensions.

Some may be appropriate in situations of a threat as well, thus in preventing coercion. This stage does not require any step taken by private actors, it can be exclusively carried out by the EU institutions.

The formal determination as regards the coercive measure does not currently exist as a legal possibility because no available legal instrument sets out which conditions should be assessed for such a determination. Thus, a dedicated instrument would deliver this new possibility. Otherwise, the rest of the measures of first resort can be pursued even in the absence of a dedicated instrument (i.e. diplomatic means and resort to adjudication in any event). Nevertheless, it is considered that a dedicated instrument would formalise and structure such possibilities in order to achieve more effectively both the deterrence objective and the objective of inducing discontinuation without the use of countermeasures. Thus, a dedicated instrument would bring about a benefit.

➤ Conditions and criteria for launching the first step

As regards the substantive conditions and criteria, there would be an assessment of whether a concrete third-country measure in individual cases falls within the scope of the instrument (design parameter (A)) and whether a certain threshold is reached (design parameter (B)). Procedurally, the assessment may involve gathering of additional information from stakeholders (design parameter (G)). A public affirmative determination at EU level may follow such an assessment (i.e. the first measure under the instrument). The EU may call on the third country to end its measures at this point. Depending on the cooperation of the third country in question, an affirmative determination may lead to subsequent measures, such as direct negotiations, mediation or international adjudication, with a view of ending the coercion. The choice of such subsequent measures would depend on the circumstance of any individual case and may differ from one case to another.

Any action under this step should be justified and supported by evidence that the relevant conditions and criteria are met. The evidence base would include elements such as evidence that an individual measure by a third country meets the conditions of application of the instrument (design parameter (A)), and that a certain threshold that justifies action is reached (design parameter (B)), evidence of efforts to enter into consultations with the third country in question and of consultation of stakeholders (design parameter (G)) where necessary.

**Step 2: Measures of last resort (i.e. countermeasures)** would include measures under the common commercial policy that temporarily restrict trade or investment. More specifically, the scope potentially extends to the following:

- new or increased customs duties and quantitative restrictions on export and import of goods;
- additional charges on imported or exported goods;
- restrictions on the transit of goods;
- quantitative restrictions on imports or exports of goods through quotas, non-automatic import or export licences or through other measures;
- new or increased restrictions on trade in services;
- restrictions on investments, in particular new investments;
- restrictions on the protection of intellectual property rights or their commercial exploitation, in relation to right-holders who are nationals of a third country concerned;
- the exclusion from public procurement of suppliers of goods or services established in and operating from a third country concerned;

- a mandatory price penalty on tenders of suppliers of goods or services established in and operating from a third country concerned and/or on that part of the tender consisting of goods or services originating in a third country concerned;
- 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).<sup>79</sup>

A similar scope exists under the EU Trade Enforcement Regulation (most notably without investment and with some limitations regarding intellectual property rights, public procurement access and measures on trade in goods), and a further extension should be examined in its review due by February 2022.<sup>80</sup>

None of the above types of measures are novel. They are known from various common commercial or other instruments but they are deployable under specific objectives and purposes, distinct from anti-coercion. In other words, in the absence of a respective legal basis, none of the above measures is deployable to address coercion, even less so to deter coercion. Moreover, as mentioned above in the baseline discussion, their use with the specific objective of countering acts of coercion would not only be legally impossible as a matter of EU law, but such use could also be questionable under international law, given the triggers for these instruments are not aligned with the relevant conditions under international law for responding to coercion. In that sense, a dedicated legal instrument would deliver precisely the legal basis to permit the use of the above measures. A new legal instrument would introduce no overlap as no other instrument contains a comparable legal basis for action against coercion.

At the same time, the provision of the same or similar types of measures in other instruments with the objective to inducing a third country to comply (for instance, under the EU Trade Enforcement Regulation to induce compliance with a WTO ruling), as well the acquired experience of their application, supports the proposition that such measures are a capable tool to encourage a third country to end its coercion as it would be the objective in the present case.

Stakeholders across the groups broadly support this scope in terms of effectiveness and appropriateness, with those in disagreement being in the minority (also across the groups). Moreover, stakeholders felt that this scope is the minimum that the EU should envisage. At the same time, identified sensitivities relate mainly to intellectual property rights, but also to trade in services and in goods, and public procurement, depending on the stakeholder (see section 7).

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<sup>79</sup> The ECFR policy brief of June 2021 considers that export controls could be “one of the most strategic and effective ways for the EU to protect itself from economic coercion”. The rationale for this measure is that it can be very targeted at specific product or service of importance to the coercing country and it comes at less costs for the EU. The use of export controls is picked up by some other stakeholders.

<sup>80</sup> The [current EU Trade Enforcement Regulation](#), as amended in February 2021, provides for the following possible commercial policy measures: customs duties or any additional charge on imports or exports of goods; quantitative restrictions on imports or exports of goods, whether made effective through quotas, import or export licences or other measures; restrictions on trade in services; restrictions on the protection of intellectual property or their commercial exploitation, where rights are granted by a EU institution or agency and valid throughout the EU; specific narrow restrictions on goods, services or suppliers in the area of public procurement. Pursuant to Article 10, the Commission is due to undertake a review aimed at envisaging additional commercial policy measures in the field of trade-related aspects of intellectual property rights, by February 2022.

In the use of the instrument, this stage would involve consultations with relevant stakeholders on the economic interests potentially affected by any countermeasures considered as well as by the coercive measure. Depending on the countermeasure in each case, public authorities may need to take action in applying the measure (e.g. levying and collecting customs duties; applying the access restriction to public procurement markets).

➤ Conditions and criteria for resorting to countermeasures

The second step of the gradual process, i.e. the imposition of countermeasures, would follow the completion of the first step only where efforts have not led to discontinuation of the coercion and the coercion is still ongoing. In that regard, the substantive conditions and criteria for proceeding with the second step would be that the first step was unsuccessful in ending the coercion and that it remains necessary for the EU and Member States to protect their interests and rights from the ongoing coercion. Before applying countermeasures, the EU would call on the third country in question one last time to end the coercion and find a solution.

Procedurally, the second step would also involve information gathering from stakeholders (design parameter (G)) particularly as regards their interests in relation to the design of countermeasures. The choice and design of countermeasures would depend on the circumstance of any individual case and may differ from one case to another.

Design parameter (D) discusses in detail the range of conditions for selection and design of countermeasures in individual cases.

Any action under this step would be supported by evidence. The evidence base would include the evidence that the measures of first resort were unsuccessful and protection from ongoing coercion remains necessary, consultation of stakeholders as regards their relevant interests, notifications of the third country in question before action is taken, and evidence of the likely impact of potential countermeasures in terms of effectiveness but also collateral damage, proportionality of response, EU's general interest (design parameter (D) conditions).

**(C2) Option (C1) with additional countermeasures**

The two-step approach could be complemented with additional possibilities for last resort responses (option (C1)). These potentially include:

- Withholding of EU funding to partner countries through financing managed by the EIB, EBRD or other institutions and other programmes managed by the EU;
- Restrictions on authorisations for banking, insurance and other activities (licence); financial transactions, financial services;
- Restriction of access to EU capital markets;
- Restrictions on registrations and authorisations under the REACH Regulation and the hazardous chemicals legislation or similar actions;
- Listing of companies that would then be subject to various restrictions mentioned above in this list of above (in particular state owned enterprises);
- Restriction of access to EU research programmes or exclusion from EU research programmes;
- Visa measures – this could, amongst other options, include suspending the issuing of multi-entry visas, suspending optional fee waivers etc.

In applying these and other restrictions (listed under C1) it would be necessary to analyse, on a case-by-case basis, the extent to which existing authorisations/permissions/grants should be withdrawn given these might impact an already established legal environment and whether the focus should be on future authorisations/permissions/grants.

The availability of such measures in other instruments supports that they have the potential to be effective. Thus, they have the potential to be effective in pursuing the objectives of this initiative.

Adding the above countermeasures to the second-step range of actions under option (C1) justifies considering the package as a separate option because of the specificities of the additional countermeasures. The additional countermeasures are not the classic type of common commercial policy measures as under option (C1). They relate typically to other areas but most of them can be construed as belonging to the common commercial policy for the purposes of this instrument. The rest can be construed as belonging to other areas of exclusive EU competence.

Stakeholders are generally positive about expanding the scope of possibilities for countermeasures. The main preference expressed is to have a choice of measures that are less costly and burdensome, in particular on EU businesses (normally tariff measures have costs for EU business which are consuming the products concerned) but that are also effective towards the coercing country (both deterrence and counteraction). Stakeholders put forwards measures such as: restrictions on mutual recognitions, licensing and certification, data flow restrictions or mandatory access to companies' sensitive data, restrictions on individual persons.

Similarly to option (C1), in the use of the instrument, this stage would also involve consultations with relevant stakeholders and possible action by public authorities in applying the concrete measure. As for option (C1), the same conditions and criteria as well as evidence base would be applicable for both the first and second step, respectively.

**(C3) Option (C2) with the addition of a financial compensation** – the two-step approach can be complemented with the possibility to compensate EU economic operators suffering losses either from the coercive measures of the foreign state or from the EU countermeasures. This would require the creation of a fund for use under the instrument and for compensating businesses, with criteria for paying compensation while ensuring a certain degree of flexibility. The need for flexibility results from the difficult predictability of possible level of financing necessary in terms of frequency of the acts of coercion or their impacts in individual cases. Private actors could request compensation and provide data for the losses suffered showing also the actions taken to mitigate losses. There would need to be a designated administrative structure to deal with the requests. The option corresponds directly to the objective of protecting economic operators, but it is also relevant for the deterrence effect of the instrument under the logic that if public budgets absorb the losses from coercion, it will not be (as) effective.

Stakeholders were split on this issue. Around half of the respondents in the public consultation (mainly businesses) supported the possibility, while the other half (including public authorities) were sceptical or did not take a position. Some suggested that tariff-based EU countermeasures could fund the specific compensating mechanism.

As for option (C1), the same conditions and criteria as well as evidence base would be applicable for both the first and second step, respectively. Additionally for the second step

under option (C3) the following would be necessary: assessment of the applicability of the financial compensation, in parallel to the possible use of countermeasures.

### **Design parameter (D) Selection conditions for countermeasures**

A range of conditions under the instrument could guide and frame the narrowing down of the possible available countermeasures in individual cases. The conditions could assist in calibrating the envisaged measures in any given case so as to manage the risks associated with the instrument (such as provoking escalation, harming international relations and increasing collateral costs). They relate to the following objectives for the initiative: deterrence, discontinuation, counteraction. At the same time, they would be a central part of the evidence base for the use of countermeasures.

In light of the specific objectives, the following cumulative conditions are identified:

**Commensurability** – this condition stems from the general principle of proportionality of international and EU law and in practice would mean that the response to a harm must not exceed the harm. A related question is about measuring the harm in order to ensure proportionality. It may be that harm caused by some coercive measures would be more challenging to measure, at least in theory, than in other cases (depending on the availability of data). It would also be the case that the sheer uncertainty caused by the coercive measures is a harm in and of itself.

Another aspect of commensurability is the duration of the measures. They should last no longer than what is necessary to produce the intended effect, and be repealed when no longer useful. Stakeholders broadly support having countermeasures in place until the coercion is discontinued. Differing views emerged suggesting countermeasures should be imposed for a limited period of time (e.g. suggestions for a short term of 3 to 6 months) and renewed if necessary, as leverage.

**Objective of discontinuation of the coercive measure** – the condition implements one of the specific objectives of the initiative. In practice, it means that the selection and design of any concrete measures in a given case must seek to achieve that objective. Nearly all respondents agreed with this objective.

**Seek to provide relief to affected EU economic operators**, to the extent possible – this condition is intrinsically linked to the specific objective of discontinuation but it implements the general objective of the initiative that is the protection of economic interests. In practice, the condition would mean that where there is a choice between otherwise equally effective available measures, those that have the potential to provide relief to EU actors should be selected.

**Smallest possible collateral damage** to EU economic operators – this is the cost that is associated with the countermeasures which must be kept to a minimum. In practice, it means selecting those measures, among various available options, that are less harmful for EU actors (industries and consumers). Possible compensation for such actors to encourage them to diversify away from relying on the country taking the coercive actions and can also reduce the collateral damage (option C3)).

**Smallest possible administrative burden** for implementation and application of measures by EU national authorities – this stems from the general principle of avoiding administrative burdens where possible and aiming at simplification.

**Action in light of the EU overall interest** stands for an assessment of relevant interests; i.e. those of economic operators, Member States and the EU as a whole, in order to determine whether the likely positive effects of a countermeasure would outweigh the likely negative effects it would or could<sup>81</sup> produce. The assessment could also cater for situations in which the interests of only certain Member States are directly concerned. The assessment can be conducted on the basis of information collected from stakeholders and Member States. Businesses and public authorities raise this question.

Stakeholders across the groups strongly support all of the above conditions. In contrast, a condition of parallelism such as that countermeasures should correspond in type and/or sector of the coercive measure was not supported overall (only some stakeholders). The report does not develop it as an option mainly because of its practical limitations (it is not always feasible or possible to respond in the same sector or with the same type of measures) but also because it is not suitable in terms of general effectiveness.

### **Design parameter (E) Decision-making**

The power to take actions in specific cases will need to be delegated to the Commission, either in the form of implementing or delegated acts under Articles 290 and 291 TFEU. The Commission exercises its implementing and delegated powers with the respective involvement of the European Parliament, Council and/or Member States as currently assigned by the TFEU and the secondary legislation.

Where empowered by the legislators in the basic act, the Commission may adopt an immediately applicable implementing or delegated act on duly justified grounds of urgency and consult subsequently. This option is available for introducing measures or for their modification and repeal.

This design parameter is crucial for the deterrence value of the instrument as well as for the objective to end coercion quickly because it relates to the efficiency of the decision-making procedure. The decision-making procedure can increase the deterrence and encourage discontinuation if it can be conducted relatively quickly (i.e. speed of action has a value) and the procedure is relatively straightforward (i.e. does not involve excessive risks of the process being blocked or delayed). At the same time, the decision-making process must ensure the appropriate political responsibility.<sup>82</sup>

In addition to the inherent efficiency of the decision-making process (due to the respective roles of the EU institutions and applicable steps), the Commission should execute each step expeditiously and without an unreasonable delay while remaining flexible to accommodate the political sensitivities towards the aim of ending coercion. This would increase the efficiency of the process.

