TRADE AND SECURITY: THE EU'S UNILATERAL APPROACH TO ECONOMIC STATECRAFT

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KEY POINTS

- The EU is developing new legal instruments to respond to, and provide remedies against, trade policies of third states which harm the EU internal market.
- While China is the main threat to EU trade security the measures will be applicable to all third states, especially Russia, the US and the UK.
- The proposals give the European Commission a central role in the investigation and enforcement of trade remedies but will have significant consequences for business
- The proposals have less than transparent criteria for their application. This gives the European Commission wide discretion but may also entail further guidance, using soft law, if the European Commission wants to avoid legal challenges to the exercise of its new powers.
- The Anti-Coercion Instrument attempts to bypass the slow procedures of the WTO and this raises questions as to whether the measure is compatible with WTO and international law.
- The use of unilateral measures for trade security is a new form of statecraft for the EU, but it may undermine the EU's pledge to maintain a rules-based global trading order.

INTRODUCTION

"The weaponization of trade for other geopolitical purposes is a fact" Vice-President of the European Commission, Dombrovskis.[1]

New legal instruments[2] are being developed by the EU to counter trade threats posed by third countries.

This Briefing Paper analyses two proposals: a Foreign Subsidies Regulation and an Anti-Coercion Instrument. Formal and informal coercion alongside subsidies used by China is considered the main threat to EU trade security,[3] but the measures apply to all third, or non-member states, including the United Kingdom.[4]

The European Parliament and some Member States of the EU shared concerns about the rise of economic coercion during the process to amend the EU Trade Enforcement Regulation in 2020.[5] This Regulation enables the EU to suspend or withdraw concessions or other obligations under international trade agreements in response to breaches of international trade rules by third countries that affect the commercial interests

1 https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_21_6696

2 See: https://www.ceps.eu/download/publication/?id=34908&pdf=PI2021-20_Lithuania-China-and-EU-lawfare.pdf

3 Darren Lim and Victor Fergusson, "Informal economic sanctions: the political economy of Chinese coercion during the THAAD dispute" Review of International Political Economy 26 May 2021, https://www.tandfonline.com/doi/full/10.1080/09692290.2021.1918746

4 In the Public Consultation on an EU Anti-Coercion Instrument respondents identified (potential) coercive measures involving Indonesia, Libya, Nigeria, Russia, Turkey as well as China and the US. https://trade.ec.europa.eu/doclib/docs/2021/september/tradoc_159792.pdf

5 Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules. See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32021R0167

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of the EU. The revised Trade Enforcement Regulation enables the EU to adopt countermeasures when it obtains a favourable ruling from a dispute settlement panel of the World Trade Organization (WTO) or in bilateral and regional agreements and when the other party fails to cooperate on the adjudication of the dispute. Amendments extended the scope of the Trade Enforcement Regulation to cover services and intellectual property rights as well as goods and a confirmation that the Regulation applies to the enforcement mechanism of the Trade and Sustainable Development chapters of EU international trade agreements.

A public consultation in 2021 garnered examples of coercive measures faced by EU trading firms: enforcing administrative rules in an excessively strict and burdensome way, causing deliberate delays, delaying the grant of necessary licences or authorisations, imposing unjustified sanitary/phytosanitary measures, barriers to public procurement (for example, imposing higher local-content requirements in tenders).[6]

The case study in the European Parliament's Briefing on the proposed Anti-Coercion Measure highlights an example from 2021 when Lithuania withdrew from a cooperation framework between China and eastern European countries after risks to national security by Chinese technology companies were exposed. Lithuania announced that a "Taiwanese representative office" would open in Vilnius and a Lithuanian trade office would open in Taipei. Traders in Lithuania then reported that Chinese trading partners were not negotiating or renewing trade contracts, that there were issues in obtaining raw materials from China and refusals of food export permits to Lithuania and the closure of financial institutions cooperating with Lithuanian exporters. By December 2021 Lithuania disappeared from the Chinese customs administration list. Although Lithuania was later restored to the list, shipments were not cleared, import applications were rejected and China also started to block imports from other EU Member States that contained components from Lithuania.

