March 2022

ESF Position on European Commission Proposal for a *"Regulation on the protection of the Union and its Member States from economic coercion by third countries"* (Anti-Coercion Instrument – ACI)

I. EXECUTIVE SUMMARY

- ESF takes note of the initiative to establish an anti-coercion instrument. Although ESF does see the potential merits of such an instrument in a fast-changing world, such an instrument could generate great risks if abused. We can see benefits for a reasonable use of an anti-coercion instrument in the area of trade in goods. In this Paper, ESF has highlighted some of the concerns that we have for an implementation in the fields of trade in services, investment and IPR, and asked for further debate.
- ESF would like to reiterate the importance of FDI for the EU's economy, particularly in services, and calls on the Commission to ensure the right balance between maintaining Europe's attractiveness as an investment destination and its legitimate need to defend its interests through anti-coercion instruments.
- ESF insists on the progressive and proportionality approach, as well as clear and transparent processes, before activating anti-coercion measures in these fields. Such measures should be activated only in last resort. They should be used only to correct trade related coercion, not for foreign affairs purposes.
- ESF would like to obtain more information on possible examples of coercion on services sectors in the different modes of supply, as well as examples anti-coercion measures in the services sectors and what form they can take.
- ESF is concerned by the creation of precedent of possible anti-coercion measures affecting trade in services, foreign direct investment and IPR, as they might be used by third countries against EU businesses as counter-retaliatory measures and would have possible strong impact on all sectors.
- Should such measures be discussed as last resort tools, ESF calls upon the Commission to thoroughly consult the sectors concerned before taking any definitive action, and to keep business organisations aware all along until the coercion trouble is solved. Such a consultation mechanism should be enacted into the regulation, similarly to the one set in Regulation (EU) 2021/167 of 10 February 2021, amending Regulation (EU) No 654/2014 ("the Enforcement Regulation").
- ESF also calls on ensuring clarity with regards to competence (between the Commission and EU Member States, with appropriate consultation processes with the latter when decisions must fall under their own competence).

II. BACKGROUND CONTEXT

On 8th December 2021, the European Commission published its proposal for a *"Regulation on the protection of the Union and its Member States from economic coercion by third countries"*, also called the Anti-Coercion Instrument (ACI) Proposal. The instrument has as an objective to, in line with public international law, dissuade or offset coercive action, identified as practices seeking to unduly interfere in the EU's and/or its Member States' policy choices. The

instrument would empower the Commission, in specific situations of coercion, to take trade, investment or other restrictive measures towards the non-EU country exerting the pressure.

The proposal of the European Commission is comprised of two main documents:

1) The Regulation on the protection of the Union and its Member States from economic coercion by third countries and its annexes with a list of possible Union response measures (Annex I) and with clarification on rules of origin, including on the origin of a service, including a service supplied in the area of public procurement (Annex II);
2) The Communication on measures within the Commission's powers which the Commission can adopt when it determines, pursuant to the future Regulation that the Union takes response measures to counteract a third-country measure of economic coercion

Prior to the Commission's adoption of a countermeasure, the Regulation proposal establishes a multi-step procedure in order to dissuade the third country concerned from maintaining the measure of economic coercion. The procedure begins with an examination of the third-country measure, followed by a determination of the existence of economic coercion and an attempt to discuss with the third country in question to remove this coercion. Once the Commission has made such a determination, but engagement with the third country has not led to the cessation of the measure of economic coercion, the Commission can react by adopting an implementing act, determining that it is necessary to take a Union response measure. A number of possible Union response measures are identified in the Regulation.

