

To whom it may concern

**Abteilung für Wirtschafts- und Handelspolitik**  
Economic and Trade Policy Department  
Wiedner Hauptstraße 63 | Postfach 197  
A-1045 Wien  
T 05 90 900DW | F 05 90 900258  
E whp@wko.at  
W <https://wko.at/whp>

Ihr Zeichen, Ihre Nachricht vom

Unser Zeichen, Sachbearbeiter  
WHP/SF  
Simon Fleischmann

Durchwahl  
4218

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## **Opinion of the Austrian Federal Economic Chamber**

(English translation of the official WKÖ Opinion available in German)

**Assessment of the proposal for a new EU trade defense instrument for the immediate application of response measures in the case of unilateral coercive measures by a third country (“Anti-Coercion Instrument” / ACI)**

### **I. In general**

The Austrian Federal Economic Chamber shares the view that unfair coercive measures by third countries affecting trade or investment restrict the external trade freedom of Austrian and European businesses and that the EU, even though it has the exclusive competence for commercial policy legislation, to date does not have a trade defense instrument to counteract such coercive measures.

Therefore, the Austrian Federal Economic Chamber welcomes the proposal for an anti-coercion instrument (ACI). This proposal would enable the EU Commission as the competent institution to counteract coercive measures by third parties directed against the EU, its member states, or economic operators in the EU with a new, autonomous, and powerful defense instrument. At the same time, it should be ensured that the instrument does not violate international law, especially WTO legislation, and that the instrument is in line with the EU’s legal competences in the area of commercial policy.

For the review of the Regulation proposal, we would like to share the following comments and kindly ask you to take them into consideration:

## II. In detail

### **Regarding Article 1 (Regulation's subject-matter) and Article 2 (Scope)**

The European Union has the exclusive competence for commercial policy, but not for external and security policy. Therefore, the new trade defense instrument is exclusively to be used as a response measure to coercive measures affecting trade or investment, but not as a response to actions by third countries that violate international law.

Response measures by the EU are only permissible within the limits defined in Article 207 of the TFEU. This means that they must be directed against specific coercive measures that immediately interfere with or threaten to interfere with European economic operators' trade or investment activities.

In the view of the Austrian Federal Economic Chamber, in Article 1 and Article 2, the Commission has made it sufficiently clear what constitutes discriminating coercive measures by third countries affecting trade and investment and that the instrument may only be used as a reaction to such coercive measures and that it follows that it falls under the policy area of the common European commercial policy. This new instrument may not be used to counteract other coercive measures by third countries that violate international law.

Any selected response measures (Annex I) must also be limited to cross-border external trade or investments that are permissible under Article 207 of the TFEU. However, we believe that restrictions of trade or investments within the single market should not be taken within the framework of the common European commercial policy. In addition, the Proposal leaves substantial discretion for the Commission about the kind of response measures to be taken. This should be made more objective by introducing guidelines.

Regarding the scope, we recommend clarifying that the instrument will not be applied where other EU trade defense instruments for the defense against specific measures by third countries affecting trade and investment exist, especially the Trade Enforcement Regulation, the anti-dumping and anti-subsidy instruments, the Surveillance Regulation and Safeguard Regulations about common rules for imports or the International Procurement Instrument.

Also, it should be ensured that this Regulation proposal is compatible with the Blocking Regulation whose review is pending.

### **Regarding Article 3 (examination of third-country measures) and Article 4 (determination with regard to the third-country measure)**

The new instrument's objective and goal are to deter third countries from imposing coercive measures. For the instrument to have a preventive effect, the proposal gives ample political discretion to the Commission to determine if and when a third-country measure is considered a measure of economic coercion pursuant to Article 2 (2) and what appropriate response measures pursuant to Article 7ff should be taken.

The Regulation allows the Commission to act largely autonomously in all procedural steps and gives it the flexibility to determine formal or informal measures for settling the conflict with third countries without imposing response measures ("exit ramps").

In our opinion, this flexibility by the Commission should be guided by clear and objective guidelines, and above all in close collaboration with the member states in the Council while including the third country in question. Above all, the affected economic operators in the EU must actively be included by the Commission from the beginning of the investigation.

While we believe that the Commission should, in the case of imminent danger, be able to take preliminary measures with immediate effect on short notice pursuant to Article 7 (6) of the Regulation proposal, as a general rule, definitive, i.e., long-term response measures should only be taken together with the member states along with an **examination procedure pursuant to Article 5 of Regulation 182/2011** and after a **mandatory public consultation of interested parties**.

Therefore, Article 3 (3) (2) should make the publication of a notice about the formal initiation of an examination in the Official Journal of the European Union **mandatory** instead of optional, thereby allowing all interested parties to participate in the procedure.

Article 3 (3) (2) should therefore read, instead of

*“The Commission **may** publish a notice in the Official Journal of the European Union or **through other suitable public communication means** with an invitation to submit information with a specified time limit”,*

as follows:

*“The Commission **shall** publish a notice in the Official Journal of the European Union with an invitation to interested parties to submit information within a specified time limit **of no less than 15 working days prior to the examination whether definitive anti-coercion measures may be imposed.**”*

This addition would also be in line with Article 11 (1) of the Regulation proposal, which stipulates a mandatory publication in the Official Journal or any other mandatory consultation for the purpose of information gathering prior to the adoption of response measures.