Other kinds of coercion may be informal and may be applied by private parties, unofficially instructed by a government, or state-controlled media. The European Parliament Briefing Paper cites that EU firms such as Adidas and H&M were subjected to a popular boycott in China when the EU imposed financial and travel sanctions on four Chinese officials involved in human rights violations in Xinjiang.[7]

6 https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12803-Trade-mechanism-to-deter-&-counteract-coercive-action-by-non-EU-countries/public-consultation_en

7 https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729299/EPRS_BRI(2022)729299_EN.pdf

The EU relies upon trade and inward investment as a source of wealth, growth and employment. In 2017 the EU attracted one-third of global investment. But some foreign subsidies have a distortive impact on the competitiveness of EU business. A screening framework was established in 2019, aimed at protecting the Member States from foreign investments that could threaten security and public order by examining the effects on critical assets and infrastructure. [8] But the Regulation does not address the issue of distortions caused by foreign subsidies on the internal market.

Similarly, the EU framework for public procurement does not specifically address distortions to EU procurement markets created by foreign subsidies.[9]

The latest additions to the EU legal toolbox, a Regulation on Foreign Subsidies, and an Anti-Coercion Instrument address these trade security threats. Both developments are controversial and were proposed before the Russian escalation of war in Ukraine. In anticipating the need for EU unilateralism in the face of global economic threats they are further evidence of a new economic statecraft.[10]

SUBSIDIES GRANTED BY THIRD STATES

The EU has refocused its trade policy on security issues posed by third states granting subsidies to firms which pose a threat to the internal market and trade. While admitting that there is a lack of reliable data on subsidies granted by third countries, the European Commission argues that there is "a growing number of instances in which foreign subsidies seem to have facilitated the acquisition of EU undertakings, influenced investment decisions, distorted trade in services or otherwise influenced the behaviour of their beneficiaries in the EU market, to the detriment of fair competition."[11] China is the biggest threat to the EU internal market, but in the wake of the UK leaving the EU, there is also the additional need to have a new coordinated procedural approach to managing third country subsides.

The WTO Subsidies and Countervailing Measures Agreement (SCM) should be the vehicle for addressing

8 Regulation (EU) 2019/452 EUR-Lex - 02019R0452-20200919 - EN - EUR-Lex (europa.eu)

9 Directives 2014/24/EU and 2014/25/EU.

10 https://ecfr.eu/article/europes-new-economic-statecraft-unity-through-a-european-resilience-fund/

11 European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on foreign subsidies distorting the internal market, Brussels, 5.5.2021 COM(2021) 223 final, Explanatory Memorandum, 2. See European Court of Auditors, "The EU's response to China's state-driven investment strategy" *Review* 03 (2020).

external threats to the EU, with the EU starting litigation against a WTO member before a WTO Panel. But the SCM does not apply to services or to investment flows. It is also difficult for the SCM to handle and categorise state-owned enterprises. [12]

However, a recent example shows how the WTO SCM has been used creatively to expose the complexity of international trade and to counter the way in which third countries may attempt to penetrate, and disrupt, EU markets. This was seen in 2020 when the European Commission imposed countervailing duties[13] (anti-subsidy measures) on imports of glass fibre fabrics produced by a Chinese company receiving subsidies from the Chinese state located in a special economic zone in Egypt allegedly established with the aim of targeting the EU market.[14]

The WTO applies only to subsidies granted to firms *within a state's own territory*. Therefore, the European Commission used a legal fiction, arguing that the Chinese subsidies were "Egyptian subsidies" adopted by the Egyptian government.

In light of the current weaknesses of the WTO system, the EU has taken the initiative: a new European economic statecraft.[15] It claims to be pursuing "a model of open strategic autonomy by shaping the system of global economic governance and developing mutually beneficial bilateral relations" while protecting its own internal market from "unfair and abusive" practices.[16]

It is within this context that the EU legal toolbox has been enhanced with controversial proposals for a Regulation on foreign subsidies and an Anti-Coercion Instrument.

FOREIGN SUBSIDIES

For the EU internal market, as well as the EEA and associated states (such as Turkey and Ukraine) and accession states, the EU state aid rules provide a clear set of rules, principles and guidelines to provide a flexible approach to managing the need for state intervention through subsidies. Foreign subsidies may slip through the rigorous EU system, for example, where foreign subsidies are granted directly to a firm established in the EU, or to a parent company outside the EU but directing the affairs of the subsidiary in the EU; or subsidies may be used to establish a strategic foothold in an EU infrastructure, or subsidies may be used to give foreign companies leverage in acquiring EU firms.