The Commission has carried out extensive consultations with stakeholders in relation to the issue of economic coercion from February to April 2021. At that time, ESF has not participated to the consultation, notably because it was felt that this possible new instrument would essentially target the goods sectors. And again, we welcome the initiative if implemented in trade in goods as sanctions and counter-actions already exist there and can be relatively well circumscribed to this domain. Indeed, coercive and other unilateral trade measures most commonly take the form of tariffs or other measures affecting the importation of physical goods (Anti-Dumping measures, Counter-Valuing Duties (CVD) and safeguards). This is also the case, up to now, for retaliatory measures taken in response to foreign government action.[1]

While these measures can be significantly disruptive to businesses, consumers, and supply chains—both in the country targeted by the measures, as well in the country imposing them—they are at least already well-known. By contrast, the proposed ACI outlines a range of novel non-tariff retaliatory measures that the Commission could deploy. These include the introduction of new export controls, exclusion from public procurements, restrictions on trade in services, restrictions on foreign investment into the European Union or on the operations of foreign enterprises already invested in the European Union, the suspension of intellectual property rights, and restrictions on access to EU banking and other financial infrastructure.[2]

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[1] *For example, when the United States determined to take action under its domestic law to respond to certain foreign government tax measures that the United States determined were discriminatory, it proposed to impose tariffs on goods imported from those countries, despite the tax measures in question being applied to services providers. See https://ustr.gov/sites/default/files/enforcement/301Investigations/India_DST_Action.pdf.*

[2] *Commission ACI proposal, Annex I.*

ESF is not aware of existing examples of trade sanctions or anti-coercion measures that have ever targeted services, Foreign Direct Investments (FDI)[3] or Intellectual Property Rights (IPR). All of these three issues are of great interest to the European services sectors.

Setting aside the considerable negative impact that all of these measures could have on the business climate in the European Union, we are concerned that, by explicitly including them in the proposed ACI, the Commission risks sending a troubling signal to third-country governments. In finalizing the ACI, the Commission must take care to ensure that it is not inadvertently undermining longstanding principles upon which international trade and investment depend.

We take note that in this Proposal, the Commission has taken the view that the EU Anti-Coercion Instrument should provide the authorities with a tool that would allow a broad enough array of interventions so as to be dissuasive as such, and hence has suggested a long list of possible measures, including many of them potentially targeting the services sectors. This tactic may be understandable but should be used with extreme prudence when deciding to include sanctions in non-goods related sectors.

III. ESF COMMENTS ON THE COMMISSION'S PROPOSAL

A. General comments

In a situation in which foreign governments use trade measures or threats of trade measures or policy of economic coercion that would damage the EU, the single market or its rights in international law, including on international trade in services, it is important that the European Union has the tools at its disposal to deter and, where necessary, respond to such measures. In developing these tools, however, the Commission should be cautious to avoid actions that could cause potential bigger harm than the targeted economic coercion measures to the long-term economic interests of EU exporters, investors, and workers. Several elements of the Commission's proposed ACI raise concern with respect to the impact they may have on these interests.

We take note that such an instrument should be activated exclusively in reaction of economic coercion against the EU or its member states, including when the coercion targets EU economic operators (provided they would be coerced for following EU law). It must not be used proactively as a threatening tool by the EU to obtain political objectives. Furthermore, in many instances, it will likely be hard to distinguish between economic coercion and political coercion. If a given country takes measures against the EU, and that the EU would object to them and decide to take sanctions through the new ACI. It must then be anticipated that instead of stopping the coercion, that country might decide to take counter sanction using measures affecting trade. The EU might then escalate the conflict and use the ACI again against that country. That's how without original intention, one could move from the security policy or human rights policy to trade policy easily.

This is the reason why ESF particularly welcomes the progressive and proportionality approach aiming at first and foremost to cease the coercion measures undertaken against the EU by a

[3] *Beyond the screening of FDI for security reasons and beyond few WTO dispute cases on services (gaming – Antigua v/s USA – DS285 – 2003) & (Telecommunication services – Mexico v/s USA – DS204 – 2000)*

third country, starting with diplomatic action and mediation, and notes that the proposed anti-coercion instrument would be activated only at a last resort. This is absolutely fundamental.

We also understand that the ACI is a tool to stop the measure taken by a third country and not to repair the damages already done by these measures. However, collateral damages produced by EU countermeasures – taken in the frame of the ACI - on EU businesses should be somewhat compensated through a mechanism yet to determine in order to consolidate the business support to this instrument.