### **Design parameter (F) Activating the instrument**

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<sup>81</sup> This is a question not only of estimating factual probability, but also of evaluating normative relevance: where for example the possible reactions of the third country in question are at issue (e.g. litigation or retaliation – in the latter respect see below in section 7 on the Impact of the policy options), it would have to be evaluated to what extent these are, apart from their likelihood, legitimated by international law and, if not, whether and how the EU should factor these in.

<sup>82</sup> Argued by some public authorities and businesses and in a detailed manner by the [ECFR policy brief of June 2021](#).

Some public authorities and businesses raised the question about the availability of a formal complaint mechanism under the instrument (F1). Such mechanism could mean that stakeholders could submit a formal substantiated request for action under the instrument. Accordingly, the Commission would assess the request and on that basis decide whether to activate the instrument. A parallel or an alternative approach is *ex officio* activation (F2). There is stakeholder support for that option as well. Neither option should preclude stakeholders from coming forward with data. These possibilities would contribute to the effectiveness of the instrument, by ensuring that all instances of coercion are flagged and the instrument effectively deployed to bring about deterrence.

### **Design parameter (G) Stakeholder involvement**

Stakeholder involvement in the process of decision-making under the instrument is a fundamental design point in general and in relation to the specific objectives of deterrence, discontinuation and counteraction. Stakeholder involvement facilitates and promotes the consideration of relevant economic interests. To that end, relevant stakeholders should have a meaningful opportunity to express their views when their interests are affected. There would be two groups of stakeholders in each case, those affected by the foreign country's measure, and those potentially affected by the EU's planned response under the instrument. There could be overlaps between the two groups.

Respondents in the open public consultation are close to unanimous in requesting meaningful involvement where the instrument is used. The difference in views concerns only the form of this involvement. Typically, businesses are interested in a greater involvement, longer periods of consultation (ranging from seven days to three months), opportunities for private and public hearings and receiving precise requests for input. For other groups of stakeholders the minimum period is five days, ten days or 10-20 days.

Accordingly, two options are identified, reflecting also stakeholder's views. **(G1) a more prescriptive approach**, whereby the instrument would prescribe the involvement in detail, for example, with a minimum period for consultations, and a mandatory process of hearings. **(G2) a case-by-case approach**, whereby there will be a degree of flexibility in how the involvement can happen in individual cases, depending on the nature of potential action. The benefit of this flexibility was also recognised by stakeholders.

## **7. IMPACT OF THE POLICY OPTIONS**

This section assesses the impact of a new legal instrument and of the policy options as regards its main design parameters, against the baseline scenario.

### **7.1. General remarks**

The instrument under assessment would be a regulation of the European Parliament and the Council establishing a framework for possible future EU action under specific circumstances and conditions. The EU's action takes place via subsequent secondary legal acts, if and when the instrument is used. Furthermore, the main purpose of the instrument is not its use, but its non-use (because the mere availability of the instrument aims to deter coercion). The best-case scenario is that there is no need for using the instrument.

Where the instrument is used, the envisaged possibilities for the EU's action are numerous in any of the options for the design parameter (C) (possible action). The choice of a concrete action in a given case is a function of a variety of circumstances, such as: the identity of the coercing country, the international relations with this country, the coercive



measure and the intention of the coercion, the economic and political consequences and effects of the coercion, which concrete EU measures are available and recommendable towards this particular country, which concrete measures are effective in pursuing the objective of discontinuation of the coercion from that particular country, possible future developments.

The frequency of use is yet another variable which essentially depends on choices made by a third country about resorting to coercion (see section 3.2 on drivers), and can be influenced by a successful deterrent. This report assumes that use would be irregular and low, but with some caveats and limitations. Initially, the use could theoretically be higher or lower compared to later years. This would be due to the geo-economic environment, the expectations of stakeholders and their willingness to request the use of the instrument in individual cases. In the medium- to long-term the use can be grossly estimated as approximately two-three cases per year, of which fewer than one case per year would result in action in the form of countermeasures. The assumption is based on the observed frequency of incidents of coercion in the past, the likely evolution of the problem (section 3.3), the likely successful deterrence effect of the instrument, the likely effectiveness of the measures of first resort, and stakeholders' views.<sup>83</sup> An important limitation of the assumption is that it is impossible to predict third countries' choices.

Any potential impact will also depend on the duration of the EU's action and whether it is one-off or continuous in individual cases. The overall duration of countermeasures would vary from a case to another because it would depend on the rapidity in producing the desired effects (bringing an end to the coercion).<sup>84</sup> Some measures would produce their intended effects rapidly because the third country in question reacts promptly. In another case, the desired effect might emerge more slowly.

The above considerations illustrate that it is not feasible to estimate with sufficient precision in advance, or in the abstract, the potential impact arising from the use of the instrument, neither it is useful as it could even be misleading. Generally, stakeholders viewed the impact assessment as a useful exercise but they also pointed out that the impact depends on the concrete countermeasures in any given case.

Consequently, the assessment focuses on the likely impact of the creation and existence of the instrument and it is by necessity qualitative. Additionally, the assessment also covers the likely impact arising from the potential use of the instrument.

## **7.2. Economic impact**

### *7.2.1. Non-EU countries that use or contemplate coercion towards the EU or Member States*

The legal instrument aims to change the conduct of third countries that use or contemplate using coercion towards the EU or Member States. The desired change is that third countries refrain from using coercion in the first place, or that they discontinue their coercion

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<sup>83</sup> Stakeholders across the groups advocate and recognise that this instrument should not be for a regular use.

<sup>84</sup> Stakeholders broadly support having countermeasures in place until the coercion is discontinued. As pointed out by a business association, under public international law there is no time limit for the duration of countermeasures, only specific conditions in which countermeasures should be lifted ([Article 52 of the International Law Commission's Articles on State Responsibility](#)). The differing views are that countermeasures should be imposed for a limited period of time (e.g. suggestions for a short term of 3 to 6 months) and renewed if necessary, as leverage.

quickly. In that sense, these third countries are addressees of the instrument. The EU and Member States are the main beneficiaries since the instrument is meant to protect the ability of the EU and its Member States to take measures in its own interest.

There are no direct, indirect or enforcement costs for the third countries arising from the creation and the existence of the instrument. If by refraining from coercion (as a result of the deterrence effect), the third country incurs losses by foregoing the political or commercial benefits which it would expect from its coercion, then this cannot be considered a relevant cost. Refraining from interfering in the jurisdiction of the EU or its Member States is not a cost to a legitimate interest which the EU must take into account. In fact, third countries refraining from coercion is exactly a desired benefit for the EU, producing gains or savings, not losses. Also, this would translate into a benefit in terms of the rejection of international coercion as a policy.

Costs and other negative effects may arise from the use of the instrument and they will be a function of the type and duration of the countermeasure (**design parameter (C) possible action**) in individual cases, and frequency of use in general. The measures of first resort (i.e. the first step for each option) could involve direct and indirect costs associated with any negotiation or agreed litigation, should such avenues be followed; or reputational costs for the third country when the third country's action is publicly qualified as coercive. Diplomatic efforts to resolve any crisis are not expected to involve any direct costs. In any event, such costs would be the same as for the baseline where diplomatic means are an available option. The measures of last resort in **options (C1) and (C2)** are diverse and would be deployed depending on what is most effective and feasible in any particular case. The economic impact would be targeted and strictly case- and country-specific, some measures may not be available for certain countries or might not be considered effective, or not effective at a particular moment. Hence, the impact cannot be estimated in the abstract.

As regards **design parameter (A) triggers for action**, namely the coverage of situations in which the EU may take action, this is likely to influence the frequency of use and thus to increase the instances where an impact will arise. Thus, only on basis of coverage, **option (A1)** covering extra-territorial sanctions implies in principle more frequent use than **option (A2)** that does not cover them. Since the Blocking Statute would remain the primary instrument to counter extra-territorial sanctions, the use of the instrument is likely to be higher only to a limited degree (the instances when the instrument is applied in addition to the Blocking Statute) under option (A1). However, this is relative and qualitative and cannot be estimated quantitatively with any precision. The use of the instrument will primarily depend on the choice of a third country whether to resort to coercion, and second on the effectiveness of the initial, first resort measures in individual cases. It is recalled that only if the first resort measures (with relatively fewer costs) fail, that the EU will proceed with countermeasures (relatively more costs). The same reasoning applies as regards **design parameter (B) threshold for action**. A higher threshold (either quantitative or qualitative) will decrease the instances of potential use in relative terms.

More importantly, the overall design of the instrument entails a restraint in the first place and counteraction only if an engagement with the coercion country does not produce the necessary effects. Also relevant is that the instrument is activated exclusively in response to a third country's coercion and it is never the EU that creates the situation.

Furthermore, those third countries may theoretically decide to respond to the action which the EU is taking under this initiative by retaliating through further measures taken against

the EU.<sup>85</sup> This **risk of escalation through retaliation** should not be taken for granted, and needs to be placed in context. A detailed discussion follows in the box.

- First, the other country in question would in no way be entitled to respond in this manner, except in the form of a retorsion. Countermeasures (reprisals) would not be allowed in response to a permitted EU response action (whether it is a reprisal or retorsion).
- Second, it also seems wrong to expect a further retaliatory response in all cases because the EU's anti-coercion reaction would already have the effect of putting the coercing third country on notice that the EU is not tolerating the coercion. Further escalation is thus unlikely to foster a positive solution or de-escalation, and the EU's proportionate anti-coercion measure would encourage the third country to work in the direction of such a solution, rather than escalation.
- Third, empirically, it is by no means the case that countermeasures always elicit further measures.<sup>86</sup> Even in trade wars, such as that between the US and China that started to become real with punitive tariffs of USD 50 billion imposed in March 2018, there is no general trend of endless escalation. What can be observed in many cases is, rather, that after one or two exchanges of measures, a new stable situation is reached from where the participants work towards a solution, even if the countries involved consider each other's measures illegal.<sup>87</sup> The cases in which the targets of coercion have chosen not to react formally, but instead opt for mitigation measures or WTO dispute settlement sometimes nevertheless feature continuous rounds of further measures (cf. China – Australia), and sometimes do not.

To the extent that there remains a risk of retaliation with costs associated for the EU, these risks and costs have to be weighed against the costs if the EU continues not to have a well-calibrated instrument in which case the EU would forego the benefits of deterring coercion.

A third country subject to EU anti-coercion measures may also consider resorting to dispute settlement procedures available under the WTO Agreement or a bilateral trade agreement with the EU. This **risk of litigation** against the EU applies only where the EU countermeasure involves a departure from EU obligations under the WTO Agreement and certain trade agreements, respectively. Whether the WTO Agreement and bilateral trade agreements can be invoked to oppose such countermeasures remains unsettled, but it can be reasonably argued that they cannot, in so far as the countermeasures are compatible with customary international law.

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<sup>85</sup> This risk is raised by some stakeholders including businesses and public authorities, associating with it with further costs for businesses and trade tensions.

<sup>86</sup> Dursun Peksen and Jin Jeong studied this question and arrived at the conclusion that the economic weight of the country that would be subject to the retaliation and the salience of the issue instigating the measures it has taken are *inversely* correlated to the likelihood of retaliation. Dursun Peksen & Jin Jeong, [Coercive Diplomacy and Economic Sanctions Reciprocity: Explaining Targets' Counter-Sanctions](#), Defence and Peace Economics 2021, 1-17. This has the potential of working to the EU's benefit, based on the EU's economic weight and an assumption that it would take anti-coercion measures on important matters.

<sup>87</sup> Louis Henkin, *How Nations Behave: Law and Foreign Policy* (1979), p. 47: "Almost all nations observe almost all principles of international law and almost all of their obligations almost all the time." which supports the argument that retaliation should not be taken for granted in the relationship between subjects of international law most of which most of the time abide by most of their international obligations.

It should, moreover, not be taken for granted that a coercing country would invoke WTO dispute settlement action against the EU anti-coercion measure. One reason is that the third country was the first to step outside the international legal order. If that third country invokes e.g. WTO dispute settlement procedures, then the EU would defend itself and the legality of its anti-coercion action including based on customary international law. This could well imply a full presentation of the coercive action and its international illegality. The coercing country might well be reluctant to undergo such discussion and scrutiny.

### 7.2.2. *International relations*

This section refers to relations with non-EU countries in general. Third countries which use coercion are discussed separately above.

There are no direct costs for third countries in general either from the existence of the instrument, or from its use. On the other hand, potential benefits may arise in terms of establishing international cooperation to tackle economic coercion. This is possible also today and forms part of the baseline. However, a dedicated EU instrument sends a more visible, powerful and effective message as regards where the EU stands and provides a platform for international cooperation more effectively in comparison to the baseline.

At the same time, there are **potential risks** to be managed in respect of international relations in general. See the discussion in the boxes below.

As also some stakeholders point out, third countries may perceive the instrument as **harming political or economic international relations**, or perceive it as **protectionist**.<sup>88</sup>

The careful design of the instrument manages these risks.

- **Design parameter (A) triggers for action** ensures that the instrument is activated exclusively in response to a third country's coercion and it is never the EU that starts a standoff. Only specific situations attributable to the non-EU country would trigger the instrument. Stakeholders also put forward that it is not the EU that would harm international relations through the anti-coercion instrument but it is the non-EU country that harms those relations by resorting to coercion in the first place. The triggers are based on observed situations of coercion.
- **Design parameter (C) possible action** ensures that the instrument operates in two steps. The first step is always non-interventionist and aims to stop the coercion. The EU's (counter)-action would be grounded on EU and international law.
- **Design parameter (B) threshold** ensures that the instrument targets only cases with certain important and relevant negative impact on the EU or Member States (as opposed to any act of coercion).
- **Design parameter (D) selection criteria** ensures that the action taken is commensurate and targeted and does not go beyond, and does not last beyond, what is necessary.