None of the Member States has adopted national rules to combat the problems associated with foreign subsidies. France, Germany, Italy, and Poland wanted EU competition rules to be adapted to address the problem,[17] whereas The Netherlands wanted laws to target undertakings that receive foreign subsidies or have an unregulated dominant position in a non-EU market.[18]

But the prominence of sovereign wealth funds and expansive overseas investment strategies of third states posed threats to sectors of the EU internal market.[19] For example, foreign subsidies may facilitate acquisitions of EU-based companies, or skew procurement tenders, allowing less efficient companies to operate at the expense of more efficient, non-subsidised companies. Public procurement markets may also be affected by bidders able to make more economically advantageous tenders, leading to the crowding out of efficient non-subsidised bidders. Foreign subsidies are especially problematic where they are an operating (as opposed to an investment) subsidy and in markets that suffer low levels of competition.[20]

The inter-dependence of EU trade and the extent, and under-reporting, of foreign direct investment, on a global scale, opened the door for a centralised EU approach, establishing the European Commission as the investigator and enforcer. the European Commission has exclusive competence to enforce the Foreign Subsidies Regulation (FSR), keeping

12 Subsidies are not excluded from the scope of GATS and there is an underdeveloped mandate for the GATS to further negotiate disciplines for services subsidies.

13 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020R0776&from=EN

14 FT, "The EU's battle against China subsidies is being played out in Egypt " https://www.ft.com/content/5a664762-4e38-11ea-95a0-43d18ec715f5

15 The WTO Appellate Body has not functioned since 11 December 2019 because the US blocked the nomination of new judges.

16 European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on foreign subsidies distorting the internal market, Brussels, 5.5.2021 COM(2021) 223 final, Explanatory Memorandum, 1.

17 European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on foreign subsidies distorting the internal market, Brussels, 5.5.2021 COM(2021) 223 final, Explanatory Memorandum.

18 Ibid

19 In assessing whether a foreign subsidy poses threats to the internal market indicators such as the type of market conduct, the size and nature of the subsidy, the characteristics of the affected market come into play. Particular sectors, for example, steel, aluminium and semi-conductor markets have been particularly affected by foreign subsidies, and have been the subject of analysis by the OECD: https://www.oecd-ilibrary.org/trade/measuring-distortions-in-international-markets_8fe4491d-en

20 Commission Staff Working Document Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market COM (2021) 223 final, 7-8. https://competition-policy.ec.europa.eu/system/files/2021-06/foreign_subsidies_impact_assessment_report.pdf

the Member States informed of and involved in any decisions adopted through the advisory procedure.

THE FOREIGN SUBSIDIES REGULATION

In the 2017 White Paper *Levelling the Playing Field as Regards Foreign Subsidies*, the European Commission identified a set of issues threatening the EU and the Member States because of a regulatory gap in EU trade policy. A screening framework was established in 2019 aimed at protecting the EU and the Member States from foreign investments that could threaten their security and public order by considering the effects on critical assets and infrastructure.[21] But the Regulation does not specifically tackle distortions caused by foreign subsidies on the internal market.

In 2021, the European Commission published a Proposal on foreign subsidies[22] distorting the internal market and the Council and the European Parliament reached a provisional political agreement on the Regulation on 30 June 2022. The final text of the Foreign Subsidies Regulation (FSR) was approved by the European Parliament on 11 July 2022, with an expected full vote in November 2022 and the Regulation coming into effect by mid-2023.

The legal base of the Regulation is Articles 207 and 114 TFEU. Article 207 (1) TFEU defines the scope of the Union's common commercial policy including measures to be taken "in the event of subsidies", "foreign direct investment" and trade in goods and services. Article 114 TFEU is the legal base for the internal market, and this is utilised since the European Commission anticipates that the Regulation may affect the fundamental economic rights of freedom of establishment and the free movement of goods and services.

THE DEFINITION OF A CONCENTRATION

The FSR focuses on mergers and acquisitions using the EU terminology of a "concentration".