Support for Rules-Based International Trade

The European Union has been a stalwart defender of the rules-based international trading system, a framework of rules that is essential to ensuring a predictable and resilient long-term environment that facilitates EU exports and investment. And ESF has always strongly supported that policy. This system is coming under increasing strain by unilateral measures taken outside rules established under the World Trade Organization (WTO) and other international agreements. In responding to these developments, it is important that the European Union as much as possible continue to defend international rules, rather than contribute to a further proliferation of unilateral measures. The priority should be to deploy the EU's considerable diplomatic and legal resources and economic heft to bring foreign governments into compliance with international rules, rather than use those resources to possibly become provocative.

A particular concern in this regard is whether and how the proposed ACI will cohere with the EU's own commitments under international trade rules. It should be clear that this anti-coercion instrument should respect the EU law and EU obligations under international law. For example, WTO rules clearly prescribe that Members must obtain a ruling from a dispute settlement panel before adopting any retaliatory measures.[4] The European Commission has not clearly addressed how actions taken under the proposed ACI would comply with this requirement, other than to note that other principles of international law may provide a justification for the actions.[5] However much the EU's actions may be "justified," unless they can be demonstrated to specifically comply with WTO rules, use of these actions risks further fracturing the rules-based trading system, an outcome that will harm EU exporters and investors over the long term.

The EU law already provides authority for the Commission to take retaliatory action for third-country trade measures that have been adjudicated by dispute settlement panels and found to be in breach of WTO rules or other international trade agreements.[6] The Commission should therefore clearly explain why the additional legal authority proposed in the ACI is necessary in cases where third-country coercive actions are challengeable under available international agreements, and should make clear that it will not forgo rules-based adjudication where such processes are available under applicable international agreements.

Should there be no possible legal venue, the temporary suspension of EU international obligations mentioned in the Annex will be acceptable in order to take additional restriction to

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[4] WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 23 ("Strengthening of the Multilateral System").

[5] Commission ACI proposal, page 2 (speaking to the "right to counteract international economic coercion").

[6] Regulation (EU) No 654/2014 & Amending Regulation (EU) No 2021/167.

stop the economic coercion. ESF would however argue against any decision that might feed escalation with an important trading partner and would recommend a strong balance exercise in deciding which measures to take.

ESF supports the view expressed by the Commission in Article 9.1 of its Proposal that "Any Union response measure shall not exceed the level that is commensurate with the injury suffered by the Union or a Member State due to the third country's measures of economic coercion, taking into account the gravity of the third country's measures and the rights in question." This is important and should be respected even if the EU's anti-coercion measures would possibly not work exactly as intended, as the ACI should restrict itself into the domain of international trade and should not serve as a tool for foreign policy.

On the other hand, one could imagine that EU services enterprises would be forbidden to trade with businesses in a third country in question because for instance the government of that country would make pressure on its own businesses not to trade or deal with EU businesses, and hence result in cancellation of existing businesses contracts and prevention of new contracts. It is not clear however whether such example of "indirect coercion" on businesses without effective government legal measures being adopted against the EU would be covered by Article 2§1 of the Proposal.

B. Comments related to the services sectors

ESF analysed in particular the Proposal so as to better understand the way it might help or impact the services sectors.

European services sectors encounter numerous barriers to enter third markets, through domestic regulation that forbid access, that impose equity caps and localisation requirements through joint ventures, that impose limitation on the legal form of establishment, that limit access to business managers and travellers, etc. On the other hand, there are not many examples of trade sanctions that directly target services sectors. The main reasons being that i) domestic regulation is applicable erga-omnes to all businesses, being national or foreign owned, and that ii) trade in services is taking place beyond the borders, and coercive action at the borders have lower effects on services trade.

The exception of such action at the borders could be translated into prohibition of services providers to travel into a country (GATS Mode 4) by not delivering any business visas and working permits. There are also few examples of companies being obliged to disinvest because of an action of the government or local authorities of the country where they invested in, but such examples are more relevant for the domain of investment protection treaties, not yet related to economic coercive measures.