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<sup>88</sup> Stakeholders across the groups expressed concerns or called for a careful assessment and management of this risk. The [ECFR Policy brief of June 2021](#) identifies a risk of encouraging protectionism and suggests mitigation strategies for the new instrument. The analysis in this report aims to address the concerns, in line with stakeholders' input.

- **Design parameter (G) stakeholder involvement** ensures that the application of the instrument is done taking into account relevant economic interests as raised by stakeholders.
- Furthermore, it is recalled that the **primary objective** of the instrument is deterrence and not necessarily its use.

Furthermore, there may be a perception by some that the EU's creating an anti-coercion instrument would be a **challenge to multilateralism** or to the perception of the EU as strong supporter of multilateralism.

- First of all, the creation of the instrument would not weaken multilateralism either in the field of trade or in the field of international peace and security. The WTO would remain the core multilateral forum for addressing trade concerns, and the EU would continue to take to the WTO any grievances it has with regard to third-country trade restrictive measures if the EU considers those to be at odds with WTO disciplines. This includes cases of coercion when these simultaneously present infringements of WTO disciplines.
- The WTO however is not an effective and suitable forum for debates about the disrespect of non-WTO rules of international customary law, such as the prohibition of intervention or interference in the internal or external affairs of another country. This however is precisely what the anti-coercion instrument aims to tackle; hence multilateralism in trade is not thereby challenged because trade rules do not cover this exact question.
- This applies mutatis mutandis to bilateral trade agreements of the EU.

### 7.2.3. UN Sustainable development goals

The UN Sustainable Development Goals are relevant to this initiative. This is particularly the case for Goal (16) to “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels” and Goal (17) to “Strengthen the means of implementation and revitalize the global partnership for sustainable development”.

The initiative would support the achievement of these goals as it would support the rule of law and the respect for international law. It would also protect the stability and predictability of the international economic order, which are being disrupted when third countries take coercive measures that restrict international trade or investment.

### 7.2.4. EU economic operators and consumers

The group consists of two categories, those affected by the coercion and those affected by the EU's action. There could be overlaps.

There are no direct, indirect or enforcement costs for this group arising from the creation and the existence of the instrument. Costs will arise only from the use of the instrument and specifically from the application of countermeasures (assumed to be less than once per year). As noted earlier, these depend on the concrete countermeasure, its duration and the third country concerned. In qualitative terms, the following applies:

**Design parameter (C) possible action** ensures that, in any option, preference is given to first resort measures, which do not involve costs for EU economic operators and consumers. This solution reflects stakeholders' views across the groups, there is strong support for careful initial engagement with the coercing country. Possible countermeasures under **option (C1)**, which similarly exist under the other options would restrict trade or investment and thus would affect this group. The impact would vary per type of measure. The negative effect would likely be produced in the short-term after the imposition of a countermeasure, and may last as long as the countermeasure lasts. This would concern only those EU economic operators with trade or investment links to the coercing country, or those with any corporate links to affected foreign entities, and then within specific sectors. The following breakdown per type of countermeasure illustrates the typology of costs for this group under this option.

Restrictions on trade in goods: the countermeasures may increase costs for EU importers for goods from a specific non-EU country, or may lower market opportunities for specific EU exporters of a specific good. Indirect costs could include costs related to substitution (e.g. reliance on alternative sources of supply), transaction costs, any price pass-through effects and negative impacts on market functioning such as reduced innovation or investment. Stakeholders reported also potential negative effects such as uncertainty in conducting business caused by possible additional costs on long-term contracts, compromised conditions on cooperation, and in an extreme case the loss of business. Some business associations urge that countermeasures do not rely exclusively on trade in goods, as goods have continuously been taken hostage of trade disputes in the past years, bearing a disproportionate burden while often being entirely unrelated to the core nature of the disputes. They would see merit in focusing on trade in services.

Restrictions on trade in services: the countermeasures may increase the costs for the cross-border provision of services of the concrete service in respect of a specific non-EU country. Indirect costs could be similar to those for restrictions on trade in goods. Some stakeholders expressed concerns with the possibility of countermeasures that affect essential services sectors, such as logistics, on which the entire range of EU sectors would rely, because of a detrimental effect on the that sector. Furthermore, concerns were flagged with targeting digital trade and sectors where the EU has a trade surplus.

Restrictions on commercial aspects of intellectual property rights: countermeasures may prevent or increase the costs for a third country intellectual property owner to benefit from protection. Stakeholders, including businesses, expressed caution about using restrictions regarding commercial aspects of intellectual property rights.

Restrictions on public procurement access: restrictions or exclusions of specific third countries' providers, goods or services from public procurement in the EU could limit competition on the EU market.

Restrictions on foreign direct investment into the EU: countermeasures could result in less investment (capital and jobs) in the EU; if not targeted precisely, investment restrictions could indirectly affect the EU's or other third countries' companies whenever there are links between companies operating in global value chains.

Export controls: fall under the national security exceptions but may be an effective countermeasure in case of refused licence for export of a specific product to a specific non-EU country (the coercing non-EU country), export controls may result in foregone business (opportunities) and in direct costs for the affected EU economic operators who in some cases may not have sufficient alternative export destinations.

Stakeholders suggested also general potential negative effects valid for most of the above countermeasures such as uncertainty in conducting business caused by possible additional costs on long-term contracts, compromised conditions for cooperation, and in an extreme case the loss of business. This confirms the identification of the costs.

Stakeholders pointed to a number of sensitive areas and sectors to better avoid for countermeasures, notably: critical infrastructure, health sector, humanitarian sector, basic public services, certain fundamental values, essential services, such as logistics, on which the entire range of EU sectors would rely, , the areas provided for in Article 50 of the International Law Committee's Articles on State Responsibility in the context of countermeasures, sectors in which the EU enjoys a strong trade surplus which is more likely to be targeted by the third country's retaliation.

On the other hand, stakeholders suggested the following areas and sectors for countermeasures: energy, the financial sector (including banks), transport, telecommunications, information and communication technologies, prohibition of investments above a certain threshold for people with permanent residence in specific third countries, specific investment prohibition for real-estate property or acquisitions of companies for people with permanent residence in such countries, including any legal entities owned, controlled by them, regardless of the place of incorporation; restriction of key patents for transfer /use in targeted non-EU countries; or sectors that are politically sensitive for the coercing country.

With respect to any EU departure from EU's international obligations (WTO or other trade agreements), such departures would not necessarily occur and would be a matter for political decision in individual instances that would be taken in line with the EU's rights under general international law, including the permission to take countermeasures in response to a coercive measure that infringes on general international law.

Under **option (C2)**, additional possible countermeasures would have relatively less impact on this group because of their nature (e.g. visa restrictions, restricted access to funding, financial market restrictions), or may have no direct impact at all if the group is not concerned. The following qualitative impact can be identified:

Restriction of access to EU research programmes or exclusion from EU research programmes of actors from the coercing non-EU country – may restrict innovation indirectly; otherwise no direct costs for EU economic operators as the specific restrictions are not related to them;

Visa restrictions for nationals of from the coercing non-EU country – no direct or indirect costs for EU economic operators as the specific restrictions are not related to them;

Withholding of EU funding to the coercing non-EU country – no direct or indirect costs for EU economic operators as the specific restriction is not related to them;

Restrictions on authorisations for banking, insurance and other activities (licence) to actors from the coercing non-EU country; financial transactions, financial services – such measures may have (direct or indirect) effect in case of corporate links of EU economic operators with the coercing non-EU country. More generally, such measures must take into account any risk to the financial stability of the EU financial sector and the need to adequately protect the financial market participants and other persons in the EU;

Restriction of access to EU capital markets by actors from the coercing non-EU country – such measures may have (direct or indirect) effect in case of corporate links of EU economic operators with actors concerned;

Restrictions on registrations and authorisations under REACH Regulation and the hazardous chemicals legislation or similar actions – such measures may affect (directly or indirectly) EU economic operators in case they act as representatives of importers or manufacturers from the coercing non-EU country which request registration; or in case of authorisation, if EU operators request authorisation to use certain chemicals on behalf of an economic operator from the coercing non-EU country.

Restrictions on individual persons linked to a government which has adopted coercive measures – no direct or indirect costs for EU economic operators; such measures do not affect them.

Listing of companies – applying various restrictions mentioned above to companies (in particular state owned enterprises) or other persons which have been listed – the impact would be the respective type identified per specific measure, i.e. there would be impact if there is a trade, investment or corporate link between EU economic operators and the coercing non-EU country and/or its operators.

**Option (C3)** does not involve additional costs as it provides financial compensation for losses for EU economic operators. At the same time, to benefit from financial compensation, concerned economic operators will need to make a substantiated request with any possible associated administrative costs. The financial compensation granted may not offset the totality of claimed costs. Stakeholders also pointed at complexity and difficulty in determining losses and compensation.

It follows that, in all cases discussed **for design parameter (C)**, the magnitude of the impact would vary from a case to another. More importantly, however, the impact would be knowable in concrete cases through the possibility of stakeholder consultation etc. and measures with no or smaller negative impact could be prioritised.

As previously noted, regards **design parameter (A) triggers for action**, or the coverage of situations in which the EU may take action, this is likely to influence the frequency of use and thus to increase the instances where an impact will arise. Thus, only on the basis of coverage, **option (A1)** including extra-territorial sanctions implies more frequent use than **option (A2)** that excludes them, keeping in mind that the Blocking Statute would remain the main vehicle for responding to extra-territorial sanctions meaning the difference may not be significant.

Again, as previously noted, similar reasoning on frequency applies as regards **design parameter (B) threshold for action**. A higher threshold will decrease the instances of potential use in relative terms. However, there are specific advantages and disadvantages for each option for this parameter from the perspective of this group. A quantitative threshold enhances the clarity and predictability, it is objective and technically easy to set. On the other hand, it may be challenging to identify an optimal universal threshold that will apply across the board, thus there is a risk that a chosen number misses the target and important cases of coercion are left out only because they do not reach a particular quantitative threshold. A qualitative threshold offers more flexibility in taking into account a variety of dimensions beyond the commercial or economic dimension, but it could be



criticised for lack of sufficient clarity and predictability.<sup>89</sup> The formulation of the threshold in the legal text should aim to mitigate this risk.

Furthermore, it is recalled that the **primary objective** of the instrument is deterrence and not necessarily its use. Therefore, any negative impact on this group will materialise only as a last resort, after the other options fail to provide a resolution.

**Design parameter (D) selection criteria** ensures specifically that any collateral effect is as small as possible, which is of direct relevance for this group, and that the action taken is commensurate and targeted and does not go beyond the necessary. Moreover, the action must be in the general interest of the EU in all cases, comprising the interests of this group.

**Design parameter (G) stakeholder involvement** ensures in relation to this group that the application of the instrument accounts for relevant economic interests. EU businesses and consumers, which are potentially affected, will have an opportunity to come forward and make their views known as regards their interests. The possibility for stakeholder involvement is considered beneficial for this group, as is recognised by stakeholders themselves. Some expressed the view that the participation helps in mitigating the potential impact. Participation in the consultation may however result in an administrative burden in parallel, i.e. costs borne as result of responding to information requests, although participation will be voluntary. **Option (G1)** may be preferable for stakeholders in terms of clarity and predictability but it may be otherwise inappropriate in some consultations where for example only a limited number of potential measures are under consideration. **Option (G2)** has the advantage of flexibility and adapting the parameters of involvement to the concrete needs in a given case (e.g. more potential measures: longer periods, more complex measure: more possibilities for input, including hearings and assistance). At the same time, such flexibility will decrease to an extent the clarity and predictability for this group (which should be resolvable on a case-by-case basis). The other advantage of this option is that it allows adapting the duration and process of consultations to a particular need for speed of action in a given case. This is directly relevant for the effectiveness of the concrete action, as well as for the deterrence value of the instrument (i.e. a signal that measures can be put in place swiftly, if necessary).

As regards the **activation of the instrument (design parameter (F))**, a formal complaint mechanism (**option (F1)**) will lead to administrative costs to those who request the use of the instrument as the request would have to be substantiated. It is very likely that such costs would be offset by the potential benefits of the EU's action requested. Ex officio initiation (**option (F2)**) will not lead to such costs, although this option should not prevent those that have relevant information to come forward. Under both options, but particularly a formal complaint mechanism, stakeholders may be concerned with the issue of confidentiality, for fear of retaliation. Necessary guarantees and mechanisms will have to be put in place in order to ensure that the flow of information, to ensure that the use and effectiveness of the instrument is not prejudiced by the fear of retaliation against those commercial actors in third-country markets where they are vulnerable vis-à-vis governments not effectively bound by the rule of law and capable of arbitrarily punishing economic operators that defend their rights and interests. Furthermore, stakeholders may not have access to sufficient evidence to substantiate their requests which will prevent them from requesting action. Therefore, a reliance on formal complaint based requests for action would imply

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<sup>89</sup> Stakeholders who see the need for a threshold (20%) find more appropriate a flexible, case-by-case approach, corresponding to the qualitative option discussed here. No stakeholder argued in favour of a quantitative threshold.

uncertainty because of the difficulties for private operators to come forward with evidence. It therefore does not seem advisable.

On the other hand, substantive **benefits** for this group are expected at both levels: the creation and existence of the instrument, and its use. Benefits will first materialise where the deterrence effect is successful in averting coercion, i.e. avoiding the negative effects of the coercive measures and countermeasures' potential negative effects on EU economic operators and consumers. In this respect the scope of the triggers, notably the specific situations of coercion that trigger the instrument, plays a role. The wider scope under **option (A1)** would produce a wider deterrence effect and avert a wider scope of coercion, in comparison to option (A2). However, **option (A2)** implies that the extra-territorial sanctions not covered by the anti-coercion instrument, would be addressed by another instrument, namely the Blocking Statute. Therefore, extra-territorial sanctions would be addressed one way or another. Among the potential costs associated with coercion by third countries, stakeholders identify the loss of market access causing a fall in revenues, higher transaction costs when goods are stranded in ports or are destroyed, and damage to their reputation and commercial attractiveness in third country markets that can arise even with a threat of coercion. Second, benefits will materialise through the use of the instrument, in providing protection to EU economic operators and consumers concerned and counteracting negative effects of the coercion while aiming at a discontinuation of the coercion. The measures of first resort are equally beneficial in that they also aim to stop the coercive measures. The financial compensation (**Option (C3)**) could help affected EU economic operators. For example, exporters suffering from a sudden drop of their sales to a coercing country could use public funds to make up for some of their losses while they find alternative destination markets for their products. The importers of the coercing country's products, experiencing higher costs, may be able to source the inputs elsewhere or modify their production processes (or provision of services). If the financial compensation is properly designed, it could neutralise negative effects imposed by a coercive country and/or those identified in **options (C1) and (C2)** on EU trade and investment flows.