The definition of a concentration in the FSR follows the definition found in the Merger Regulation: *a change of control on a lasting basis that results from the merger of two previously independent undertakings, the acquisition of control of an undertaking by another, or the creation of a full function joint venture.* The concept of 'control' is also similar to the meaning in the Merger Regulation as the ability to exercise decisive influence on an undertaking.

ROUTES FOR SCRUTINY

Unlike the internal EU state rules, foreign subsidies are not automatically regarded as illegal or prohibited. Instead, the FSR creates three routes for the scrutiny of third-country subsidies:

1. ***Ex officio* powers** allowing an investigation by the European Commission on its own initiative. This includes concentrations below the thresholds set in the FSR and concentrations already implemented, if the European Commission considers there is an impact on the internal market;
2. **Mandatory, *ex ante*, notification** for concentrations meeting certain financial thresholds, including a minimum level of foreign contribution received from third countries. The 'financial contribution' does not need to be directly related to the transaction in question.
3. **Mandatory, *ex ante*, notification of public procurement bids** where a certain level of financial contribution has been granted by third countries.

If an undertaking fails to comply with the obligation to notify a qualifying subsidised concentration or a financial contribution in a public procurement procedure, the European Commission can impose fines and examine the transaction, as if it had been notified.

The FSR contains various definitions of entities and transactions that will fall under its review. These mirror definitions and concepts found within EU measures regulating the internal market. But some important definitions are missing, and, for the sake of certainty, and to avoid protracted challenges, the European Commission will have to develop further guidance using soft law to deter litigation.

EX ANTE MANDATORY NOTIFICATION: QUALIFYING THRESHOLDS

It is necessary to notify a proposed concentration to the European Commission when:

One of the merging entities, the acquired undertaking or the joint venture is:

(i) established in the EU; and

(ii) generates an aggregate turnover of at least EUR 500m in the EU; and

(iii) All undertakings involved in the concentration

21 Regulation (EU) 2019/452 EUR-Lex - 02019R0452-20200919 - EN - EUR-Lex (europa.eu)

22 European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on foreign subsidies distorting the internal market, Brussels, 5.5.2021 COM(2021) 223 final: https://ec.europa.eu/competition/international/overview/proposal_for_regulation.pdf

were granted, in the three financial years prior to notification, combined aggregate financial contributions of more than EUR 50m from third countries.

There is no clarity of what is meant by the term an undertaking "established" in the EU.

Once the financial thresholds are satisfied, a standstill obligation kicks in and the proposed deal must be notified to the European Commission. The same timescale that is in the Merger Regulation applies to investigation: the European Commission has 25 working days to conduct the initial (Phase I) review. If the European Commission has sufficient indications of the existence of a foreign subsidy distorting the internal market, it can open an in-depth (Phase II) investigation lasting 90 working days, extendable by a further 15 where the undertakings concerned offer commitments.

Article 13 of the Proposal states that the European Commission may conduct inspections in the territory of the third state provided that the undertaking concerned has consented and the government of the third country has been officially notified.

FINANCIAL CONTRIBUTION

Art 2 FSR sets out a non-exhaustive definition of a "financial contribution", which is much wider than the way a subsidy or state aid is understood in EU law and does not need to confer a benefit on either an undertaking or a sector:

A financial contribution shall include:

> The transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, setting-off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling.
>
> Foregoing of revenue that is otherwise due, such as tax exemptions or the granting of special or exclusive rights without adequate remuneration; or
>
> The provision of goods or services or the purchase of goods or services.

Article 2 FSR states that relevant financial contributions may be made by:

- The central government and government authorities at all levels.
- Foreign public entities, whose actions can be attributed to the third country, considering elements such as the characteristics of the entity, the legal and economic environment prevailing in the State in which the entity operates including the government's role in the economy; or
- Any private entity whose actions can be attributed to the third country considering all relevant circumstances.

Again, the provision is very widely drawn. The inclusion of "private entities" as suppliers of financial contributions widens the scope of EU law beyond the WTO SCM provisions, raising questions of the compatibility of EU law with WTO law.

The second situation, referring to "characteristics of the entity" and the "legal and economic environment prevailing in the State" suggests a leeway or discretion for the European Commission to treat entities differently, depending upon the level of state intervention in the economy or the role of arm's length dealings between the state and commercial entities.

