

## European Commission Preliminary Impact Assessment – **Legislative initiative for an anti-coercion instrument**

### AFEP COMMENTS ON THE PRELIMINARY IMPACT ASSESSMENT ROADMAP

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**AFEP** would like first to thank the European Commission for giving the opportunity to **submit comments on the roadmap for the impact assessment of a legislative regarding the adoption of an anti-coercion instrument** in line with international law.

Large French companies clearly **welcomes the preparation of such initiative**, announced in the joint declaration adopted at the sides of the revised Enforcement Regulation.

As signalled in AFEP public contribution to the public consultation on the trade policy review, The EU should, notwithstanding its commitment toward multilateralism and due dispute settlement proceedings, **be equipped with a vast array of unilateral tools** to adequately respond in an agile way to **different harmful and/or adversarial situations** to be faced with our trading partners. Discussions held during the legislative procedures towards the adoption of the revised Enforcement Regulation shed light on the need to design an instrument to **rapidly react to unilateral and disproportionate trade restrictive measures by third countries** outside the framework of WTO or FTA dispute settlement mechanism, alongside the new flexibility brought by the Enforcement Regulation to handle the blocking of appeal or bilateral DSM proceedings.

With a view to fuelling the on-going impact assessment, AFEP shares the following comments regarding the different aspects of the intended legislative proposal on an anti-coercion tool:

#### **Close coordination with the impact assessment on the revision of the Blocking Regulation and other initiatives on the improvement of the EU resilience**

Large French companies have long advocated for a substantive revision of the blocking Regulation with a view to effectively protecting EU businesses against measures with extraterritorial effects and increase its deterrence.

In this respect, AFEP welcomes the **possible inclusion of extraterritorial sanctions and other extraterritorial measures in the scope of measures by third countries taken into to decide on EU responses** ("triggers") under the proposal for an anti-coercion instrument (see below) and the **parallel initiative of a possible update of the blocking Regulation regarding notably the protection tools for business as well as non-trade retorsion measures**<sup>1</sup>.

As hinted in the roadmap for the anti-coercion instrument, large French companies deem **necessary that the two impact assessments are conducted hand in hand** and that the resulting legislative proposals bring forward an **optimum articulation of both legislations on adequate EU responses**. This consistence exercise should be **extended to the entire spectrum of policy initiatives proposed to increase the EU resilience** such as the much-expected set-up of an **EU resilience taskforce** that could work both on the uniform enforcement of EU sanctions as well countermeasures to coercive

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<sup>1</sup> Key action 15 of the communication « the European economic and financial system : fostering openness, strength and resilience

measures by third countries (identification of coercive measures and possible countermeasures, assistance to EU companies facing coercive measures inter alia).

### Notion and scope of coercive measures

The roadmap does not entirely clarify whether the legislative proposal will limit the scope of “triggers” to regulations, administrative measures or behaviours adopted by third countries in breach with international law.

While responses envisaged under the proposed instrument should be of course compatible with international law, AFEP insists nonetheless that criteria used for determining the triggers are **flexible enough to capture the variety of economic coercion behaviours**, even if **they do not consist themselves in a failure to comply with specific commitments under the WTO or bilateral FTAs**.

Likewise, the appreciation whether a measure is deemed to be coercive should not only focus on the intended effect on EU and its member states policies **but also on the expected effect on EU companies and their market position**, keeping in mind that possible damages vary from a sector to another, depending to pre-existing bounds with the country imposing or subject to coercive measures.

Should therefore be considered, in addition to extraterritorial measures adopted in violation of EU Member States sovereignty (sanctions, export control or investment screening decisions with an extraterritorial reach), a large spectrum of behaviours such as the adoption of **trade and investment restrictive measures** meant to impose a certain course of action to EU and its Member States or abusively distort the competition with EU companies, **threats** of such measures as well as **intended administrative delays** for instance during certification processes, **excessive border controls** (acting as de facto export ban or custom duties) or **exercise of legal constraints** to abusively extract sensitive piece of information and data from EU companies in the context of **judicial or prior criminal investigations by foreign prosecuting authorities** on the EU territory or in the jurisdiction of these third countries.