#### 7.2.5. *SMEs*

Where they engage in international trade, SMEs would experience similar type of impacts as other EU economic operators, with the possible difference that because of their smaller size they would be less exposed to being used by third-country governments as symbolic examples. SMEs reported additionally that a lack of EU policy intervention may lead to reluctance on their part to carry out their trade and investment activities abroad as they would fear that they would not be protected against economic coercion. At the same time, SMEs may experience the same impact more acutely, they are also less capable of directly voicing their interests vis-à-vis foreign and their home governments and of sustaining losses (less resources at their disposal, such as human, financial, technology).<sup>90</sup>

#### 7.2.6. *Trade and investment flows*

The mere creation and existence of the instrument may have consequences for trade and investment flows. To the extent that the instrument is effective in preventing coercion, it safeguards trade and investment flows that could otherwise be targeted by the relevant coercion and would allow trade and investment decisions based on the respect for the rules-

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<sup>90</sup> One SME came forward in the public consultation. Participating business associations represented also SMEs' interests (e.g. European Confederation of the Footwear Industry; Cerame-Unie; SEMAE (ex GNIS); EURATEX, SPECTARIS, and others).

based international order. Thus, medium- to long-term economic effects on trade and investment flows will be positive, in particular because reductions and distortions in trade or investment flows can be avoided. More generally, the instrument will increase the perception of stability in the international trading system, fostering confidence in and of economic operators.

The imposition of countermeasures will have a direct impact on trade and investment flows which will depend however on the specific countermeasure in individual cases. This is discussed in details in relation to EU economic operators and third countries above.

#### 7.2.7. *Public authorities* (EU, national, regional or local administrations)

The creation and existence of the instrument does not result in direct, indirect or enforcement costs for public authorities. Such costs will potentially arise only in the use of the instrument. National public administrations could be involved in applying specific countermeasures if such are imposed in concrete cases (i.e. **design parameter (C) possible action**). Countermeasures would fall under the common commercial policy and the regulation would be directly applicable in all EU Member States. There are no costs as regards first resort measures in any of the options.

Thus, the only action likely to be required at national level, if any, would be administration and application of countermeasures (e.g. national customs services enforcing EU legislation, visa restrictions, etc.). The range of possible measures is familiar to the public authorities as it exists in the respective fields already and other instruments (e.g. EU Trade Enforcement Regulation). Therefore, it is unlikely that a national action would require substantial additional resources in comparison to the baseline scenario. A similar assessment applies as regards EU agencies that may be involved in the application of countermeasures under **option (C2)**. It is of note that it is not intended and expected that the instrument is applied regularly. Its design and objectives rather imply limited use.

Nevertheless, public authorities participating in the public consultation expressed concerns about administrative cost of restrictions on trade in services (they argued that uniform implementation in non-harmonised areas would, in particular, be complicated) and public procurement. It was said that more important than defining the areas of action is their effectiveness and proportionality, which should always be assessed on a case-by-case basis.

Any applicable costs, as identified in a concrete case of the use of the instrument, as well as any views of the public authorities would be taken into account when adopting specific countermeasures. According to **design parameter (D) selection conditions**, the smallest possible administrative burden is among the conditions for selection of specific measures such that those that are less burdensome should be preferred.

As regards **design parameter (E) decision-making**, Member States may need to appoint delegates to serve as members of a committee in case of implementing powers conferred on the Commission, or experts in case of delegated powers conferral. The resources involved would depend on the frequency of use.

None of the other design parameters involves an action at national level, therefore, there is no additional impact to be created by the other design parameters.

On the other hand, **benefits** will arise from averting coercion that targets public authorities through the mere existence and availability of the instrument, or its discontinuation, using

the instrument. The result would be that public authorities would withstand foreign interference in their policy choices and would preserve their autonomy.

As regards the Commission, potential costs would occur for administration, monitoring, enforcement and adjudication in relation to the instrument and its use. Significant costs in individual cases would be associated with the collection of evidence on the nature and effects of the third-country measure, and on potential effects of contemplated counter-measures. This would involve additional human resources for the Commission (around two or three FTEs depending on the frequency of use). On the other hand, the financial compensation (**option (C3)**) implies substantial additional resources in terms of creation of a fund and increased administrative burden in terms of managing the fund, other than to the extent that existing schemes may be used (under the Common Agricultural Policy).

#### 7.2.8. EU citizens and society as a whole

The report looks also at impacts that are widespread and do not affect a particular subgroup in a specific way. No direct impact is expected, but a general benefit from deterring or discontinuing coercion quickly is expected, in particular if this makes it easier for the EU or Member States to act to protect citizens.<sup>91</sup>

### 7.3. Social impact

Generally, the existence of the instrument is expected to have a positive effect on social indicators, in that coercion may decrease or be prevented. The positive effect arises from preserving the status quo and averting adverse changes that are associated with the coercion (e.g. on employment, competitiveness, risk of investments and loss of market opportunities in third countries, increased uncertainty in conducting business). Where the instrument is used, benefits will arise if the EU's action is successful in ending the coercion quickly. Some stakeholders argue that if both coercive and anti-coercion measures would stay in place for long, this could have a significant adverse impact on income and employment. As also pointed out by stakeholders, it is expected that the instrument will contribute to the EU's capability to set ambitious social standards (for instance, it would protect the EU in the event that third countries sought to impose retaliation in respect of the EU's due diligence legislation). Stakeholder involvement (design parameter (G)) will assist in identifying any relevant negative impact so that any such impact is factored in the selection and design of concrete countermeasures before their application. Ultimately, the instrument should help build a more stable environment for using regulatory powers.

### 7.4. Environmental impact

There is no discernible adverse impact on the environment from the instrument or its use. Furthermore, and as pointed out by stakeholders, it is expected that the instrument can contribute to the EU's capability to develop ambitious environmental standards in a predictable way (for instance, it would protect the EU in the event that third countries sought to impose retaliation in respect of the EU' climate change mitigation legislation – something which has already happened when the Emission Trading Scheme was originally extended to aviation). Stakeholder involvement (**design parameter (G)**) will assist in identifying any relevant impact so that the selection and design of concrete

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<sup>91</sup> Participating citizens (6) from Germany, France, Italy, Hungary spoke generally about business and political interests and potential benefits of having a dedicated instrument, rather than from a societal perspective. Those views are integrated into the respective impact sections.

countermeasures factor them in. Ultimately, the instrument should help build a more stable environment for using regulatory powers, one that protects the environment in the EU.

### 7.5. Fundamental rights

The creation of an anti-coercion instrument itself would affect fundamental rights only by protecting them, in implementation of the EU's positive obligation to protect the rights of its citizens against infringements from other sources, in this case foreign governments, when the existence of the instrument can make a contribution towards deterring their acts of coercion which could negatively affect those rights.<sup>92</sup> The use of an anti-coercion instrument could similarly contribute to this protective effect. It could also, however, and depending on the EU's action chosen in the individual case, imply EU-imposed restrictions on trade or investment (under any option), thereby restricting the freedom to engage in international trade or investment as part of the freedom of professional activity.<sup>93</sup> Intellectual property rights could also be affected (under any option).<sup>94</sup> Individual EU stakeholders affected by these restrictions contrary to other stakeholders (e.g. because they import the products subject to restrictions) can also feel affected in their right to equal treatment.<sup>95</sup> These restrictions, however, would be a legitimate action by the EU authorities bound by the Charter because they would be taken in conformity with the requirements that the action be taken on the basis of a proper legal basis, by the competent authorities, in pursuit of a legitimate objective, and in line with the principle of proportionality.<sup>96</sup> Ultimately, the instrument would be apt to help build a more stable environment for using regulatory powers, one that promotes fundamental rights in the EU and abroad.

## 8. HOW DO THE OPTIONS COMPARE?

Following the assessment of the impact of the various design parameters and options, this section presents three alternative policy packages for a legal instrument and examines how they compare based on effectiveness, efficiency and coherence with other EU policies.

### 8.1. Configuration of policy packages

The identified policy packages represent the most suitable configurations of policy parameters or their options based on the likely impact as identified and their potential to achieve the initiative's objectives. The configurations resulted from the following methodological steps:

First step: The policy packages are built around, and vary, on the basis of, the **EU's possible action** that is being considered (design parameter (C)). That parameter came across as the most determinative in the design of an appropriate and effective instrument; it carries the most weight in terms of potential impact, both positive and negative.

Second step: Each policy package includes the two alternative options for **triggers** (for design parameter (A)) as considered, i.e. both options are retained as suitable, for reasons discussed below, and the choice is left for the legislative proposal.

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<sup>92</sup> Article 52(1), *in fine*, of the Charter of Fundamental Rights of the European Union.

<sup>93</sup> Articles 15(1) and 16 of the Charter of Fundamental Rights of the European Union.

<sup>94</sup> Article 17(2) of the Charter of Fundamental Rights of the European Union.

<sup>95</sup> Article 20 of the Charter of Fundamental Rights of the European Union.

<sup>96</sup> Article 52(1) of the Charter of Fundamental Rights of the European Union.

Third step: The other components for a legal instrument are the same across the policy packages (the constant parameters). Three of them (**threshold, activation, stakeholder involvement**) correspond to the most viable option per respective design parameter and they have the function of enhancing the main component (i.e. possible EU action). The rationale for identifying the most viable option is based on its likely impact as identified and potential to support the initiative's objectives, as discussed in more detail below. Finally, the remaining two components (**selection conditions and decision-making**) are constant and do not foresee policy options from the outset. They also apply equally across the three policy packages. Their overall effectiveness and efficiency is discussed as an integral part of the policy packages in the next section (8.2).

## 8.2. Policy packages

Following the above steps of configuration, **policy package 1** proposes a two-step process for possible action under the instrument, namely first resort measures, and, if they fail, last resort measures limited to countermeasures under option (C1). **Policy package 2** proposes the same two-step process for possible action but with an additional possibility for countermeasures under option (C2). **Policy package 3** proposes the same two-step process as policy package 2 but with yet another possibility that is granting financial compensation. Thus, all policy packages include the same first resort measures but there is a progression in the level of ambition as regards the second step. Policy package 1 is sufficiently ambitious, policy package 2 is more ambitious and the policy package 3 is the most ambitious of the three. Finally, they all include trade and investment measures.

Next, each package contains two alternatives for triggers (options (A1) and (A2)). The two alternatives differ as regards the coverage of extra-territorial sanctions when they also coerce the EU or Member States public authorities. Each option is considered suitable, thus they are retained as alternatives. **Option (A1)** (i.e. including those extra-territorial sanctions) is more ambitious than option (A2). Based on likely impact and potential to support the initiative's objectives, it is considered viable and appropriate for this instrument, and it is suitable for each of the three policy packages. It covers comprehensively coercive measures and potential evolutions, excluding only those that are directed at private actors and do not seek to coerce public authorities. Coercion by means of extra-territorial sanctions would entail substantial costs for EU economic operators, and therefore be harmful and requires adequate attention. The Blocking Statute remains the principal instrument for the EU to deal with extra-territorial sanctions, while the anti-coercion instrument should operate in the background, and only come into play when further actions may be required at EU level, to top up the response where needed.

**Option (A2)** carves out extra-territorial sanctions with a coercive effect which otherwise fall within option (A1), is also viable and would be appropriate, and equally suitable for each of the three policy packages. It is an appropriate alternative because of the potential reform of the Blocking Statute that is foreseen to update the response to extra-territorial sanctions and to ensure effective deterrence, protection and counteraction. Otherwise, the remaining scope of triggers under option (A2) covers sufficiently the other observed coercive measures (explicit, disguised, silent, boycotts). It implies a less frequent use than option (A2) which would potentially reduce the cost of using the instrument (all other factors equal). The deterrence as regards the covered forms of coercion would remain unchanged in this option.

The other (constant) components of the policy packages are the same across the packages and they serve to strengthen the EU's possible action. They are identified as follows:

**Qualitative threshold for action (B2)** – this option is more appropriate and viable than the quantitative threshold option in cases such as economic coercion because it could provide for a flexible and sophisticated approach in deciding which incidents of coercion should be tackled at a given time. It allows for taking into consideration not only the commercial dimension of the coercion but any other relevant dimensions like relations with the coercing country, industry affected, significance of the interests affected, political considerations. No substantial differences in impact were otherwise identified.

**Ex officio activation of the instrument (F1)** – this is a more viable option than setting up a formal complaint mechanism for this instrument in several respects. A formal mechanism would cause additional administrative costs both for the stakeholders that will contemplate using it, and for the Commission to set it up and respond to requests. More importantly, however, a private stakeholder-driven mechanism might not be a suitable solution for an instrument that addresses coercion against EU public authorities, where political considerations play an important role in a given case. It is also more suitable not to require a formal complaint to avoid that petitioners are subject to retaliatory actions. Thus, an ex officio mechanism would respond to the uncertainty associated with identified difficulties for private operators to come forward with evidence.

**Mandatory stakeholders involvement with a case-by-case approach (G2)** – this is a more viable and appropriate option for this instrument in general. It will allow adapting the process of consultation to concrete needs, including the duration and form of consultations. Mandatory public hearings may not be useful in all circumstances and will lead to additional expenses for both stakeholders and the Commission. However, where useful, public hearings could be arranged on a case-by-case basis. At the same time, private meetings with stakeholders in the context of a consultation, to provide assistance, remain a possibility as well under this option. Similarly, it is more practical and reasonable to adapt the duration of the consultation to the specific circumstances of each case, keeping in mind that in some cases there is a need for longer periods, and in others for shorter periods (e.g. reflecting the complexity of potential countermeasures, number and magnitude of potential countermeasures; available timeframe for effective action). Either way, the objective remains that stakeholders receive a meaningful opportunity to provide input.