The European Commission is clear that sovereign wealth funds should be within the scope of the FSR.

AN ACTUAL OR POTENTIAL DISTORTIVE EFFECT ON THE EU INTERNAL MARKET

The European Commission will deem that a distortion on the internal market exists where a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market and where, in doing so, it actually or potentially negatively affects competition on the internal market.

When the European Commission decides that a foreign subsidy may have an actual or potential distortive effect on the EU internal market it may take measures (structural and behavioural) or ask for divestments and repayments of the subsidy to redress the effects or accept commitments. In the extreme case, it may ask for the concentration to be dissolved. The European Commission will balance any positive effects against the negative effects of a foreign subsidy.

In reaching a decision the European Commission has wide discretion. It will consider the amount of the subsidy; the nature of the subsidy; the situation of the undertaking, including its size and the markets or sectors concerned; the level and evolution of economic activity of the undertaking on the internal market; the purpose and conditions attached to the foreign subsidy as well as its use on the internal market.

The FSR sets out factors which are most likely to distort the internal market:

> (a) a foreign subsidy granted to an ailing undertaking, (one which will go out of business in the short or medium term in the absence of any subsidy) unless there is a restructuring plan that

is capable of leading to the long-term viability of that undertaking and includes a significant own contribution by the undertaking;

(b) a foreign subsidy in the form of an unlimited guarantee for debts or liabilities of the undertaking, (without any limitation as to the amount or the duration of such guarantee);

(c) an export financing measure that is not in line with the OECD Arrangement on officially supported export credits;

(d) a foreign subsidy directly facilitating a concentration;

(e) a foreign subsidy enabling an undertaking to submit an unduly advantageous
tender, based on which the undertaking could be awarded the contract.

IMPLICATIONS FOR THE UK

For third states, the FSR imposes a restraint upon the use of subsidies to enable foreign trade and investment. For a firm it may act as a disincentive to apply for, and use, subsidies where it has a significant presence in the EU.

The UK adopted the Subsidy Control Act 2022 and it hoped that there would be an equivalence provision in the FSR whereby subsidies from third countries with an equivalent subsidy control mechanism to that in place at the EU level would be presumed unlikely to be distortive. The Committee on International Trade Rapporteur, Christophe Hansen MEP, had suggested an equivalence provision but this was rejected. [23]

The FSR confirms the position of the EU as a regulatory magnet. The UK Government wanted to free itself from the [perceived] constraints of the EU state aid regime but now it discovers the extent of EU penetration into third-country internal trade policies. Asset management and private equity investment portfolios are exposed to much more scrutiny over whether global assets have benefited from foreign subsidies bringing any deals within the FSR thresholds and reference period. There are hints that the FSR may not be applied uniformly and that its real focus will remain on states such as China. But there is no certainty that the European Commission would give subsidies granted by the UK a light touch.

The FSR comes at a time when the UK has reluctantly intervened in markets, as a reaction to the COVID-19 pandemic, the economic downturn created by the pandemic,[24] the effects of the Russian war in Ukraine and the ensuing energy crisis. The FSR will affect any UK business that trades in the EU, either established or operating through subsidiaries or that is connected with other businesses in receipt of foreign subsidies.

Furthermore, the FSR will have to be considered when the Labour Party draws up its Manifesto plans for the use of state-owned renewable energy companies and a sovereign wealth fund,[25] As well as any new initiatives such as investment zones, planned by the current Government to boost growth.

THE ANTI-COERCION INSTRUMENT

Trade coercion is another aspect of trade security where the EU is taking steps to create legal tools to address a global problem. Trade coercion is a broad concept, encompassing situations where states impose arbitrary trade barriers, investment restrictions against other states (or trading blocs), or companies operating from these states, as leverage for political and economic ambitions.[26]

The aim of the Anti-Coercion Instrument (ACI) is to create a rapid response to a trade security situation. The European Commission impact assessment[27] explains that economic coercion falls outside of the scope of WTO disputes because the WTO does not address the separate infringement of general international law that lies in the coercive act and intention. The European Commission explicitly identifies states where the economy is controlled by the ruling political party. In such states, it argues, there is a wide range of informal coercive measures not covered by WTO rules: ordering companies to stop imports of goods or ordering travel agencies to stop tourism to a country that is subject to sanctions.

