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An Eye For An Eye?

The European Commission's Proposal for an Anti-Coercion Instrument and What It Means for Member States

Abstract

The European Commission proposed a Regulation for an Anti-Coercion Instrument (ACI) at the end of 2021, which is the latest example of a protectionist-style shift in EU Trade Policy. The ACI would grant the Commission strong competences to impose economic countermeasures, similar in their scope and effect to the existing sanctions under the Common Foreign and Security Policy. However, as the ACI is to be placed under the Common Commercial Policy, these economic sanctions would be adopted by only qualified majority voting, therefore effectively circumventing the unanimity rule in the European Council when it comes to sanctioning third countries and their legal persons. The article discusses some of these developments in the ACI Proposal in order to provide context for the legislative process.

Keywords: Common Commercial Policy, Anti-Coercion Instrument, European Commission, sanctions, unanimity, qualified majority

I An End of an Era?

European trade integration started from scratch after the Second World War, based on the consensus that it creates a win-win situation. It reached its peak while bringing about the Single Market between 1990 and 2008, during which time the total trade in

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goods and services increased from 39% to 61% of world GDP.¹ Trade gave impetus for many other European Union policies, including investment, competition, and research & technology, to develop and form in the spirit of free trade. However, during the years following the economic crisis of 2008, trade has dropped to around 58% of world GDP² while new economic powers have emerged to claim their place in the international political arena from the EU-US axis. This challenge of the existing world order gave a push to subtle, non-tariff forms of protectionism, meaning that the once-dominant forms of trade restrictions such as tariffs, quotas and border measures, began to be replaced by seemingly impartial, technical measures, for example subsidies, taxes and environmental and labour regulations.

In an environment where everybody respects global rules, the EU approach was founded on open markets, and trying to reduce tariffs and non-tariff barriers. This is evidently not the case anymore as the Bloc faces unprecedented disputes with old allies and new competition from emerging players in the domains of international trade. As a reaction to that, the European Commission has initiated several new pieces of legislation over the last couple of years, with the aim of making EU trade policy fit for the power politics and challenges represented by the changing world order. The shift became apparent with the Von der Leyen Commission taking up office, explicitly to make Europe stronger on the global stage.³

The EU still accounts for around 15% of the world's trade in goods,⁴ and is the third largest economy in the world in nominal terms, after the United States and China. It is no surprise that primarily trade is involved when it comes to the EU's relations with other countries and organisations, especially since the Union by itself has no military power and only very limited conventional diplomatic means. The Union has been equipped with a set of conventional instruments against unfair trade practices, such as anti-dumping and anti-subsidy duties. However, due to events such as the trade war with the United States, China buying into European strategic industries, and their recent ban on Lithuanian imports and exports, the Commission concluded that it did not have enough means to stand up for the EU economy. In the last two years, it initiated legislation such as the EU Foreign Direct Investment Screening Regulation, the Foreign Subsidies Regulation (FSR) and the International Procurement Instrument (IPI), deriving from the White Paper on levelling the playing field as regards foreign subsidies, together with those still in a proposal stage, such as the Proposal for an EU Corporate Sustainability Due Diligence Directive, and most recently a Proposal for an Anti-Coercion Instrument (ACI).

¹ Vanessa Gunnella, Lucia Quaglietti, 'The economic implications of rising protectionism: a euro area and global perspective' 2019 (3) ECB Economic Bulletin <https://www.ecb.europa.eu/pub/economic-bulletin/articles/2019/html/ecb.ebart201903_01~e589a502e5.en.html> accessed 16 September 2022, title 1.

² Gunnella, Quaglietti (n 1) title 1.

³ Hans von der Burchard, Jacopo Barigazzi, Kalina Oroschakoff, 'Here comes European protectionism' (17/12/2019) Politico <<https://www.politico.eu/article/european-protectionism-trade-technology-defense-environment>> accessed 16 September 2022.

⁴ Eurostat, 'Facts and figures on the European Union economy' <https://european-union.europa.eu/principles-countries-history/key-facts-and-figures/economy_en> accessed 16 September 2022.