*Table 3 Overview of policy packages*

| <b>Design parameter</b>         | <b>Policy package 1</b>   |  | <b>Policy package 2</b>                                   |  | <b>Policy package 3</b>                                   |  |
|---------------------------------|---|--|---|--|---|--|
| <b>(A) Triggers for action</b>  | (A1)<br>Explicit, disguised, silent coercion and boycotts                                       | (A2)<br>(A1) without Extra-territorial sanctions | (A1)<br>Explicit, disguised, silent coercion and boycotts | (A2)<br>(A1) without Extra-territorial sanctions | (A1)<br>Explicit, disguised, silent coercion and boycotts | (A2)<br>(A1) without Extra-territorial sanctions |
| <b>(B) Threshold for action</b> | (B2) Qualitative threshold  |  |   |  |   |  |
| <b>(C) Possible action</b>      | <b>(C1)</b><br>First resort actions and Countermeasures restricting trade in goods or services, |  | <b>(C2)</b><br>(C1) and Additional countermeasures        |  | <b>(C3)</b><br>(C2) and Financial compensation            |  |

|                                      |   |  |  |
|--------------------------------------|---|--|--|
|                                      | <b>commercial aspects of intellectual property rights, access to EU public procurement market, as well as foreign direct investment</b> |  |  |
| <b>(D) Selection conditions</b>      | Effectiveness, minimal collateral damage, minimal administrative burden, EU's general interest  |  |  |
| <b>(E) Decision-making</b>           | Stemming from the Treaties' framework: Delegated/Implementing acts  |  |  |
| <b>(F) Activating the instrument</b> | (F2) Ex officio   |  |  |
| <b>(G) Stakeholders involvement</b>  | (G2) Case-by-case   |  |  |

### 8.3. Comparison

#### 8.3.1. Effectiveness or the extent to which the policy packages would achieve the objectives (deter, de-escalate, discontinue, counteract)

- Deter coercion (objective 1)

As explained already, the deterrence value of the instrument depends on the possibility for the EU to respond effectively and quickly and in a credible way. It is considered that the mere possibility of using the instrument has the potential to produce the necessary deterrence effect on third countries so that they do not use coercion in the first place, and hence, the EU does not need to impose countermeasures. This is the best-case scenario. Ultimately, however, whether coercion takes place depends on the third country's choices and these are factors beyond the control of the EU or Member States (see section 3.2 on drivers). Consequently, even if the instrument is designed to produce a deterrence effect, coercion may nevertheless occur. If it happens less frequently, that would be also beneficial. In any event, in comparison to the baseline, the availability of a dedicated instrument, under any of the three policy packages, significantly increases the chances of preventing or persuading the third country not to engage in coercion.

Specifically, policy package 1 has solid prospects of achieving the objective of deterrence by providing for a potentially very broad menu of effective and versatile measures as a last resort. Policy package 2 has even better prospects because it adds to the menu further versatile possible measures to allow even better tailoring and effective impact on the third country concerned. Policy package 3 may slightly increase the deterrence effect further because the financial compensation could offset the negative effects of the coercion on EU economic operators.

The scope of the triggers will very likely broaden the deterrence effect as regards a sufficiently broad range of known and potential coercive measures. Option (A1) captures and thus has the potential to deter any form of coercion as long as the target of the coercion is a public authority including threats and evolving forms of coercion. It is, however, only theoretically more encompassing than option (A2), since the revised Blocking Statute will remain the primary instrument to address extra-territorial sanctions in any event. Option (A2) excluding extra-territorial sanctions, would enhance the deterrence effect in the same



way for all forms of coercion with the exception of extra-territorial sanctions (which would be further addressed in the Blocking Statute).

Some of the constant components would further enhance the deterrence potential of each policy package. The decision-making process is, in particular, very determinative for the deterrence effect. The possibility for a swift adoption of countermeasures without excessive risks of blockages or delays, will significantly contribute to that. Conversely, if the decision-making process is lengthy and prone to blockages and delays, the deterrence effect would significantly decrease, regardless of how broad the triggers are and how versatile the countermeasures. Finally, the possibility to swiftly consult stakeholders on potential countermeasures could also contribute to the effectiveness of the decision-making process, and thus to the deterrence effect.

- De-escalate specific coercive measures (objective 2)

There is no difference between the three policy packages in this respect as all of them incorporate the same first resort measures. In comparison to the baseline, all three policy packages have the potential to be effective because they provide for a structure and predictability as well as for additional responses as compared to the use of diplomatic means available in the baseline. The difference in coverage of triggers means that in option (A1) relevant extra-territorial sanctions could be addressed via this step under the anti-coercion instrument, while in option (A2) they will not be addressed in this instrument (i.e. exclusively by the Blocking Statute), but this has no effect on the response for the rest.

- Induce discontinuation of specific coercive measures (objective 3)

There is no difference between the policy packages when it comes to the first resort measures and their potential to induce the discontinuation of the coercion. Achieving this objective without inflicting cost will always be preferable. However, if that were no solution, the EU would be able to adopt countermeasures as a last resort.

Policy packages 1 and 2 have the potential of inducing discontinuation using the range of countermeasures available. The already broad menu of possibilities under option (C1) has sufficient potential (policy package 1). Increasing the possibilities to choose the most appropriate and effective measures (option (C2)), will increase the potential as well, i.e. policy package 2 scores even better. The possibility for financial compensation may bring the advantage of absorbing the coercion and hence contributing to its deterrence and discontinuance (policy package 3).

The constant components would contribute to achieving this objective as well. In particular, the selection conditions explicitly require that measures must be capable of inducing discontinuation. Stakeholder involvement will allow for relevant views to reach the EU so that the EU's action takes into account all relevant circumstances.

The scope of the triggers under option (A1) would allow that relevant extra-territorial sanctions be addressed under the instrument as a complement to the Blocking Statute, while option (A2) excludes them without affecting the other triggers.

- Counteract specific coercive measures (objective 4)

Policy packages 1 and 2 achieve the objective through the use of the available range of countermeasures. The already broad menu of possibilities in policy package 1 serves the objective sufficiently well, while adding to the menu possibilities under policy package 2

will serve the objective even better because of the broader choice and increased chance of selecting an appropriate countermeasure. The possibility for financial compensation does not have direct relevance but it is not excluded that it may be used to counteract the coercion while it does not inflict a harm on the coercing country (policy package 3).

The constant components would serve this objective essentially by setting requirements that the countermeasures are proportionate, carefully targeted, cause as little collateral damage as possible and minimise administrative burdens (selection conditions) and that they apply only as a last resort, in the general interest of the EU and following appropriate consultation of stakeholders.

Again, the scope of the triggers under option (A1) would allow that extra-territorial sanctions be counteracted under the instrument as a complement to the Blocking Statute, while option (A2) excludes them without any bearing on the other triggers.

### 8.3.2. *Efficiency*

In terms of the main potential costs and negative effects such as collateral harm to EU economic operators from the specific application of countermeasures and the risk of negative perception and escalation of geopolitical tensions, there is a light progression between the policy packages. Policy package 1 is associated with fewer costs and fewer risks than policy package 2 because of the additional range of possible measures under policy package 2, and the potential collateral harm and potential risks that such an addition implies. Policy package 3 is the most costly because of the addition of a financial compensation to the range of measures under policy package 2. At the same time, policy package 3 should not make any difference as regards the other potential negative effects because the financial compensation would have no negative effect on the third country concerned or would run no additional risks of negative perception and escalation of geopolitical tensions in comparison to the other policy packages. However, the likely difference in costs and negative effects between the policy packages much depends on any given case, as the main variables are unforeseeable: which countermeasures exactly would apply, for how long and under which circumstances? It is therefore conceivable that although policy package 2 is more costly than policy package 1 in theory, in a given case the concrete countermeasure would be more efficient (bring about the intended effect at a lower cost and applicable for a limited period of time) and run no risk of negative perception and escalation of geopolitical tensions. In any event, managing any applicable risks and keeping collateral harm as small as possible in the concrete use of the instrument is inherited in the design of each of the three policy packages for a framework legislation.

In terms of main potential benefits such as averting or minimising the costs associated with the coercion and protecting the EU's and Member States' interests and legitimate policymaking space, there is a gradation, but in reverse. Policy package 1 is less beneficial in comparison to policy package 2 because of the broader scope of possible EU's action in policy package 2, while policy package 3 is the most beneficial as the scope of possible EU's action includes also financial compensation. However, as mentioned above, the likely differences in benefits between policy packages would depend on the particular circumstances in a given case. Effectiveness of the EU response is an inherent feature of the design of the framework legislation for each of the three packages.

On balance, the three policy packages score similarly in efficiency rates because of the synergies. For instance, the broader scope for the EU's action under policy package 2 is potentially more costly but its deterrence effect is stronger notably because of the broad scope. The same is true for policy option 1, where the costs are lower but its potential to

avert incidents of coercion in comparison to other policy packages is similar. The financial compensation (in policy package 3) is associated with additional costs (EU funds, budgetary implications) but also with additional benefits (offsetting harm, potentially absorbing the coercion). The main benefit of the instrument is its deterrence value, which, if successful, can avert costly coercion without inflicting harm. In all three options, the threshold for action, selection conditions, involvement of stakeholders and the decision-making process have the purpose to drive the potential costs and risks down, and strengthen and support the potential benefits. Thus, efficiency would be also aimed at through the application of the instrument in individual cases.

Finally, the two alternative options for triggers imply a different frequency of use of the instrument (all other factors equal). Specifically, under option (A1) the use may be slightly more frequent as more situations are covered, while under option (A2) the use may be less frequent in comparison because of the exclusion of the extra-territorial sanctions. More frequent use may result in more counteraction, but with the respective synergies between costs and benefits of the counteraction. Thus, this has no bearing on the overall efficiency, but only on the policy decision between the two options.

### *8.3.3. Coherence with other EU policy objectives, including the Charter for fundamental rights, and with other policy initiatives and instruments*

All policy packages aim at enhancing EU's open strategic autonomy, and are complementary to efforts on the economic front for the EU to recover from the Covid-19 crisis, remain competitive and address strategic dependencies that could make the EU or the Member States vulnerable to coercion. They are also coherent on the external front of updating the Blocking Statute and cooperating on coercion as discussed in the G7 context (May 2021). As regards the Blocking Statute, coherence at the level of both options (A1) and (A2) is considered equal, irrespective that they offer contrary solutions. It is considered that maximum coherence is achievable for both options. Option (A1) would ensure coherence by maintaining the Blocking Statute as the main vehicle, at EU level, for responding to extra-territorial sanctions, while the alternative option (A2) excluding extra-territorial sanctions avoids the interaction completely. Under option (A1), the choice of whether the instrument may be used to complement the Blocking Statute in individual cases, can be left for the implementation stage. Under option (A2), the legislative text – either for the current initiative or on the future amendment of the Blocking Statute, would need to include a specific clause to the effect of excluding coercive extra-territorial sanctions from the scope of triggers under the instrument. Given that the revision of the Blocking Statute is subsequent to the current initiative, it is not possible for the current impact assessment to provide further precision and consideration. Nor does it preclude any option that the amendment of the Blocking Statute might consider and pursue.

Package 2 ensures maximum policy coherence as it brings a range of EU policies working together in sync in terms of possible countermeasures. Solely on the account of the option for a financial compensation (the single difference to package 2), package 3 raises the issue of coherence with the current Multiannual Financial Framework (MFF). The MFF would need to be reopened to provide the necessary financial resources to support this option. This may be difficult to do during the current MFF at this point in time despite the merits of this option, but the question could be revisited in the next MFF.

All three packages for the creation of a legislative framework are in line with the EU's international obligations, in the sense that the sole existence of an instrument does not breach any international obligation of the EU. The choice of the appropriate countermeasure would in any event be made in individual circumstances while duly

considering all relevant circumstances, including international legality. Therefore, there is no difference between the policy packages in these terms.

Finally, all three packages are coherent with the EU’s human rights policy and consistent with the Charter of Fundamental Rights. Where the use of the instrument results in restrictions that affect fundamental rights (relevant for all packages), this would be a legitimate action by the EU authorities bound by the Charter. The existence of an anti-coercion instrument, alone, would only positively affect fundamental rights, in implementation of the EU’s positive obligation to protect the rights of its citizens against infringements from other sources, in this case foreign governments.

*Table 4 Overview of policy packages comparison*

| Basis for comparison             |                                   | Baseline | Policy package 1 | Policy package 2 | Policy package 3 |
|----------------------------------|-----------------------------------|----------|------------------|------------------|------------------|
| Effectiveness                    | Objective: deter                  | 0        | ++               | +++              | ++++             |
|                                  | Objective: de-escalate            | 0        | +++              | +++              | +++              |
|                                  | Objective: induce discontinuation | 0        | ++               | +++              | +++              |
|                                  | Objective: counteract             | 0        | ++               | +++              | +++              |
| Efficiency                       |                                   | 0        | ++               | ++               | ++               |
| Coherence with other EU policies |                                   | 0        | ++               | +++              | +                |

## 9. PREFERRED OPTION

Based on its overall high score in terms of effectiveness, efficiency and coherence (see the comparison in section 8), policy package 2 emerges as the preferred option.

### *Design of the preferred option to achieve the specific objectives*

Policy package 2 shows the potential to achieve the policy objectives of the initiative. It is capable of exerting a **deterrence effect** on the basis of a broad and versatile menu of possible EU response to coercion in either trigger option (with or without coercive extra-territorial sanctions). It also has the potential to ensure swift EU action.

More specifically, the envisaged range of possible actions provides for a **broad menu of versatile and effective responses** to choose from in individual cases. Those measures should be quickly deployable. This is crucial for the deterrence objective in particular. Furthermore, the broad choice of countermeasures would permit the EU to tailor its approach to a particular case, to ensure that the countermeasures are most likely to bring about de-escalation, discontinuation and counteraction.