The "US versus China" tensions, popularly known as a "trade war" is a prominent example of geo-political tension. The US response to economic coercion through the Countering China Economic Coercion Act[28] provides specific responses to China in addition

23 https://www.europarl.europa.eu/doceo/document/INTA-PR-703002_EN.pdf

24 For example, the Coronavirus Large Business Interruption Loan scheme allowed firms to borrow up to £200m. Although the COVID-19 schemes have ended, the loans may still be within the three-year reference period of the FSR.

25 https://bettersociety.net/labour-public-energy-company.php

26 Examples of coercion can be found at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12803-Trade-mechanism-to-deter-&-counteract-coercive-action-by-non-EU-countries/public-consultation_en

27 https://trade.ec.europa.eu/doclib/docs/2021/december/tradoc_159963.pdf

28 Text - H.R.5580 - 117th Congress (2021-2022): Countering China Economic Coercion Act | Congress.gov | Library of Congress

to Section 301 of the Trade Act of 1974.[29] The latter measure was the inspiration for the proposed ACI, but ironically, US threats to impose import duties on some EU Member States in order to influence their stance on digital services taxes is cited in the European Parliament Report as kindling the debate for the ACI as a reciprocal, retaliatory remedy.

In addition to these widely-publicised trade wars, the range of subtle and aggressive trade measures globally has challenged the integrity of the global trading system, weakening the role of the WTO underpinning a rules-based approach to global trade. For these reasons, the European Commission boldly states that the EU can address and redress the harm caused by economic coercion unilaterally and without regard to WTO law.

The European Parliament and some Member States expressed concerns about economic coercion in 2020, during the legislative process launched to amend the EU Trade Enforcement Regulation.[30]

A joint declaration[31] of the European Commission, the Council and the Parliament on an instrument to deter and counteract coercive action by third countries was published with the amended Trade Enforcement Regulation.[32]

The proposal is with the European Parliament, and the file has been assigned to the Committee on International Trade (INTA). The draft report was published in April and the Committee should vote on its Report in autumn 2022.[33]

The European Commission stresses that the new legal tool is aimed at deterrence, using traditional diplomatic tools of dialogue and engagement. It provides, as a last resort, for the use of retaliation through countermeasures embracing a very wide range of restrictions related to trade, investment, and funding.

29 Section 301 aims to remedy violations under trade agreements and/or "unjustifiable" trade actions that restrain U.S. commerce, and "reasonable" or "discriminatory" trade actions. It grants the Office of the United States Trade Representative (USTR) a broad range of powers to investigate unfair foreign trade practices and take remedial action, including the application of punitive measures such as tariffs. https://crsreports.congress.gov/product/pdf/IF/IF11346

30 https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652021/EPRS_BRI(2020)652021_EN.pdf

31 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2021.049.01.0001.01.ENG&toc=OJ%3AC%3A2021%3A049%3ATOC

32 Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32021R0167.

33 https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)729299

The ACI places the European Commission at the centre of the initial investigation to discern if a third state has engaged in coercive economic behaviour. The European Commission has the discretion to ask for information from relevant stakeholders. If the European Commission finds that there is evidence of coercive economic behaviour, the normal Comitology procedure for implementing acts will be used by the Director General for Trade in consultation with Member States.[34]

THE DEFINITION OF ECONOMIC COERCION

Art 2 states that economic coercion may be found if two conditions are satisfied:

- a third country seeks to interfere 'in the legitimate sovereign choices of the Union or a Member State by seeking to prevent or obtain the cessation, modification or adoption of a particular act by the Union or a Member State'
- by applying or threatening to apply measures affecting trade or investment.

In determining whether a third state has adopted an economic coercion measure, the following will be considered:

> '(a) the intensity, severity, frequency, duration, breadth, and magnitude of the third country's measure and the pressure arising from it;
>
> (b) whether the third country is engaging in a pattern of interference seeking to obtain from the Union or from Member States or other countries particular acts;
>
> (c) the extent to which the third-country measure encroaches upon an area of the Union's or Member States' sovereignty;
>
> (d) whether the third country is acting based on a legitimate concern that is internationally recognised;