Before looking into the latter in detail, it is important to highlight that putting a legislative proposal under scrutiny for how it was adopted, its applicability or the unintended, or overreaching effects it might have does not directly imply opposition to the core idea behind it. Free trade with third countries is not equal to tolerating unfair trading practices. Nevertheless, investigating the strongest and newest specimen of restrictive measures, the ACI, helps us to get a clear picture of the recent trends in EU trade policy, as well as the background processes and hidden motives, since it is a complex set of rules with possibly far-reaching consequences for the EU's relations with certain third states, its own Member States and the EU legal order.

II A Real Hard Power Added to the EU Trade Enforcement Arsenal?

At the end of 2021, the European Commission put forward a Proposal for an Anti-Coercion Instrument, aiming to remedy a legislative gap to address the evolving issue of economic coercion. The proposed regulation, backed by extensive consultations and an impact assessment, is still in the legislative process and is currently being discussed before the European Parliament's Committee on International Trade (INTA).

While modifications of the Proposal cannot be ruled out, given that it is yet to be approved by the Parliament and the Council, it is still more than relevant to analyse it in its current form, as it constitutes one of the most significant improvements to the EU's trade arsenal⁵ and it well represents the new approach the Commission has taken as a response to the rising politicisation of trade and the emerging geopolitical landscape. To illustrate the point, several articles frame the Proposal as a tool targeting China,⁶ which, in the beginning of 2021, put Lithuania under a de facto trade embargo after Vilnius allowed Taiwan to open a representative office in the country. Not that trade-related disputes have never arisen between the EU and China before, but the idea for anti-coercion measures actually predates the Lithuanian dispute by a few months, as it was first laid down in the 2021 State of the Union letter.⁷

The Proposal defines economic coercion as a situation where 'a third country is seeking to pressure the Union or a Member State into making a particular policy choice by applying, or threatening to apply, measures affecting trade or investment against the Union or a

⁵ Mayer Brown Legal Update, 'European Commission Unveils Its Anti-Coercion Instrument Proposal' (9 December 2021) <<https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2021/12/european-commission-unveils-its-anticoercion-instrument-proposal.pdf>> accessed 16 September 2022, introduction.

⁶ Elettra Ardissono, Eyck Freymann, 'The European Union Is Turning on China' (2022) Foreign Policy <<https://foreignpolicy.com/2022/06/23/european-union-china-relations>> accessed 16 September 2022.

⁷ Ursula von der Leyen, Maroš Šefčovič, 'STATE OF THE UNION 2020 – Letter of Intent to President David Maria Sassoli and to Chancellor Angela Merkel' (16/09/2020) <https://ec.europa.eu/info/sites/default/files/state_of_the_union_2020_letter_of_intent_en.pdf> accessed 16 September 2022.

Member State'.⁸ The definition essentially could not be broader, thus covering all kinds of direct or indirect measures of economic coercion in the form of trade or investment restrictions. This also means that the Commission could identify a wide range of third country measures as coercive, since international trade is rarely without countries putting pressure on each other. The Commission carried out extensive consultations and conducted a detailed impact assessment, in view of the expectable harsh criticism of the potential economic fallout of such measures. This unveiled that stakeholders generally prefer to deter third countries from economic coercion in softer, diplomatic ways above all, and they are generally wary of using interventionist measures. They see countermeasures as a last resort that should primarily be avoided, because of the risk of collateral damage, further retaliation and escalation.⁹ They fear the obvious, that the ACI would be used for political objectives and would become a protectionist tool.¹⁰

There is also the risk that trade restrictions become permanent. 'Temporary' economic and other sanctions have been in force since 2014 on Russian, Crimean and other entities, which raises the issue whether amending, suspending, or terminating such sanctions would happen anytime soon. The American Chamber of Commerce in the EU – the members of which could very well find themselves to be targets of this instrument – and other stakeholders stress that it is of the utmost importance that the EU remains open to international trade and investment, and that the EU should be especially careful not to shift from an open to a defensive or even protectionist trade policy, as it would have negative consequences for international businesses, their supply chains and investment decisions.¹¹

The necessity of a considerate, multi-step process was backed by the impact assessment as well. The mechanism was constructed in that spirit; as Mayer Brown's analysis aptly describes it, with 'assess, talk, warn, strike'.¹² In broad terms, the procedure involves the Commission investigating whether the measure qualifies as coercive and then stating it publicly; entering into an alternative dispute resolution phase with the third country; and, as a last resort, intervening by adopting countermeasures (with a deadline to cease coercion), *if* the action is deemed necessary and is in the Union's interest. The Commission would also be required to raise the issue in front of relevant international organisations (mainly the World Trade Organisation) and consult or cooperate with other affected countries.