Either option for **triggers** is considered capable of deterrence as regards the respective coercive measures captured. Option (A1) captures a comprehensive range of possible coercive measures, corresponding to incidents of coercion observed in the recent past, as also reported by stakeholders, and takes into account possible further developments. Under option (A2), coercive extra-territorial sanctions would be outwith the scope and exclusively

addressed in another instrument, without affecting the rest of the triggers and their deterrence effect.

It is expected that all these elements can contribute to averting the targeted coercive measures. Should coercive measures take place nevertheless, the EU would be in a position to take a specific action in a given case.

In this respect, the preferred option serves optimally the specific objectives of **de-escalation, discontinuation and counteraction** of coercive measures. First, it provides for a **two-step action**. The **first step** refers to deploying measures of a first resort, with the prime aim to de-escalate the coercion and encourage the third country to withdraw their measures. This is a non-interventionist approach but has the potential to be powerful and effective without the need to impose costs. This is the best-case scenario if deterrence does not work in a given case.

The **second step** relates to the objective to counteract and refers to the use of countermeasures. While the countermeasures aim to respond to the coercive measures and/or their adverse effects and to induce discontinuation of the coercion, they would do so only after all other avenues are exhausted without satisfactory solution. Their use as a last and non-mandatory resort also reflects the objective of de-escalation.

The variety of possibilities allows calibrating the potential countermeasures, so that they be effective and efficient in individual cases. It would also allow navigating potential concerns and would provide for measures capable of diminishing potential costs and managing real and perceived risks (collateral damage, escalation risks, negative perception).

The other design parameters would additionally strengthen the intended deterrence effect and would facilitate the calibration of the appropriate action by the EU in individual cases in terms of the other specific objectives. The **qualitative threshold for action** ensures a flexible and sophisticated approach in deciding which incidents of coercion to tackle, taking into account all dimensions of the coercion (such as economic effects, relations with the coercing country, industry affected, significance of the interests affected, political considerations). The **selection criteria** would guide the narrowing down of possible options in terms of proportionality, EU general interest, reducing collateral costs and administrative burden. **Stakeholders** could participate, so that the potential EU action takes account of all relevant interests.

In terms of process, the application of the instrument would involve the following steps:

- **The first step** starts through an assessment of whether a concrete third-country measure in individual cases falls within the scope of the instrument and whether a certain threshold is reached, with the possibility for gathering of additional information from stakeholders.
- A public affirmative determination at EU level may follow such an assessment (i.e. the first measure under the instrument). The EU may call on the third country to end its measures at this point.
- Depending on the cooperation of the third country in question, an affirmative determination may lead to subsequent measures, such as direct negotiations, mediation or international adjudication, with a view of ending the coercion. The choice of such subsequent measures would depend on the circumstance of any individual case and may differ from one case to another.
- Where the above efforts have not led to discontinuation of the coercion and the coercion is still ongoing, and it remains necessary for the EU and Member States to

protect their interests from the ongoing coercion, **the second step** becomes available, notably the recourse to countermeasures, as last resort;

- Before applying countermeasures, the EU would call on the third country in question one last time to end the coercion and find a solution;
- Information gathering from stakeholders particularly as regards their interests in relation to the design of countermeasures. The choice and design of countermeasures would depend on the circumstance of any individual case and may differ from one case to another (design parameter (D) discusses in detail the range of conditions for selection and design of countermeasures in individual cases).

Any action under the instrument would be justified and supported by evidence that the respective conditions and criteria are met. The evidence base would include elements such as:

- evidence that an individual measure by a third country meets the conditions of application of the instrument,
- a certain threshold that justifies action is reached,
- evidence of efforts to enter into consultations with the third country in question and of consultation of stakeholders where necessary,
- the measures of first resort were unsuccessful and protection from ongoing coercion remains necessary,
- consultation of stakeholders as regards their relevant interests,
- notifications of the third country in question before application of countermeasures, and
- evidence of the likely impact of potential countermeasures in terms of effectiveness but also collateral damage, proportionality of response, EU's general interest (design parameter (D) conditions).

On the other hand, the **decision-making process** under the instrument requires further consideration for the legislative proposal. Relevant considerations are the role of the Member States, Parliament and Council, and the need for speed of action to support the intended deterrence and counteracting functions. The inherent efficiency of the decision-making process in either avenue (due to the respective roles of the EU institutions and applicable steps), would be enhanced if the Commission executes each procedural step expeditiously and without unreasonable delay while remaining flexible to accommodate the political sensitivities towards the aim of ending coercion.

#### *Broader considerations in support of the preferred option*

A single and comprehensive legal instrument would respond to the need for the EU to handle the new geo-economic normal that accentuates the challenge of economic coercion. It would increase the assertiveness and the resilience of the EU, and would fit with the efforts to secure the EU's open strategic autonomy. It can be a clear signal to international partners that the EU is not willing to accept coercion. It would enhance the existing framework that otherwise fails to offer a satisfactory solution to the problem of coercion. Furthermore, it would underline the EU's adherence to a rules-based approach.

The preferred solution is compatible with the **EU's international obligations**. The creation of an anti-coercion instrument, of the design considered, would in no event, as such (i.e. by virtue of its sole existence), constitute a breach of WTO obligations or other trade agreements concluded by the EU. When it comes to the actual taking of measures under a future anti-coercion instrument, there are different views but it is considered that these can be imposed in a manner consistent with the EU's international trade and investment

obligations (most notably the WTO). The choice of the appropriate countermeasure would in any event be made in individual circumstances while duly considering all relevant circumstances, including international legality and the likely reactions and consequences.<sup>97</sup>

Last but not least, the preferred option respects the **principle of proportionality**. The envisaged instrument would be a comprehensive framework for action against economic coercion. Its structures imply restraint in action in order first to try resolve issues without resorting to countermeasures (deterrence effect, de-escalation phase). The instrument would explicitly prioritise a non-interventionist approach (first resort measures versus last resort measures). However, where the need arises, the EU would be able to act. The selection criteria explicitly include a requirement that countermeasures must be commensurate to the harm that they counteract in individual cases. The selection criteria further prescribe that collateral damage and administrative burden be as small as possible. Therefore, not only the instrument itself, but also measures adopted under the instrument would be proportionate.

#### **10. HOW WILL THE ACTUAL IMPACTS BE MONITORED AND EVALUATED?**

The Commission services will monitor the functioning of the instrument. They will collect data on coercive measures identified as well as on anti-coercion measures considered and adopted. Data will notably be collected on:

- The number of coercive measures identified per year, as well as their magnitude;
- The number and type of actions of first resort and their outcome, in particular if they resulted in discontinuation of the coercive measure or any other change;
- The number and type of countermeasures adopted by the EU, their duration and impact, and in particular if they stopped the coercive measure.

Monitoring will also be applied to the operation of the various procedural and substantive conditions for the application of the instrument, both as regard first resort and last resort measures, with a view to their subsequent assessment. The legislative text will set out such precise conditions, as explained above.

The impact of the existence of the instrument *per se* will be more difficult to measure, as the counterfactual (i.e. the situation that would have prevailed in the absence of the instrument) will be difficult to establish. However, the Commission services will try to continue to engage with stakeholders to monitor their experiences and views regarding the impact of the instrument.

The legislative proposal should provide for a review, within a reasonable time, on the functioning and application of the instrument, with reporting obligations to the European Parliament and the Council.

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<sup>97</sup> Cf. supra footnote 81 and accompanying text regarding also the reaction of the other country involved and the extent to which the EU should take this into account from the outset.

## Annex 1: Procedural information

### 1. LEAD DG, DECIDE PLANNING/CWP REFERENCES

Directorate General for Trade (DG Trade), PLAN/2020/9688 – TRADE

CWP 2021, Annex

### 2. ORGANISATION AND TIMING

Interservice (steering) group (ISG) chaired by SG supported the impact assessment work. The ISG comprised representatives at the level of a Director and/or Head of Unit of the following services (in addition to SG and TRADE):

- Legal Service of the Commission;
- FISMA, EEAS, DEFIS, INTPA;
- GROW, AGRI, ENER, MARE, TAXUD, ENV, CLIMA, CNECT;
- JUST, NEAR, JRC, EMPL, RTD, ECFIN, HOME, BUDG<sup>98</sup>; and
- IDEA.

In total, five meetings were held, as follows:

- 17 February 2021 meeting devoted to an initial introduction of the initiative and the inception impact assessment, which was published the same day;
- 15 March 2021 meeting devoted to the consultation strategy and the questionnaire for the public consultation;
- 11 July 2021 meeting devoted to stock-taking of the consultation work by that time;
- 13 July 2021 meeting consulting the DGs on the draft impact assessment report (with a later revised version circulated on 26 July 2021);
- 19 October 2021 meeting devoted to the preparation of the draft legislative proposal;

Relevant documents were distributed in advance of each meeting by SG and/or DG TRADE as applicable. SG prepared and circulated the meeting minutes to the participating DGs.

### 3. CONSULTATION OF THE RSB

On 11 June 2021, an upstream meeting with RSB took place. On 30 July 2021, the draft impact assessment report was submitted to RSB for scrutiny. On 22 September 2021, the meeting on the draft report took place. The main recommendations received from the RSB were assessed and the report modified accordingly (as indicated in the table below).

| RSB main recommendations                | Modification of the report                        |
|---|---|
| Clarify relation with international law | Section 3.1 now contains the following additional |

<sup>98</sup> HOME and BUDG invited subsequently.



|   |   |
|---|---|
|   | <p>clarifications:</p> <p>1/ Coercive measures against the EU and Member States can be considered a breach of customary international law, which is a matter of a case-specific analysis in individual cases;</p> <p>2/ The EU lacks the legal means to address the problem of coercion effectively and timely; The EU has not counteracted coercion so far;</p> <p>3/ Contrary to other jurisdictions, which may take anti-coercion measures rapidly and without the need for a framework legislation put in place first, the principle of conferred powers requires the establishment of a legal basis in the EU legal order for the EU to act in specific cases such as coercion;</p> <p>4/ Other countries' standpoint is supplemented with additional clarifications in these regards.</p> |
| Present more systematically evidence on significance and rise of the problem                          | <p>Section 3 now contains additional references, e.g. to the following:</p> <p>1/ ECFR policy brief "<a href="#">Measured response: How to design a European instrument against economic coercion</a>" and other contributions by academia;</p> <p>2/ Results of the open public consultation;</p>  |
| Clarify the articulation with existing instruments  | <p>1/ Sections 3 and 6 (baseline; design parameter (A)) now contain further explanations, in particular on the Blocking Statute;</p> <p>2/ Annex 5 has been introduced to illustrate that none of the existing instrument is suitable or suitable to address the issue of coercion;</p>   |
| Highlight the gap the instrument is designed to fill  | Highlighted throughout the report, in particular in sections 3, 4 and 6.  |
| Clarify the conditions and criteria for launching a case and for adoption of measures                 | <p>1/ Section 6.2 (design parameter (C)), now contains dedicated paragraphs on conditions and criteria as well as on respective evidence base, for each of the two steps. A flowchart now illustrates the process.</p> <p>2/ Section 9 on the preferred option contains references to the process.</p> <p>3/ Section 10 also clarifies the monitoring as regards these conditions and criteria.</p>   |
| Accompany policy options with the best possible evidence of their effectiveness and efficiency        | Further references to evidence have been added in sections 6 and 7.   |
| Comparison of options to take into account better the likely differences in costs between the options | Section 8.3.2 contains now an elaborated argumentation as regards the likely differences between policy packages..  |
| More precision on the required legal basis for the actions taken                                      | Section 4 now contains a further precision as regards legal basis.  |

#### 4. EVIDENCE, SOURCES AND QUALITY

The report uses several sources of information. First, it relies on input from stakeholders received during the consultation period (public consultation and targeted consultation activities) as described in Annex 2 to this report. The input encompasses opinions, expertise, data. The detailed results of the open public consultation are available [here](#), while a summary factual report is available [here](#).

Second, it relies on input and research on the subject from academia and think tanks, to list a few:

ECFR policy brief "[Measured response: How to design a European instrument against economic coercion](#)" of June 2021 based on the work of ECFR's Task Force for

Strengthening Europe against Economic coercion that brings together officials from six Member State governments (the Czech Republic, France, Germany, the Netherlands, Spain, and Sweden) and private sectors (although the report does not necessarily represent their views). ECFR has been very active on the issue of economic coercion.

ECFR policy brief “[Defending Europe’s economic sovereignty: New ways to resist economic coercion](#)” of October 2020 presented eleven policy options for the EU to tackle economic coercion; a type of an anti-coercion instrument is among these, but also a reform of the Blocking Statute, creation of European export bank, building digital currency, creation of EU resilience office and EU resilience fund, etc.

ECFR policy brief “[Redefining Europe’s economic sovereignty](#)” of June 2019 discusses an agenda to strengthen the economic sovereignty.

Darren Lim and Victor Ferguson, ‘[Informal economic sanctions: the political economy of Chinese coercion during the THAAD dispute](#)’, Review of International Political Economy, advanced online publication;

Victor Ferguson and Darren Lim, ‘[Economic power and vulnerability in Sino-Australian relations](#)’, in Linda Jaivin, Jane Golley, and Sharon Strange (eds), China Story Yearbook 2020: Crisis (Canberra: ANU Press, 2021).

Ketian Vivian Zhang, ‘[Chinese non-military coercion—Tactics and rationale](#)’, 22 January 2019.

Huong Le Thu, ‘[China's dual strategy of coercion and inducement towards ASEAN](#)’, The Pacific Review, 32:1, 20-36 (2019).

Peter Krause and Timothy Crawford, ‘[Coercion – The Power to Hurt in International Politics](#)’ (Oxford University Press, 2018).

Ravindran, Madhu Sudan, ‘[China’s Potential for Economic Coercion in the South China Sea Disputes: A Comparative Study of the Philippines and Vietnam](#)’, in: Journal of Current Southeast Asian Affairs, 31, 3, 105-132 (2012).

Christina Lai, ‘[Acting one way and talking another: China's coercive economic diplomacy in East Asia and beyond](#)’, The Pacific Review, 31:2, 169-187 (2018).

Scott L. Kastner, and Margaret M. Pearson, ‘[Exploring the Parameters of China’s Economic Influence](#)’, St Comp Int Dev 56, 18–44 (2021).