In addition, prior to any examination, member states should, during a formal procedure, provide information to the European Commission about the existence or threat of coercive measures by third parties against the member state or economic operator in the member state in question, which the Commission shall assess and forward to the other member states.

The article in question could read as follows:

*Article 3a*

*Examination of third-country measures against individual member states*

*“If a third country threatens to impose or has already imposed coercive measures against an individual member state or economic operators in the respective member state, the affected member state shall inform the Commission without delay. This notification shall include all available evidence that follows from the criteria set out in Article (2) (2). The Commission shall forward this notification to all member states without delay and shall consider initiating an examination of third-country measures.”*

**Regarding Article 5 (Engagement with the third country concerned) and Article 6 (international cooperation)**

No comments for the time being. Article 12 (2) generally clarifies that no information provided under the condition of confidentiality shall be published.

**Regarding Article 7 (Procedure for adopting Union response measures), Article 8 (Response measures with regard to natural or legal persons) and Article 9 (criteria for selecting and designing union response measures)**

We explicitly welcome the provisions made in Article 8 regarding the claim of civil damages against persons defined in Article 8 (2).

Regarding Article 9 (3), the Austrian Federal Economic Chamber believes it to be questionable whether, based on Article 207 of the TFEU, restrictions on direct investment and services supplied within the single market for persons established in the EU may be made, especially if these persons are not listed themselves pursuant to Article 8 (2), but are merely under the economic (majority) ownership or under the control of a listed third-country person. Ownership or control by persons established in the Union must not be a final criterion for encroaching upon such persons' freedom of ownership and freedom to do business in the EU. The Austrian Federal Economic Chamber therefore proposes a review to determine if restrictions pursuant to Article 9 (3) of the Regulation Proposal violate European or constitutional provisions and, in case they do not, to determine if these restrictions are permissible under Article 207 of the TFEU or if they require another basis in Union law.

**Regarding Article 10 (Amendment, suspension, and termination of response measures)**

No comments for the time being.

**Regarding Article 11 (Information gathering)**

In paragraph 3, *industry associations* must be replaced by *business associations*. Coercive measures can equally affect all economic sectors (trade, banking, transit, etc.).

**Regarding Article 12 (Confidentiality), Article 13 (rules of origin), and Article 14 (delegated acts / amendments to the list of possible response measures)**

No comments for the time being.

**Regarding Article 15 (Committee procedure)**

See comments regarding Article 4. No further comments for the time being.

**Regarding Article 16 (Review) and Article 17 (Entry into force of the Regulation)**

No comments for the time being.

**Annex I (selecting possible response measures)**

Annex I describes some of the possible response measures. These response measures include both trade and investment-related restrictions such as customs duties, customs quotas, export and import restrictions, restrictions on trade of services, direct foreign investment, tender procedures in the area of public procurement, protection of intellectual property, access to financial services including banking and insurance services, access to the EU capital market and other financial

services. Another possible response measure is the restriction of collaboration with the concerned third country within the framework of the European Bank for Reconstruction.

In the opinion of the Economic Chamber, response measures are only permissible within the limits of constitutions, EU legislation, and international law. Above all, the new instrument must not interfere with the right of ownership of Union citizens and businesses established in the EU or violate WTO law. Single market trade or investment restrictions should not be the subject of response measures.

In addition, it is the responsibility of member state authorities to provide or deny licenses for exporting goods within the framework of the Dual Use Regulation 2021/821 or other relevant export control provisions. In the view of the Austrian Federal Economic Chamber, it is questionable whether, within the framework of the proposed trade defense instrument, interference with export control rules, especially the Dual Use Regulation, is permissible.

## **Annex II**

No comments for the time being. Regarding businesses under (majority) ownership or under the control of listed persons, please see our comment about Article 9 (3).

### **Other important comments:**

For the new instrument against coercive measures by third countries to yield results, the Austrian Federal Economic Chamber believes that it should be complemented by a mechanism of government safeguards and guarantees for European economic operators affected by such coercive measures. Businesses that suffer the collateral damage of lost sales or profit resulting from coercive measures or EU response measures should receive financial compensation. This would considerably increase businesses' trust that the ACI provides sufficient protection against coercive measures by third countries.

### **III. Summary**

With the new anti-coercion instrument, the EU shall be empowered to defend itself from coercive economic measures by third countries such as China, Russia and the USA. For this purpose, the EU Commission shall make use of trade and investment-restrictive countermeasures against third countries or individuals based on the new anti-coercion instruments. However, the primary objective of the instrument must stay to prevent third countries from imposing coercive measures against European businesses. Countermeasures shall be used only as the last resort to protect EU businesses from coercive measures.

With kind regards

Dr. Harald Mahrer  
President

Karlheinz Kopf  
Secretary General