ESF has some difficulties in identifying examples of such measures targeting services sectors and how the proposal might help the services sectors. ESF would welcome further explanations by the Commission on this regard, by providing some concrete examples of when the ACI could be triggered to support the services sector that might be subject to direct or indirect coercion measures.

The Commission is proposing to be able to impose some sanctions that are aimed directly at services sectors in the third country that exert coercion upon the EU. Indeed, among the

measures listed in Annex I of the Regulation's proposal, one can note measures which may be adopted pursuant to Articles 7 and 8 of the Regulation and in particular:

"(f) the suspension of applicable international obligations regarding **trade in services**, as necessary, and the imposition of measures affecting **trade in services**;

(g) the suspension of applicable international obligations, as necessary, and the imposition of measures affecting **foreign direct investment**;"

The European Services Forum calls upon the Commission to provide more information on how such "suspension of applicable international obligations regarding **trade in services**, as necessary, and the imposition of measures affecting trade in services" would work in practice.

We understand that Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021, amending Regulation (EU) No 654/2014 ("the Enforcement Regulation") "concerning the exercise of the Union's rights for the application and enforcement of international trade rules"[7] has extended the scope of the countermeasures envisaged by the regulation to trade in services and partially to trade-related aspects of intellectual property rights, and that the current proposal uses similar terms in sub-paragraph (f) of Annex I.

However, as to our own information, no example of such suspension of concessions in services schedules of commitments either under the GATS or under bilateral or regional agreement has ever occurred. The European Services Forum reiterates therefore its call for caution in deciding for such measure as a way of anti-coercion. ESF would also be interested in getting more information from the Commission on concrete examples of possible measures "affecting trade in services", their exact dissuasive purpose and the possible consequences on the targeted services businesses. Clarity must be provided on this important issue before the proposed regulation would enter into force, as it would possibly trigger great unpredictability for businesses.

Furthermore, the **question of competence** between the EU institutions and the EU Member States would also need to be clarified. Indeed, even if Opinion 2/15 of the European Court of Justice[8] confirms the full/exclusive EU competence for the commitments related to market access, we understand that market access commitments to EU Member States services markets is made in consultation and agreement of the EU Member States. This explains the long list of restrictions by individual member states in the EU Schedules of commitments either in WTO GATS or in bilateral FTAs. Our understanding would be that, in most cases, any withdrawal by the Commission of a concession granted by a Member State if that state would prefer to keep it might be problematic, at least politically if not legally. At the very least, a proper consultation of the members states and the interested stakeholders will have to be conducted through the comitology process before a delegated act is taken.

And even if the Commission would have the legal competence, is it practically feasible? How can the EU take effective sanction in preventing trade in services through modes 1 and mode 2? Would the EU ban European tourists to go in a specific targeted country on holidays? Again, the question of competence might pop-up as well. And the question is whether the EU wants to take that route? And what will be the costs if similar counterretaliation would be taken?

[7] See OJEU L 49 of 12 February 2021.

[8] ECJ OPINION 2/15 OF THE COURT (Full Court) - 16 May 2017

Possible Discrimination among EU firms

A striking feature of the proposed ACI is the proposal to allow the Commission to impose retaliatory measures on EU companies, based on the equity ownership of those companies and irrespective of whether the companies have any connection to the government of a third country taking coercive action against the EU.[9] Such retaliation would be permitted even if the company in question is a bona-fide EU juridical person that satisfies all criteria for recognition as such under EU treaties. This feature of the proposed ACI raises a host of serious concerns:

1. Negative impact on the investment climate. The European Union is the single largest destination for global foreign direct investment[10]. The proposed ACI sends an immediate signal to existing and potential investors that their activities in the Union could be curtailed as a consequence of political factors over which these investors have no control.

2. Negative impact on EU economy. Retaliatory measures against EU companies, by definition, target entities that make and sell products and services in the Union (including for export) and that employ EU citizens. Penalizing European employers and workers for the actions of foreign governments makes little policy sense.