Peter Harrell, Elizabeth Rosenberg, and Edoardo Saravalle, ‘[China's Use of Coercive Economic Measures](#)’, Report of 11 June 2018 by the Center for a New American Security.

James Reilly, ‘[China’s Economic Statecraft: Turning Wealth Into Power](#)’, November 2013, Analysis by the Lowy Institute for International Policy.

[The limits of China’s economic coercion: Luke Patey for Inside Policy \(macdonaldlaurier.ca\)](#), 26 April 2021.

Third, the report benefits from input by academic and policy experts. Several meetings (March-May 2021) were held with Australian National University, School of Regulation and Global Governance (REGNET), in relation to their research programme on [Navigating](#)

[the Emerging Geoeconomic Order](#) led by Prof. Anthea Roberts and including Dr. Darren Lim, Dr. Benjamin Herscovitch, Victor Ferguson and Dr. Dirk van der Kley.

Furthermore, three dedicated exchanges of views took place with the following academics:

| <b>First session (May 2021)</b>        | <b>Affiliation</b>  |
|--|---|
| 1. Dr. Dawid Walentek                  | University of Warsaw, Department of Political Science and International Studies, Poland   |
| 2. Drs. Felipe Rodriguez Silvestre     | Department of European, Public and International Law, Universiteit Gent, Belgium  |
| 3. Univ. Prof. ret. Dr. Gerhard Hafner | Institute of European, International and Comparative Law, University of Vienna, Austria   |
| 4. Prof. Gerald Schneider              | Department of Politics and Public Administration, Universitat Konstanz, Germany   |
| 5. Prof. Henri Culot                   | Faculty of Law and Criminology, Universite Catolique de Louvain, Belgium  |
| 6. Dr. Julia Grauvogel                 | German Institute for Global and Area Studies, Germany   |
| 7. Ass. Prof. Ketian Vivian Zhang      | Schar School of Policy and Government, George Mason University, United States   |
| 8. Dr. Luke Patey                      | Danish Institute for International Studies, Denmark   |
| 9. Prof. Dr. Tom Ruys                  | Department of European, Public and International Law, Universiteit Gent, Belgium  |
| <b>Second session (June 2021)</b>      |   |
| 1. Prof. Andrew Lang                   | Edinburgh Law School, University of Edinburgh, United Kingdom   |
| 2. Prof. Antonios Tzanakopoulos        | Faculty of Law, University of Oxford, United Kingdom  |
| 3. Prof. Antonino Ali                  | National and European Security Law - EU Sanctions and Judicial Review, Faculty of Law - School of International Studies, University of Trento |
| 4. Dr. Christian von Soest             | German Institute for Global and Area Studies (GIGA), Hamburg, Germany   |
| 5. Prof. Dr. Julian Hinz               | Bielefeld University and Kiel Institute for the World Economy, Germany  |
| 6. Ass. Prof. Kerim Can Kavakli        | Department of Social and Political Sciences, Bocconi University, Italy  |
| 7. Dr. Lorand Bartels                  | University of Cambridge and Counsel, Freshfields, United Kingdom  |
| 8. Dr. Patrick M. Weber                | Department of Politics and Public Administration, Universitat Konstanz  |
| <b>Third session (September 2021)</b>  | <i>(focused on the draft legislative proposal)</i>  |
| 1. Prof. Andrew Lang                   | Edinburgh Law School, University of Edinburgh, United Kingdom   |
| 2. Prof. Antonios Tzanakopoulos        | Faculty of Law, University of Oxford, United Kingdom  |
| 3. Dr. Dawid Walentek                  | University of Warsaw, Department of Political Science and International Studies, Poland   |
| 4. Prof. Gerald Schneider              | Department of Politics and Public Administration, Universitat Konstanz, Germany   |
| 5. Dr. Lorand Bartels                  | University of Cambridge and Counsel, Freshfields, United Kingdom  |
| 6. Dr. Patrick M. Weber                | Department of Politics and Public Administration, Universitat Konstanz  |

|                                    |  |
|------------------------------------|--|
| 7. Drs. Felipe Rodriguez Silvestre | Department of European, Public and International Law, Universiteit Gent, Belgium |
| 8. Prof. Dr. Tom Ruys              | Department of European, Public and International Law, Universiteit Gent, Belgium |
| 9. Ass. Prof. Kerim Can Kavakli    | Department of Social and Political Sciences, Bocconi University, Italy           |

Finally, the report is based on internal knowledge and expertise within DG TRADE and also within other services (FISMA, GROW, RTD, HOME, CNECT, ENER, BUDG, Legal Service and others).

## Annex 2: Stakeholder consultation – synopsis report

### Introduction

The stakeholder consultation comprised a variety of activities aimed to provide sufficient opportunities for all relevant stakeholders and citizens to participate and make their views known. The consultation activities were carried out throughout March-June 2021 and in line with the announced [Consultation strategy](#) of 19 March 2021, available on [DG Trade webpage for the initiative](#). They included the following:

- Inception impact assessment for feedback from 17 February to 17 March 2021;
- Online stakeholder meeting for the launch of the public consultation (16 April 2021);
- Targeted consultations with specific groups throughout March-June 2021;
- Open public consultation on EUSurvey on all EU official languages for 12 weeks, from 23 March to 15 June 2021;
- Ad hoc submissions March-June 2021 (some in July 2021);

The relevant stakeholders are identified as follows:

- EU businesses (including SMEs) and their associations, trade unions, including those active outside the EU, as well as EU Member States' public authorities. This category is considered to have a high interest and stake in the initiative.
- Research and academic institutions, think tanks, consultancies and non-governmental organisations and platforms, in particular as regards identifying and studying the problem of coercion. This category is considered to have a high to moderate interest and stake in the initiative.
- Finally, non-EU governments and non-EU businesses, as well as international institutions and bodies. This category is considered to have a high to moderate interest and stake.

The activities and their outcome are presented below.

### Feedback on the inception impact assessment

The inception impact assessment ([here](#)) outlined the political and legal context, the problem the initiative aims to tackle, the pursued general and specific objectives, the baseline scenario and contemplated policy intervention as well as potential impact and consultation activities foreseen. The Commission received 22 submissions ([available here](#)) from Business associations (10), Company/Business organisations (5), Public authorities (3), EU citizens (2), non-EU citizens (1) and Academic/Research Institutions (1), from the following countries: Belgium (6), Sweden (3), France (3), Poland (2), Germany (2), Estonia (1), Denmark (1), United States (1), Russia (1), Japan (1) and Iran (1).

The Commission took account of the feedback in the finalisation of the consultation strategy and of the questionnaire for the public consultation as well as in the subsequent assessment reflected in this report. The input was a useful early guidance for the Commission in its preparatory work. The feedback confirmed the general approach of the impact assessment report in terms of the elements that should be considered as part of the available policy options and their impacts. Most of the respondents also participated in the public consultation and/or other consultation activities with confirmed and/or evolved views.

Stakeholders and citizens raised relevant issues for consideration with regard to the main elements of the impact assessment. Businesses and their associations were predominantly supportive of the initiative in that coercive measures are of a concern for EU interests (reporting on some practices) and should be countered, the triggers for the legal instrument should be broad (a number of suggestions were made), to include for example informal coercion, and possibly extra-territorial sanctions by non-EU countries. At the same time, they point to the need to avoid or minimize collateral damage to businesses when countering the coercion, impact to stakeholders to be duly accounted for, and for proper consultation with stakeholders prior to adoption of countermeasures. A few stakeholders, across the groups, were cautious in their support, while some explicitly recognised that the coercion is an existing issue. More specifically, they suggested a thorough assessment of the need for an instrument and its impact, especially any detrimental impact on international relations, on EU Member States and other stakeholders, as well as a prominent role for EU Member States in the operation of such an instrument. That group also prioritises building cooperation among international partners and integration with those facing the problem. Additionally, across the groups, a few raised the issue of compatibility of an instrument for countering coercion with the WTO Agreement and of a legal basis under the EU Treaties. Finally, several, across the groups, referred to the need for coherence with the parallel Commission's initiative on the reform of the Blocking Statute.

### **Stakeholder meeting**

A stakeholder meeting accompanied the launch of the public consultation. The meeting assisted stakeholders and citizens in participating in the public consultation, and offered a first exchange of views. The Commission used the feedback as a basis for further discussions with specific stakeholders and took it into account in the subsequent work. Accordingly, the feedback guided the Commission in every aspect of the impact assessment work, in particular as regards the development of available policy options and their likely impact.

More than 120 participants registered for the meeting, representing the following groups:

- Business associations and companies: predominantly operating within the EU, and in the UK, China, US;
- EU Member States' public authorities: Belgium, Italy, Estonia, Germany, Denmark, Czech Republic, Ireland, Hungary, Spain, Lithuania, Austria;
- Non-EU public authorities: Brazil, New Zealand, Japan, Taiwan;
- EU institutions: European Parliament, EESC;
- Academic/research institutions: Belgium, Italy, Finland, US, Turkey;
- NGOs: Belgium;
- EU citizens in France, Germany, Lithuania;
- Journalists and law practitioners within the EU.

Intervening participants spoke generally in favour of an anti-coercion instrument and the need to preserve the open strategic autonomy and policymaking space of the EU and Member States. Some expressed the view that the instrument should be adaptable to the geopolitical challenges in the next 20 years and not merely focused on the next few years.

As regards possible triggers for the instrument, the need for a response to extra-territorial sanctions of third countries was a recurring theme with most speakers suggesting coverage within the instrument. Participants also emphasized that informal coercion exists and should be addressed. Excessive and burdensome export controls was also raised as a form

of coercion to be considered. It was further suggested that triggers must be high and that there should be a reaction only if vital interests are at stake. Some argued for a wider scope.

As regards possible responses and their likely impact as well modalities of use, participants spoke about the need for predictability and legal certainty, proportionality, fairness, the temporary nature of measures and effectiveness. At the same time, some expressed caution about causing harm and targeting industries with a big trade surplus. It was noted that account must be taken of global supply chains.

As regards decision-making under the instrument, some raised the issue of managing Member States solidarity and the question of an EU interest test. Effective stakeholder involvement was regarded as essential and suggestions for public and private hearings as well as longer consultation periods were made. The importance of the speed of action to ensure the effectiveness of the instrument was also highlighted.

Additionally, participants regarded the question of WTO and public international law compatibility of the instrument as essential. Others put forward the idea of a data collection and coordination body within the institutions to ensure a coordinated response through various available instruments to the horizontal nature of coercive and extraterritorial measures that can take place in many fields like export control, data, digital, etc.

### **Targeted consultations**

The Commission carried out a number of targeted consultations with the aim to deepen the discussions with specific stakeholders on specialised subjects in relation to the problem of coercion and the possible solutions. This was an opportunity for the respective stakeholders to provide their expertise but equally to seek clarification from the Commission with a view to shaping their positions. Meetings were held in closed sessions due to the level of technical detail as well as to allow for an open exchange of views on a sensitive subject. Certain stakeholders preferred an oral exchange and were reluctant to provide written input for fear of adverse consequences for their interests abroad. In the majority of cases, views were shared informally, while the formal views followed through the public consultation or formal ad hoc submissions. Yet, the informal views shared in this context were valuable and effective guidance on elements for consideration in the impact assessment. In addition to the meetings planned and initiated by the Commission, many stakeholders came forward and requested meetings or invited the Commission team to participate in events organised by their organisations on the subject.

Activities took place with each of the identified groups of stakeholders. The majority of the activities (10) were with businesses and their associations (across Europe but mostly based in Germany, France and Belgium), and those active abroad (China, Russia). Events were organised with EU Member States (all) or with their participation, including individual meetings with Member States on their request, academia (three dedicated discussions with academics-experts in the field, a list available in Annex 1) and think tanks and the like (ECFR, Cercle Europe, Justice et Droits, Fondation pour le droit continental), non-EU countries' public authorities (Australia, Canada, New Zealand, Japan, Singapore, the UK, the US). The CTEO spoke on the subject at the International Trade Committee (INTA) April 2021 meeting at the Parliament.

EU business associations and those active abroad focused on the scope of the triggers with the tendency to argue for a broader scope, including informal coercion, coercion at private operators, extra-territorial sanctions. They were also mindful of the possible collateral damage of EU countermeasures, inflicted on them, as well as the risk of escalation though

retaliation. There is a strong interest for this group to be properly involved and consulted prior to any use of the instrument. Ideas as regards the creation of a coordination or resilience body or office were floated. The impact assessment report treats all these topics.

Particularly useful were the exchanges with academia and think tanks as regards the definition of the problem of economic coercion, drivers and evolution of the economic coercion, and possible solutions. The input received, also in the form of literature and articles on the subject, fed substantively into the impact assessment. References to the work relied on are contained in the report.

The meetings with the EU Member States and political parties in INTA helped indicate the preliminary views about coercive practices and likely impact of a policy intervention. The main topics raised in INTA at that stage concerned the scope of triggers and the necessity to address informal coercion and for the instrument to be comprehensive and ambitious in general, including coverage of extra-territorial sanctions. There were calls on the Commission to speed up the preparation of the legislative proposal, sooner than end-2021. Member States welcomed the ongoing work on an impact assessment, regarding it as essential, and the preliminary views ranged from support to calls for caution about the potential instrument.

Third countries' reactions were careful at that stage, tending to inquire for details rather than to share a position. The main topics of interest were types of actions to be qualified as coercive, referring to the extra-territorial sanctions as well, the possible solutions, relations with WTO and international law, and decision-making under the instrument.

### **Public consultation**

**48** contributions were submitted via EUSurvey, including **12** position papers, while **12** additional contributions were made outside. The majority were business associations, representing hundreds of companies and industries at national or EU level. **16** countries were represented. The detailed results of the open public consultation, including a list of respondents, are available [here](#), while a summary factual report is available [here](#).