34 The European Commission adopts an implementing act using the comitology procedure in areas where uniform conditions for implementation are necessary. Normally it should consult a committee in which every EU Member State is represented. Citizens and other stakeholders can provide feedback on the draft text of an implementing act for four weeks before the relevant committee votes to accept or reject it. Although there are exceptions, for example, in case of emergency or when citizens and stakeholders have already contributed. A relevant committee votes to accept or reject it. Although there are exceptions, for example, in case of emergency or when citizens and stakeholders have already contributed. An overview of the feedback gathered is presented to the committee, and the resulting discussion is included in the summary record, which is published in the comitology register. https://ec.europa.eu/info/law/law-making-process/adopting-eu-law/implementing-and-delegated-acts_en

> (e) whether and in what manner the third country, before the imposition of its measures, has made serious attempts, in good faith, to settle the matter by way of international coordination or adjudication, either bilaterally or within an international forum.'

These criteria indicate that the ACI will only be triggered in situations where there is evidence of *grave* economic coercion.

WHEN DIPLOMACY FAILS

Annex I[35] sets out the potential measures that may be used:

- Suspension of tariff concessions;
- Import and export restrictions, through quotas, licenses, or other measures;
- Restrictions on participation in tender for public procurement projects;
- Broadening the scope of export controls;
- Restrictions on foreign direct investment;
- Restrictions on intellectual property rights protections; and
- Restrictions on banking, insurance, and access to capital markets.

The European Commission states that ACI will be used in a proportionate manner, that the measures will be proportionate to the injury caused by third countries. But there is scope for punitive outcomes that would exceed the proportionality principle, for example, the ACI permits the "suspension of applicable international obligations" with respect to trade commitments. The European Commission argues that this would not be an illegal response because the acts would be reprisals, authorized as countermeasures in response to a violation of international law Article 52(3) of the ILC Articles on State Responsibility.[36]

COMPATIBILITY WITH INTERNATIONAL LAW

The proposal is controversial, straying EU law and policy into the area of foreign policy where the EU has limited competence. Questions have been raised as to the compatibility of the ACI with WTO law, as well as international law.

The proposal empowers the use of a trade remedy allowing the EU to suspend international obligations, for example, material rules or market access commitments in WTO, free trade agreements or investment treaties, thus by-passing the WTO dispute settlement process, which normally requires authorisation. This would be inconsistent with the rules of the WTO Dispute Settlement Understanding.

The question of whether the proposed ACI may be incompatible with international law is uncertain. It may be that international law needs to reappraise its traditional stance in the light of the use of trade measures to conduct a *form* of war.[37] Traditionally, international law is only comfortable in handling the explicit threat or use of force against a sovereign nation.[38] But economic coercion has been recognised, and challenged, by developing countries when larger developed economies use leverage for their own political agenda. For example, the EU has been accused of using a form of coercion in the use of conditionality clauses in its trade agreements.[39]

A UN General Assembly Resolution on Friendly Relations of 1970 recognised that

> '[n]o State may use or encourage the use of economic political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind'.

The International Court of Justice (ICJ) in NICARAGUA v. UNITED STATES OF AMERICA 1986,[40] defended the sovereignty of states from foreign interference but held that a trade embargo imposed by the United States on Nicaragua did not breach the customary law principle of non-intervention.

International law is out of tune with the way economic coercion is being deployed. The number of instances suggests that it may only be called upon to be of assistance where an extreme act is challenged as a test case. But the threat to global trade by the range of unilateral measures used may force the hand of the UN or the ICJ to develop and recognise new kinds of legal harm created through abusive trade policies.

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35 https://trade.ec.europa.eu/doclib/docs/2021/december/tradoc_159967.pdf

36 https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf#page=14

37 See the discussion by Deepak Raju, "Proposed EU Regulation to Address Third Country Coercion – What is Coercion?" EJIL:Talk! January 6, 2022; Maziar Jamnejad and Michael Wood, "The Principle of Non-intervention" (2009) 22.2 Leiden Journal of International Law https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/abs/principle-of-nonintervention/7EE9EC769A3F2CEE10E3DEE1CB30E274

38 Article 2(4) UN Charter.

39 Marco Bronckers, Giovanni Gruni, "Retooling the Sustainability Standards in EU Free Trade Agreements" (2021) 24.1 *Journal of International Economic Law* 25–51. https://academic.oup.com/jiel/article/24/1/25/6146679?login=true

40 070-19860627-JUD-01-00-EN.pdf (icj-cij.org)

CONCLUSION

The current geo-political trade environment is uncertain. The threats to EU trade security emerged before the COVID-19 pandemic and the escalation of the Russian war in Ukraine, but these latter events have focused the EU to respond quickly, through legal measures.