⁸ Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries' COM (2021) 775 final (Anti-Coercion Instrument Proposal) Explanatory Memorandum, title 1.

⁹ Anti-Coercion Instrument Proposal Explanatory Memorandum (n 8) title 3.

¹⁰ Insurance Europe, 'Proposed EU anti-coercion instrument must not be used as protectionist tool' (14/03/2022) Consultation response <<https://www.insuranceeurope.eu/news/2566/proposed-eu-anti-coercion-instrument-must-not-be-used-as-protectionist-tool>> accessed 16 September 2022.

¹¹ AmCham EU, 'Mechanism to deter & counteract coercive action by non-EU countries' (07/03/2022) Consultation response <https://www.amchameu.eu/system/files/position_papers/20220307_consultation_paper_eu_anti-coercion_instrument.pdf> accessed 16 September 2022.

¹² Mayer Brown Legal Update (n 5) title 2.

III Combatting Economic Coercion as well as Unanimous Decision Making

According to Annex I of the Proposal, a wide variety of countermeasures may be adopted such as the suspension of any tariff concessions and the imposition of new or increased customs duties; the introduction or increase of restrictions on the importation or exportation of goods; suspending the right to participate in public procurement; and denying access to financial services. It is essential from the perspective of this article to note that the Commission may amend this list by adding other available measures via a delegated act.¹³ It is also the Commission that proposes the adequate countermeasure from the list, which only needs to be approved by a committee consisting of representatives of the Member States with a qualified majority vote.¹⁴ This way of adopting a countermeasure is not only dangerous in terms of lacking effective oversight – no European Parliament participation and no unanimity required from the Member States – but it would circumvent the already existing sanctions system under the Common Foreign and Security Policy (CFSP), which requires a unanimous decision from the Member States. The Commission put forward Article 207(2) TFEU¹⁵ as the legal basis of the Proposal, according to which the proposed instrument falls under the EU’s common commercial policy rather than foreign policy. The Proposal only provides that ‘the application of this Regulation shall be consistent with the Union’s overall external policy’.¹⁶

The idea of changing the unanimous voting rule has been put forward many times by various political actors in the EU (including several Member States), but it can only be set aside by a unanimous decision in the Council, for which there is hardly a consensus nowadays. While of course not questioning the Commission’s exclusive competence on trade matters, which is laid down in the Treaties with absolute clarity, some of the economic countermeasures – and especially the fact that the Commission can invent new ones as they see fit via a delegated act¹⁷ – could be comparable to economic sanctions under CFSP. As the Proposal currently stands, this means the EU could, for example, ban third country legal persons from trading on EU markets or prohibit them from using EU financial services with just a qualified majority approval from representatives of the Member States. In terms of impact, let us compare this with the latest EU sanctions package in response to Russia’s invasion of Ukraine. This ‘maintenance and alignment’ package, adopted unanimously in the Council on 21 July 2022, includes *inter alia* prohibiting the purchase, import or transfer

¹³ Anti-Coercion Instrument Proposal (n 8) art 7 (7).

¹⁴ See ‘Committee procedure’ in Anti-Coercion Instrument Proposal, art 15.

¹⁵ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

¹⁶ See ‘Legal basis’ in Anti-Coercion Instrument Proposal.

¹⁷ There is a right of veto guaranteed to the Council and the Parliament, but with a qualified majority in the Council and an absolute majority in the Parliament. These are proposed and adopted by the Commission in accordance with a mandate provided by the co-legislators (since the Commission is drafting the basic legislative act, it would usually take advantage of this by giving the mandate a broad scope).

of Russian-origin gold, and forbids EU companies from making funds available to a major Russian financial institution, Sberbank.¹⁸ Although this time Member States agreed fairly easily, an even more alarming comparison would be the infamous 5th Sanctions Package, which bans imports of coal and other solid fossil fuels from Russia in general. During the negotiation of the so-called oil ban, landlocked countries – namely Slovakia, Czechia, and Hungary the harshest – fought with their only effective tool, the veto, for an exemption, which they were eventually granted. If this had happened under the ACI, they could have simply been voted out (to be cynical, their vote is not even required to adopt the ACI, as it comes in the form of a regulation). As a sort of cherry-on-top, the Proposal would also allow the Commission to adopt countermeasures targeting foreign direct investments (FDI) made within the EU by third country affiliated legal persons,¹⁹ which could result in the Commission and a qualified majority of Member States preventing an investment in a Member State, even if the Member State would otherwise welcome it. While there are legitimate concerns about certain foreign acquisitions of EU companies (mostly for security and public order reasons), the competence still lies within the Member States to make the ultimate decision on which foreign direct investment they allow or prohibit from entering the country.