A few points emerged as **consensual among all groups** and they form the basis of the preferred option. First, economic coercion is increasingly posing a problem for the EU and Member States such that it needs an appropriate solution. Stakeholders put forward a number of examples of coercive measures taking place from multiple sources (but mainly China, Russia, Turkey, US). Second, where the solution lies in the creation of a new legal instrument, the deterrence function of the instrument must be predominant and a priority for the design. Third, where coercion does happen, countermeasures should be taken only as last resort and only after efforts are being made to encourage the discontinuation of the coercion. Fourth, the collateral costs of countermeasures must be factored in in the selection of the EU's action in concrete cases. Finally, most often stakeholders urged that the EU consider the risk of conflict escalation and the consequences for the international cooperation, multilateralism and the rules-based order. The report addresses these issues in detail.

The public consultation shows some differences as regards more detailed design issues and between the groups (rather than major differences within the groups). Typically, **business associations and companies**, which came forward in large numbers, including those representing **SMEs**, were in favour of an EU intervention in the form of a new legal instrument. They recognise its benefits and argue that even if costs are unavoidable, the cost of the coercion is higher than the cost of inaction. They generally act on their economic



interest of seeking protection from coercive measures (and/or their effects) and accordingly not to be harmed even more, through potential EU countermeasures or third countries' further measures in escalation. Because of this interest, they most often argued (also in line with views expressed during targeted consultations) that the instrument should cover not only informal, silent coercion, but also extra-territorial sanctions and any coercion against private actions, and that the range of available countermeasure must be sufficiently broad to allow for calibration in concrete cases, and to support the deterrence value of the instrument. These options and reported potential impact are taken up in the impact assessment. That group also expressed an interest in the financial compensation option, which was not retained in the preferred option. The views on the subject are mixed. Roughly half of the respondents across the groups favour it (mostly businesses), and the other half either disagreed or showed no interest. Businesses in favour also pointed to potential issues such as complexity of determining the compensation, budgetary implications and appropriateness for this instrument.

Generally, the few **EU Member States** that came forward did not share the same line of argumentation. Some Member States approach the possible EU intervention with more caution (referring to concerns of interaction with the WTO and international law, alleged risks for the multilateral trading system and not convinced about the absolute need for an instrument but are willing to engage) and some that expressed solid support (while recognising the risks and suggesting ways to manage them). However, the public consultation is not capable of revealing the whole picture. Member States have a further say during the legislative process. Nevertheless, their reactions at this stage is a valuable input together with the rest of the input and are taken into account.

A few business associations and public authorities raise the idea of the resilience office. The report refers to these views and explains why the option is not retained at this stage.

### **Ad hoc submissions**

Additionally, the Commission provided for a direct contact for this initiative (via a functional email address), which was an additional opportunity for citizens and stakeholders to make their views known in a non-structured or informal fashion or to request meetings on the matter. The Commission received 12 ad hoc submissions from Business associations and organisations (7) and Member States' public authorities (4), from the following countries: Austria (1), Belgium (5), Denmark (1), France (2), Germany (2) and Sweden (1). The input received is integrated and presented within with the public consultation results in the preceding section.

### **Conclusion**

The consultations covered all main components of the impact assessment and beyond. Stakeholders' input received through the different activities guided the Commission in the assessment work, and the preferred option reflects the majority's views. The input contributed subsequently to the shaping and design of the proposed legal instrument. It has been described throughout the report and annexes how the concrete elements of stakeholder feedback were used.

## Annex 3: Who is affected and how?

### 1. PRACTICAL IMPLICATIONS OF THE INITIATIVE

| Stakeholder  | Practical implications:<br>Existence of the instrument   | Practical implications:<br>Instances of use of the instrument<br>where coercion occurs   |
|--|--|--|
| <b>Public authorities</b><br>(EU institutions;<br>Member States) | Setting up of the decision-making process under the instrument; e.g. a committee or expert group of Member States;   | The European Commission would be the most affected as it will carry out the decision-making procedure. Depending on the final determination on the use of implementing and delegated acts, Member States, the Council and the European Parliament would be affected as well.<br>The Commission would engage with the third country concerned in the application of this instrument.<br>The Commission would organise and conduct consultations with stakeholders in the application of the instrument. |
| <b>EU businesses, including those operating abroad</b>           | No direct implications. No action required.<br><br>Economic operators would have the opportunity to submit to the Commission any data or information they have as regards coercive measures by non-EU countries. | The imposition of countermeasures under the instrument would affect EU economic operators where the countermeasure is related to their activities.<br><br>Economic operators would have the opportunity to provide input as regards the economic interests potentially affected by planned EU countermeasures, but also economic interests affected by the concrete coercive measures.   |
| <b>Consumers</b>   | No direct implications. No action required.  | Indirect effects might be possible in the use of certain countermeasures, such as trade-restrictive measures.  |
| <b>Non-EU countries</b>  | In general, they are the addressees of the deterrence effect of the preferred option and it is expected that they would be encouraged to refrain from coercion towards the EU and its Member States as a result. | The non-EU countries or their economic operators or citizens may be affected by the concrete EU response.  |

### 2. SUMMARY OF COSTS AND BENEFITS

Specific costs are linked to the use of the instrument in specific, future cases and for the reasons stated in the report it is not feasible to estimate them at the design phase.

| <i>I. Overview of Benefits (total for all provisions) – Preferred Option</i>  |               |   |
|---|---------------|---|
| <i>Description</i>  | <i>Amount</i> | <i>Comments</i>   |
| <i>Direct benefits</i>  |               |   |
| EU authorities are able to adopt policies, which were at the origin of the coercion, without being subject to external pressure |               | By deterring third country coercion or deterring threats of using coercive measures |

|  |  |   |
|--|--|---|
| More predictable environment in the sphere of trade policy; including:                   |  |   |
| (i) lower transaction costs for EU exporters, which is of particular importance for SMEs |  | If coercion would take the form of host country import restrictions                   |
| (ii) lower host country compliance costs for EU investors                                |  | If coercion would take the form of restrictions in the market of the coercing country |
| (iii) lower costs for EU importers and predictable supply                                |  | If imports of inputs for their economic activity would be restricted                  |
| <b>Indirect benefits</b>   |  |   |
| Continued and stable employment  |  | In sectors that would be targeted by coercive country                                 |
| Lower or stable prices for EU consumers  |  |   |

Costs are specified based on the assumption that the instrument is able to deter coercion and therefore is used less than once a year. This is classified as “one-off” in the table below.

| <b>II. Overview of costs – Preferred option</b> |                |  |           |   |           |   |           |
|---|----------------|--|-----------|---|-----------|---|-----------|
|   |                | Citizens/Consumers   |           | Businesses  |           | Administrations   |           |
|   |                | One-off  | Recurrent | One-off   | Recurrent | One-off   | Recurrent |
| <b>Policy package 2</b>                         | Direct costs   | Higher costs of products if there is pass-through effect<br><br>Third country: may take place if a specific group of funding or persons is affected by countermeasures |           | Higher costs of imported products; depressed market access; restricted operations of EU investors abroad (depending on countermeasures)<br><br>Third country: may take place if a specific group of funding or persons is affected by countermeasures |           | Administrative costs of assessing the damage to the EU economic operators and designing countermeasures<br><br>Third country: may take place if a specific group of funding or persons is affected by countermeasures |           |
|   | Indirect costs |  |           |   |           |   |           |

## Annex 4: Analytical methods

Analytical methods foreseen at this stage:

### ***Formal coercion***

In cases of formal coercion, economic impacts can be assessed with the use of an in-house partial equilibrium (PE) model. The model allows quantifying those impacts and revealing possible trade diversion effects and has been used extensively, for instance to assess impacts of the adoption of countermeasures in the WTO context.

The PE model is an adaption and extension of the basic four equations, perfect competition framework of Balistreri and Rutherford (2013)<sup>99</sup>. On the basis of the elasticities of the products considered and of the quantification of the trade cost increase brought by the introduction of a barrier, the model calculates the reduction in trade generated by the price increase for analysed subset of goods and for specified trade partners.

It has been used at DG TRADE for numerous analyses of trade policies usually focussed on a subset of goods, such as trade defence and dispute settlement cases but also of initiatives such as FTAs. The model being partial means that no macroeconomic effects, i.e. on GDP, factor markets, aggregate price level, etc. are produced and their possible interaction with what happens in single product markets are not available. Furthermore, no cross-price effects are taken into account. The model is specified with trade and tariff data only, meaning that domestic effects can only be analysed implicitly. Despite being partial, the model closes the world market for each product under analysis by including a rest-of-the-world aggregate and therefore allows to draw conclusions on possible trade diversion.

The model is run in GAMS.

### ***Informal coercion***

If it is possible to quantify a given trade barrier, the analysis of economic impacts of informal coercion could be done with the use of the PE model described above.

However, when it is not possible to quantify a change in trade barriers, the analysis of impacts would need to more be qualitative. It can follow the structure currently applied in Market Access Cases Workflow (MACFLOW) repository. MACFLOW was created to ensure the transparent workflow of enforcement activities – from the collection of information, analysis and prioritisation, to removal actions. It provides structure for encoding trade barriers enacted by third countries, which in turn allows prioritising and managing irritants while developing synergies between desks, delegations and sectorial / thematic units.

### ***Necessity for tailor-made approach***

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<sup>99</sup> Balistreri, E. and Rutherford, T. (2013): Computing general equilibrium theories of monopolistic competition and heterogeneous firms. In Dixon, P.B. and Jorgenson, D.W. (ed.): Handbook of Computable General Equilibrium Modeling. Chapter 23, pp. 1513–1570. Oxford (UK), Elsevier.

In any given case, it may be necessary to develop in-house, tailor-made, unique analytical approach, incorporating some other tools of economic analysis, depending on the case (e.g. econometrics).

## Annex 5: Overview of certain existing instruments and their relation to coercion

| Instrument  | Scope of application and objectives   | Action under the instrument  | Relation to coercion   |
|---|---|--|--|
| <p><b>Regulation on the access of third-country economic operators, goods and services to the Union's procurement market and procedures supporting negotiations on access of Union economic operators, goods and services to the procurement markets of third countries</b></p> <p>(currently in the legislative process)</p> | <p>Applies where a third country does not give EU companies access to procurement</p>   | <p>1/ Investigation of the third country's measures and respective consultations with the third country on the matter;</p> <p>2/ Imposition of measures to limit the access of economic operators to the Union procurement or concessions market in the area of non-covered procurement;</p> | <p>Does not specifically relate to coercion;</p> <p>If a third country uses measures that fall within the scope of the instrument but with a coercive objective towards the EU or Member States, then the instrument remains available to address the situation as it falls within its scope.</p> <p>This does not change the proposition that the instrument is neither suitable, nor capable to respond to the coercive objective.</p> |
| <p><b>Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules</b></p>  | <p>Applies where dispute settlement procedures have been completed (or if they are blocked) to enforce the EU's international rights under WTO Agreement or other EU trade agreements</p> | <p>Various types of countermeasures in goods, services, intellectual property rights and public procurement</p>  | <p>The situations falling within the scope of the instrument are unconnected to coercion.</p> <p>The instrument is neither suitable, nor capable to respond to the coercive objective.</p>   |
| <p><b>Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union</b></p>  | <p>Applies where foreign direct investment into the Union is likely to affect security or public order</p>  | <p>1/ Screening mechanisms involving assessment and investigation</p> <p>2/ Possibly prohibition of foreign direct investments to be determined by the Member States (not the EU)</p>  | <p>Does not specifically relate to coercion;</p> <p>If a third country uses measures that fall within the scope of the instrument but with a coercive objective towards the EU or Member States, then the instrument remains available to address the situation as it falls within its scope.</p> <p>This does not change the</p>  |

|   |  |  |  |
|---|--|--|--|
|   |  |  | proposition that the instrument is neither suitable, nor capable to respond to the coercive objective.   |
| <b>Regulation on foreign subsidies distorting the internal market</b><br><br>(currently in the legislative process)   | Applies where foreign subsidies may cause distortions in the internal market, in particular with regard to concentrations and public procurement procedures  | 1/ Investigation<br><br>2/ Redress and commitments that include divestment and the reduction of market presence  | The situations falling within the scope of the instrument are unconnected to coercion.<br><br>The instrument is neither suitable, nor capable to respond to the coercive objective.  |
| <b>Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union</b>  | Applies in case of subsidies for the manufacture, production, export or transport of any product whose release for free circulation in the Union causes injury   | 1/ Investigation<br><br>2/ Countervailing customs duties on the supplying country and/or individual exporters and producers to offset the countervailable subsidy or injury<br><br>3/Possibility for undertakings            | The situations falling within the scope of the instrument are unconnected to coercion.<br><br>The instrument is neither suitable, nor capable to respond to the coercive objective.  |
| <b>Regulation (EU) 2015/478 on common rules for imports;</b><br><br><b>Regulation (EU) 2015/755 on common rules for imports from certain third countries</b>                                      | Applies where a product originating in a third country is imported in such greatly increased quantities as to cause or threaten to cause serious injury to Union industry  | 1/ Investigation;<br><br>2/ Safeguard customs duties to offset injury  | The situations falling within the scope of the instruments are unconnected to coercion.<br><br>The instruments are neither suitable, nor capable to respond to the coercive objective.   |
| <b>Regulation (EC) No 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom</b> | Applies where extra-territorial application of a legislation adopted by a third country affects the interest of designated persons within the Union engaging in international trade and/or capital movement or other commercial activities | Nullifying the effect of foreign court rulings based on the foreign laws listed in the Annex and allowing EU operators to recover in court damages caused by the extra-territorial application of the specified foreign laws | Does not specifically relate to coercion;<br><br>If a third country uses measures that fall within the scope of the instrument but with a coercive objective towards the EU or Member States, then the instrument remains available to address the situation as it falls within its scope. |

|   |  |                                       |   |
|---|--|---------------------------------------|---|
|   |  |                                       | This does not change the proposition that the instrument is neither suitable, nor capable to respond to the coercive objective.   |
| <b>WTO dispute settlement system and the bilateral dispute settlement systems</b> | <p>Available to address breaches under the respective international agreements.</p> <p>In the WTO's case, also other cases of nullification or impairment of benefits can be addressed</p> | Treaty-made dispute settlement system | <p>Does not apply to coercion.</p> <p>Coercion in breach of customary international law does not feature among the possible claims that can be submitted to these dispute settlement systems.</p> |