3. Risk to EU investors abroad. The European Union is also the largest source for global foreign direct investment, much of which is in markets where judicial systems and legal rights are less robust than in the Union. By explicitly providing that foreign-invested enterprises are potential target for purposes of retaliation, the Commission risks putting the thousands of EU investors currently in overseas markets in a highly vulnerable position vis-à-vis foreign governments that may feel they have a green light to emulate the EU approach.

ESF draws the attention of the Commission on the fact that under the revised "Enforcement Regulation", the Commission is required to consult with stakeholders to establish the Union's economic interest and to take their input into account. These requirements of consultation with stakeholders and Member States' public authorities are particularly highlighted as regards measures in the area of trade in services and of trade-related aspects of intellectual property rights where the Commission "shall take into utmost account" the information gathered, and shall provide an analysis of the measures envisaged before proposing implementing measures to Member States (see Article 9.1.& 9.1.a. of Regulation (EU) No 654/2014 I as amended by Regulation (EU) 2021/167). ESF calls upon the Commission and the legislators to ensure that similar stakeholders consultation requirements be enacted in the current proposal for ACI.

We take note that the decision-making process under the ACI instrument falls under the standard framework of delegated and implementing acts, which includes avenues for swift action. We have therefore some questions about how to reconcile a proper consultation of the relevant stakeholders, who should have the opportunity to share their views and data

[9] *Commission ACI proposal, Annex II ("Rules of Origin"), points 2(b)(iii) & 3(c).*

[10] *The EU is the biggest investor in the world with US$13.4 Trillion Outward FDI stocks in 2020 (34.1% of global FDI), and the biggest recipient of investment in the world with US$11.5 Trillion Inward FDI Stocks in 2020 (28% of global FDI) - UNCTAD World Investment Report 2021- Annex Table 2 – page 252. According to Eurostat, 72% of outward FDI positions are invested by the Services sectors, and 80% of Inward FDI stocks in the EU are invested by Services sectors – 2019 – Source: Eurostat [Bop_fdi6_pos].*

regarding the use of the instrument, and a "swift action", while the proposal also is meant to give priority to diplomatic action, which always take time.

It is not clear in our understanding that the proposed measures in sub-paragraph g) *(the suspension of applicable international obligations, as necessary, and the imposition of measures affecting* ***foreign direct investment***) are also envisaged in the Regulation (EU) 2021/167, as much of trade in services is carried out through services enterprises established abroad via foreign direct investment (so-called Mode 3 commitments).

But in any case, regarding the current proposal (which we understand cover all sort of FDI beyond services), ESF calls also for extreme cautious in activating such measure, as the consequences might be devastating for EU businesses that might be subject to counter-retaliatory measures of that nature. We trust that this is not the intention of the Proposal, but setting up the precedent of the simple existence of such a measure could open up a dangerous pandora box. Third countries which would want to activate counter-coercion measures against the EU could use similar sanctions against EU foreign investors and expropriate EU businesses out of their country.

Furthermore, it seems also that such sanctions could be applied to companies in the EU that are foreign-owned, even apparently if these companies have full-fledged EU legal personality (recital n° 18 of the Regulation). Should that be the case, it would be quite unprecedented and could lead to some worrying developments like threatening FDI in the EU. ESF would like to request further explanation on the intention of the Commission on this particular matter. One can question the legality of such measure in European Law, where it has always been clear in the rules of the EU Single Market that businesses established and fully incorporated into the EU law or law of EU member states are EU companies and hence protected by EU treaty[11].

In addition, the Commission should always properly assess with the business community what will be the concrete consequences of such measures on the EU economy. Imposing existing EU firms which would be foreign owned to leave the EU would trigger loss of jobs and wealth, and would seriously damage the EU reputation and credibility for foreign investors. We take note of the subtle but rather long and complex definition of the rules of origin of a service in the case of legal persons that is proposed in Annex II. We are concerned with the introduction of this concept of "nationality of an investment" and again having in mind the use of such a concept by third countries that would wish to use it against EU investments. In many countries around the world, EU services companies have to abide by localisation requirements and joint-venture requirements with equity cap below 50% and hence could be subject to similar measures and be obliged to disinvest[12].