Not forgetting that the Proposal would still need to go through the EP and the Council, which involves possible softening, there is no doubt that, as it stands, this is a hard power tool and the most potent trade defence mechanism compared to any previous initiatives. The implications of such legislation would be far reaching – some people have already started to advocate expanding it in wartime situations.²⁰ The Proposal and the adoption mechanism perfectly sheds light on the dangers of economic sanctions and the possible protectionism they bring, and to the questionable practice of circumventing unanimous decision-making and the lack of effective oversight of the Commission's competences and, finally, consistency issues regarding existing EU mechanisms.

IV Conclusions

Trade policy is an exclusive EU competence for a reason. It is widely shared that having a trade policy at EU level rather than at a national one allows for more weight in trade negotiations and within international institutions. It is the European Commission that

¹⁸ Council of the European Union Press release, 'Russia's aggression against Ukraine: the EU targets additional 54 individuals and 10 entities' (22/06/2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/07/22/russia-s-aggression-against-ukraine-the-eu-targets-additional-54-individuals-and-10-entities>> accessed 16 September 2022.

¹⁹ Mayer Brown Legal Update (n 5) title 3.1.

²⁰ Hackenbroich, Jonathan, 'Europe's new economic statecraft: A strong Anti-Coercion Instrument' (2022) The European Council on Foreign Relations <<https://ecfr.eu/article/europes-new-economic-statecraft-a-strong-anti-coercion-instrument>> accessed 16 September 2022.

is best suited to put EU trade policy into effect, which also involves updating the EU's existing regulations in certain cases. However, looking at the bigger picture, trade defence initiatives over the last couple of years also highlight the underlying difficulty that comes with the concept. A uniform trade defence instrument for the whole Bloc is a perfect tool when a Member State with strong Brussels lobby power does not want to adopt retaliations or restrictions alone, so it pushes instead for a group decision according to its own interest (which then becomes an EU interest). However, since trade policy has become a major tool in geopolitical rivalries – topped with the war in Ukraine – it is also increasingly difficult to distinguish it from foreign policy, which implies that a similarly strict scrutiny and oversight is needed by the Parliament and the Council to ensure its democratic functioning.²¹

This is why the anti-coercion instrument is likely to meet resistance from several players. The free-trade favouring countries would fear that the ACI could intensify trade conflicts, and countermeasures would become permanent; the smaller Member States would try to prevent their veto powers from becoming useless, and all Member States in a difficult economic situation would want to preserve their unconditional right to decide what kind of investment they allow in. Finally, the European Parliament would likely also ask for more involvement in the countermeasure procedure. As such, as one takeaway, it will be vital for Member States in support of unanimity to try to round up support against the adoption of the ACI in its current form, as it would rob them of their most important advocacy tool when it comes to economic sanctions, the veto. Moreover, for all of the Bloc, it would be vital that EU trade policy is not allowed to turn further into protectionism and start focusing on the underlying bigger problem, of which the trade defence mechanisms are only symptoms. As a rule of thumb, in international trade everybody provides what is their own national best interest; not for mutual recognition, nor for a level playing field, but for the beneficial effects of creating more trade revenue or new foreign investment. If the EU continues to offer less, but imposes more restrictions, it clearly shows the scales have been tipped against us.

²¹ For more details on the lack of effective accountability in trade measures, see: Thomas Verellen, 'Unilateral Trade Measures in Times of Geopolitical Rivalry' (25/05/2021) Verfassungsblog <<https://verfassungsblog.de/unilateral-trade-measures-in-times-of-geopolitical-rivalry>> accessed 16 September 2022, <https://doi.org/10.17176/20210527-100702-0>.