**Such list cannot be exhaustive or limited to official/published measures**, since foreign countries resorting to coercive behaviours may deny that they derive from a deliberate policy. This is also an additional reason why the European Commission should **retain a certain room for manoeuvre in the material determination of these coercive actions**, using for instance an **approach based on a set of evidence** (“faisceau d’indices”).

### Proceedings for the enforcement of the anti-coercion instrument

Assuming that the instrument’s enforcement will likely made contingent upon prior investigation procedures in potential coercion cases, large French companies insist that they are **framed in time to allow for rapid actions** in case EU interests are deeply affected by coercive measures. A quick and swift assessment and response to these behaviours is indeed a key element to strengthen the deterrent effect of this tool.

EU companies being first in line to endure the economic damages inherent to coercive measures by third countries, AFEP also recommends that **investigation procedures could be initiated both ex officio and upon requests of impacted businesses**. The same way, if an EU interest for acting is required, this test should take into account not only the harm done on the EU and its member States sovereignty **but also the level of these economic damages, as well as the likely impact of EU responses**, including in terms of countermeasures adopted in turn by targeted third countries.

This requires putting into place **a monitoring system** to quantify losses endured by EU businesses due to coercive measures and risks inherent to EU envisaged responses. By the same token, the **prior investigation phase should include a thorough stakeholder consultation** during which EU

companies would be able to **share data on the impact of economic coercive measures** but also be given the opportunity to **participate in hearings on the nature and level of EU intended responses**, to share their view on their likely impact on their activities. This consultation process should take place at an early stage in the design of intended measures and rely on the publication of consultation notices by which the European Commission would detail the types of evidence requested as well as EU responses envisaged.

### EU Trade and investment responses

Large French companies agree that the anti-coercion instrument should mainly act as a deterrent and that trade and investment responses should be considered only if the threat of these measures is not sufficient to have EU trading partners backtracking.

Nonetheless, the deterrent effect will much rely on the **credibility and the scale of trade and investment measures** that the EU is likely to roll out. This requires contemplating a very large scope of restrictive measures, covering **trade in goods** (both in terms of tariffs and non-tariff barriers), **trade in service, investment, IPR and government procurement**.

AFEP also suggests that the impact assessment analyses the **different options for determining the level of EU potential countermeasures as well as their purpose**, in coordination with the impact assessment conducted for the revision of the blocking regulation.

One of the weakest point of the blocking regulation is obviously the lack of effectiveness of legal proceedings for obtaining compensation for economic damages caused by extraterritorial measures imposed by third countries.

While AFEP is ready to make concrete proposals to improve legal proceedings against third countries' assets as well as on other aspects of the blocking regulation (notably in giving more flexibility to EU companies in complying with the ban to abide by extraterritorial measures depending on the country concerned) , it is also worth considering whether the **quantum of EU measures adopted under the anti-coercion could be calculated by reference to the economic damages endured by EU companies** (hence the added value to set up a monitoring tool to measure up these damages) and if **EU tariff measures could finance a compensation fund for EU companies**. Such considerations build up on ideas floated in the policy brief by the European Council for Foreign Relations (ECFR) referred to in the roadmap.

In addition, the determination of EU responses should take into the **likeliness of countermeasures by third countries** and be **calibrated with respect to the pre-existing trade relationship**. It would be advisable to avoid imposing restrictive measures on sectors for which the EU has a trade surplus to limit the scale of countermeasures by targeted countries.

AFEP stands of course ready to further elaborate in its reply to the public consultation to come.

### About AFEP

Since 1982, AFEP brings together large companies operating in France. The Association, based in Paris and Brussels, aims to foster a business-friendly environment and to present the company members' vision to French public authorities, European institutions and international organisations. Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation is AFEP's core priority. AFEP has around [111 members](#). More than 8 million people are employed by Afep companies and their annual combined turnover amounts to €2,600 billion.

AFEP is involved in drafting cross-sectoral legislation, at French and European level, in the following areas: economy, taxation, company law and corporate governance, corporate finance and financial markets, competition, intellectual property and consumer affairs, labour law and social protection, environment and energy, corporate social responsibility and trade.

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