In developing a trade policy, the EU treads a careful line. Trade policy must be consistent with the internal policies of the EU. A trade policy must be mindful of the competence restraints imposed by the Member States on the EU, compatibility with international law commitments, alongside obligations of respect for fundamental rights and effective judicial protection. These over-arching restraints result in the EU developing a piecemeal set of legislative tools. This may detract from the European Commission developing a specialist trade policy but may also develop possibilities of tackling perceived trade abuses from different angles. Especially if the use of the EU trade defence tools escalates trade wars.

Both the FSR and the ACI reveal a significant shift in EU competence under the common commercial policy with a consolidation of power to the European Commission to undertake investigations of the activities of third states and, if necessary, impose trade remedies. This inevitably will raise concerns for EU Member States as to how far inroads are being made into their own foreign, industrial, and fiscal policies. Some Member States may be wary of being drawn into EU trade wars which are not of their concern, fuelling the escalation of trade disputes with spill-overs into the political arena.

There is support from Member States and businesses for the regulation of foreign subsidies and for creating a legislative tool to address the growing problem of economic coercion, although the Member States are divided as regards the severity of countermeasures and the manner of establishing when they should kick in.

While the attention is focused upon the major players – foreign governments and the Member States represented through the European Commission - other stakeholders (NGOs, private businesses, public authorities) have an interest in the application of the new trade security tools.

Non-state actors will be affected by the new trade defence tools. Private parties in third states may be responsible for the implementation of trade barriers and consumers – outside and within the EU will be affected. Traders and consumers will bear the brunt of increased administrative costs. This impact is seen in another concurrent proposal on forced labour,[41] as firms trading with third states, will be drawn into investigations of their own conduct and business affairs.

The EU action - using sanctions against Russia in 2022 - has been of symbolic as much as practical significance in raising the game of the EU acting as a major economic player, even if the unity of action has sometimes been precarious. It has been suggested that the anti-coercion measures could be enhanced to provide rapid responses to the economic consequences of war situations.[42]

These measures, along with autonomous trade policy initiatives confirm the reliance of the EU on trade and its need to protect itself as a major trading bloc as global trade and economic interdependence are increasingly weaponised. But pursuing unilateralism may damage its credibility in continuing to promote the use of a rules-based multi-lateral trading system.[43] In a speech in 2021 at the NATO HQ the US Secretary of State, Antony Blinken, argued that the US should work together with its allies through co-operation and exchange of information and expertise. [44] However, the EU approach creates a juxtaposition: the US and the UK are allies of the EU in trade wars with the rest of the world, but also recipients of the new EU offensive against third countries.

41 Should trade policy be used to tackle forced labour? https://blogs.sussex.ac.uk/uktpo/2022/09/16/should-trade-policy-be-used-to-tackle-forced-labour/

42 Europe's new economic statecraft: A strong Anti-Coercion Instrument – European Council on Foreign Relations (ecfr.eu) https://ecfr.eu/article/europes-new-economic-statecraft-a-strong-anti-coercion-instrument/

43 https://www.atlanticcouncil.org/content-series/atlantic-council-strategy-paper-series/strategic-context-the-rules-based-international-system/

44 https://www.state.gov/reaffirming-and-reimagining-americas-alliances/

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FURTHER INFORMATION

The UK Trade Policy Observatory (UKTPO), a partnership between the University of Sussex and Chatham House, is an independent expert group that:

1) initiates, comments on and analyses trade policy proposals for the UK; and

2) trains British policy makers, negotiators and other interested parties through tailored training packages.

The UKTPO is committed to engaging with a wide variety of stakeholders to ensure that the UK's international trading environment is reconstructed in a manner that benefits all in Britain and is fair to Britain, the EU and the world. The Observatory offers a wide range of expertise and services to help support government departments, international organisations and businesses to strategise and develop new trade policies in the post-Brexit era.

For further information on this theme or the work of the UK Trade Observatory, please contact:

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