AmCham EU
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Consultation response

Mechanism to deter & counteract coercive action by non-EU countries

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3 trillion in 2020, directly supports more than 4.8 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

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Introduction

The aim of trade policy should be to open markets and guarantee a level playing field for all, notably by establishing market access in a fair and equitable way. The geopolitical and economic reality makes the context of trade policy increasingly politicised, and the EU currently lacks a system to respond autonomously to coercion through economic pressure. The EU proposal for a Regulation on the protection of the Union and its Member States from economic coercion by third countries (hereafter anti-coercion instrument [ACI]) could be positive for the business environment in Europe insofar as it counteracts behaviours that undermine the rights and interests of the EU and its Member States or distort free and fair competition for all businesses.

The ACI should be seen as a measure of last resort, it should be WTO-compliant and implemented in coordination with other relevant countries and policies. It should also include assessment and analysis of how businesses could be affected, to avoid unpredictability, uncertainty and escalation. Its final configuration and potential impact should be carefully assessed in coordination with other EU initiatives and reforms, to avoid overlaps, accumulation of its effects and excessive administrative burden on businesses.

Legal basis

Economic and trade relations should be developed based on mutually agreed principles and rules. As such, the inclusion of several behaviours by third countries in the scope of the regulation, is welcome. Such rules should not be politicised or weaponised for geostrategic purposes. Thus, legally basing the proposed regulation on article 207(2) of the Treaty on the Functioning of the European Union (TFEU), provides for the adoption of measures defining the framework for implementing the common commercial policy. The consequent inclusion in its scope of services and investments, as well as several conducts against international law or that hamper the rule-based trading system, are also welcome - notably those violating intellectual property enforcement and acts carried out by the judicial system of third countries in violation of the rule of law. This is especially relevant to protect the ability of businesses from the EU and its trade partners to innovate and invest in research and development (R&D) and standardisation globally, especially in the digital and technology sectors.

Scope of coercion and measures

Noting the declared primary purpose of deterrence of the ACI, its implementation will require a careful and comprehensive definition of several elements, based solely on objective criteria.

The definition and identification of the scope of coercion should include a comprehensive assessment of the origin and potential impact of the coercive conduct, focused on businesses and trade interests. The criteria of article 2 defining the scope of coercion are open to interpretation. More detail and guidance is needed on what could constitute 'legitimate sovereign choices' in article 2(1) or 'legitimate concern that is internationally recognised' in article 2(2)d. It should be thoroughly considered whether some third countries have, or not, clear intent behind and full control over the circumstances perceived as coercive behaviour.

The activation of each phase foreseen in the ACI should be based on stringent criteria and pragmatic thresholds, targeting grave conducts that have or can have grave consequences. Article 2(1) describes threats of coercion as possibly constituting coercion, which might cause issues at the time of evaluating their impact. The regulation should use 'shall' instead of 'may' in article 3(3), first sentence, and article 4, second paragraph, to ensure that any countermeasure is proportionate to the damage caused or prevented. The concept of 'interest of the Union' present in several articles – notably 1(1), 7(1)b, 7(1)c, 7(5) and 9(2) – should be defined more clearly to avoid unpredictability and legal uncertainty. Moreover, the regulation should acknowledge that non-action may be in the interest of the Union and should thus include such an option.

The measures threatened or adopted should be based on an objective methodology assessing economic and trade factors. International cooperation and article 5 of the proposal are very important to avoid to the extent

possible a negative impact and retaliation on businesses, especially as companies may end up being the target of measures regardless of their involvement in the coercive behaviours. Elements allowing the targeting of specific persons as per article 8(2) should be further defined and interpreted narrowly. The criteria in article 9 are too open-ended and vague and would require guidelines to reduce unpredictability.

International cooperation

The ACI includes provisions on the need for the EU to coordinate with trade partners, notably in its article 6. Indeed, the most effective and persuasive anti-coercion measures may be those coordinated with like-minded countries, notably at transatlantic or G7 level. A more coordinated approach may also reinforce the deterrence effect of the measures, and possibly reduce the need to impose them, as well as reduce the ensuing risk of escalation. Therefore, the elements on international cooperation in the proposal should be reinforced, notably foreseeing international coordination at all stages of the process.

The regulation should explicitly mention the need to avoid overlaps and ensure compatibility with existing international and multilateral frameworks, notably the EU's commitments under WTO law. The EU should ideally seek to configure the instrument so as to create the assumption that a measure imposed under the instrument is WTO-compliant because it is a response to coercion in order to avoid doubts about their nature as countermeasures under international law, and thus be attacked at the WTO. Whereas a WTO dispute may only address breaches of WTO law - not the coercive nature of certain behaviours - action in that framework might also be effective. The regulation should allow for the suspension or withdrawal of the measures or the framework in case of international or multilateral action with the same subject matter and purpose that has already been adopted and enforced during the ACI decision process.

Stakeholders' consultations

AmCham strongly welcomes the reference to consultation of businesses and stakeholders in article 11 of the proposal. A robust framework that includes businesses' views in the process is paramount to avoid backfiring of any measures, which could directly or indirectly target or damage European, US or transatlantic value chains and imports that sustain jobs and possibly downstream industries in the EU.

Article 11 is a vital element of the proposal and must be part of the final regulation. The obligation of the Commission to collect data on economic impact (article 11[1]) and to inform and consult in particular industry associations (article 11[3]) are of utmost importance. In line with this, the exceptions of article 11(6) should be further specified and interpreted restrictively. Furthermore, the final regulation should explicitly include mechanisms that allow information gathering and consultation of affected stakeholders at the early stages of the process, notably at the time of examination and determination of third country measures. Article 3(3) should thus use 'shall' instead of 'may' in its first sentence and article 4 should include provisions allowing for the same degree of participation.

Accumulation and de-escalation

Any overlap with existing legislation should be examined and avoided, both in terms of defining the scope of the regulation as well as at the time of defining and imposing measures under ACI. The frameworks to be considered should include existing EU trade defence cases, the new EU enforcement regulation, the blocking statute, the international procurement instrument (IPI), the Regulation to address distortions caused by foreign subsidies in the Single Market, the Agreement on Government Procurement (GPA), as well as the sanctions toolbox at the disposal of the EU under its external relations competences.

The risk of retaliation and escalation should not be underestimated. Measures like these could set off a vicious circle of escalation. For instance, the EU and its Member States use economic pressure to influence policies of other countries with the Generalised Scheme of Preferences (GSP+) system: when ACI is adopted, beneficiary

countries could be tempted to frame their complaints as instances of economic coercion, by reference to the EU's own legislation. There is also the risk that the restrictions become *de facto* permanent. The regulation should therefore allow for de-escalation and withdrawal of the measures already adopted, based also on the possibility to obtain or maintain similar effects with other EU measures. Information received from relevant stakeholders or sudden changes of the context should be thoroughly considered.

Conclusion

AmCham EU members understand the need for this proposal and agree with its rationale and scope of application. However, this instrument must remain balanced, compatible with the WTO. complementary to other EU trade defenses and instruments, implemented as a measure of last resort and grounded in coordination with trade partners and the consultation of affected businesses.

Fair and free trade and open markets foster economic exchanges and provide the best conditions for economic coordination and improvement of international trade rules. The ACI can complement the WTO efforts to advance international trade law, provided that the EU's trade policy does not shift from open and outward-looking to defensive and inward-looking, or even protectionist, with negative consequences on international businesses, their supply chains and investment decisions. Against this backdrop, the ACI should include safeguards to ensure its primary function of deterrence.

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