On the other hand, should the intention of such a measure affecting foreign direct investment be to target new comers, it would be certainly more acceptable, but in that case one can wonder the effectiveness of such measure on the third country to stop coercive measures.

Annex I of the Regulation's proposal also lists among the Measures which may be adopted pursuant to Articles 7 and 8:

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[11] *See Article 54 of the Treaty of the Functioning of the European Union – OJEU C 326 of 26 October 2012*

[12] *As a reminder, the EU is by far the main investor in the world with 13.4 Trillion US$ of outward stocks in 2020 (34%), and the main recipient of FDI in the world with 11.5 Trillion US$ of inward stocks in 2020 (28%). The US come second with 8.1 Tri $ outward FDI (20%) and 10.8 Tri $ inward FDI (26%) – Source Unctad FDI Report 2021 page 252.*

"(i) the suspension of applicable international obligations with respect to financial services, as necessary, and the imposition of restrictions for **banking**, **insurance, access to Union capital markets and other financial service activities**;"

Here as well, beyond well-established process for restrictions of payment and other financial services activities in case of sanctions against individual and assets of individuals, the European Services Forum would like to obtain more information on concrete examples of such possible suspension and imposition of restrictions for the listed financial services activities. Is the Commission envisaging the suspension of commercial licences? Or of delivery of new licenses for newcomers in the sector? Once again, ESF invites the Commission and legislators to look at the effectiveness of such measures and at possible impact on EU businesses, should similar measures be taken against EU businesses as counter-retaliatory measures.

In the same vein of previous comments, as many EU services sectors are also taking part of their revenues from the protection of their **Intellectual Property Rights (IPR),** like copyrights on software, on broadcasting, like franchise royalty fees, etc., ESF wants also to raise possible negative impact on the EU when the EU might take anti-coercion measures in this field (see Annex I, sub-paragraph h).

Indeed, when considering the case of intellectual property rights – the EU has long (and rightly) taken the position that protection of intellectual property rights is essential for jobs and growth, and that EU competitiveness depends upon a "solid and predictable IPR legal framework."[13] One need to ask relevant questions like: can a trademark be withdrawn? If a third country firm has registered a trademark in the EU, paid for it and got it recognized, can the Commission then suddenly step in and withdraw it as part of the ACI? That the Commission would now propose to use the protection of these rights as a discretionary trade policy tool sends a contradictory and highly negative signal about the sanctity and importance of these rights, both within the EU and in other markets where observance of intellectual property rights is already less robust than EU businesses would like.

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[13] https://ec.europa.eu/trade/policy/accessing-markets/intellectual-property/

List of members supporting the above position

- Amfori
- Apple
- Architects' Council of Europe –ACE
- British Telecom Plc
- BDO
- Bureau International des Producteurs et Intermédiaires d'Assurances – BIPAR
- BUSINESSEUROPE
- BUSINESSEUROPE WTO Working Group
- BSA The Software Alliance – BSA
- Danish Shipping
- Deutsche Post DHL
- DI – Confederation of Danish Industries
- Digital Europe
- EK - Confederation of Finnish Industries
- EuroCommerce
- European Banking Federation - EBF
- European Community Shipowners' Associations – ECSA
- European Express Association – EEA
- European Federation of Engineering and Consultancy Associations – EFCA
- European Public Telecom Network – ETNO
- FratiniVergano European Lawyers
- General Council of the Bar of England & Wales
- Google
- Huawei Europe
- IBM Europe, Middle East & Africa
- Institute of Chartered Accountants in England and Wales (ICAEW)
- Insurance Europe
- Irish Business and Employers' Confederation - IBEC
- Le Groupe La Poste
- Microsoft Corporation Europe
- Mouvement des entreprises de France – MEDEF
- Orange
- PostEurop
- Prudential Plc.
- Svenskt Näringsliv (Confederation of Swedish Enterprise)
- TechUK
- Telenor Group
- TheCityUK
- UPS
- Vodafone
- Zurich Insurance