

Main points regarding the anti-coercion instrument

Confederation of Swedish Enterprise

Henrik Isakson, Director trade policy

We have no clearly established position regarding this instrument yet. It depends on exactly what actions it is supposed to counter and how it aims to do so. It might become a powerful deterrent and an efficient tool to counter coercion, not least as a collective mechanism which may protect small states with limited capacity for “self-defense”. But it might also prove dangerous if it turns protectionist or undermines international norms and the rule of law or is abused by the EU so the EU itself becomes the coercer.

It is also of importance to assess the added value of the proposed instrument in relation to the sanction's regimes already existing but also in conjunction with the development of a toolbox for countering hybrid threats within the framework of EUs Strategic Compass in the field of security and defence.

However, if this instrument should be established then we think the following points are important to consider.

Triggers

There are undeniably policies in some countries that could be labelled as “coercion” against the EU and the interests and values which we share, and also towards individual member states and companies. Some of this coercion comes in the form of transparent legislative acts, which makes it quite clear where it comes from and what the nature and aim of the measure is. However, there is also coercion which is informal, for example cyber-attacks, state sponsored boycotts or phony charges against businesses where there is no clear source or stated aim.

It is our firm opinion that any instrument must address both these forms of coercion. Otherwise, it can only be used against democracies and in many important cases not be used at all. Certain states that excel in navigating the “grey zone”, specifically to avoid formal responsibility of their actions, would then avoid countermeasures.

The instrument must thus also address forms of coercion which does not directly violate international law (as that requires formal actions by a state) but nevertheless constitutes a threat to us. If the instrument does not address such informal coercion it is our belief that we should not have the instrument at all, as that would serve to increase tensions with like-minded partners but leave us incapable of addressing the serious threats posed by more authoritarian regimes.

In order to deal with informal coercion the EU must strengthen its capacity to gather intelligence and data to attribute non formal policy decisions to the responsible state. This is a prerequisite for an instrument that must not be abused for protectionist purposes or expose us to legal challenges. We need to be able to counter coercion from authoritarian actors efficiently, but without getting into a slippery slope of starting to act outside the realm of the law ourselves.

Procedures

Hence, any measure must be legal and withstand a legal challenge, for example at the WTO. Also, any measure should be preceded by dialogue with the supposed coercer to avoid misunderstandings and facilitate an amicable de-escalation.

On the other hand, if such dialogue does not produce results, the EU should act swiftly with an efficient and quick decision making process. This measure should not be a slow tortuous process like trade policy often is but a quick one, if it is to have any deterring effect.

Unacceptable measures

Basically all measures will, to different degrees and in different ways, also inflict damage on ourselves. This can never be totally avoided. Conflicts are painful for all those involved and we can never have a policy where we accept no degree of shooting ourselves in the foot because if we do, someone else might shoot us. Thus, we need to be realistic.

Still, some measures are clearly less appropriate than others. The basic position that we hold is that we oppose policies that undermine the functioning of the market economy. That, for us, means the following.

First, measures must not undermine the rule of law. This means in practice that we are fundamentally opposed to ideas that have been floated that may politicize regulatory decisions, such as adequacy decisions on data flows or equivalence decisions on the rights of financial operators from third countries, or regulatory decisions regarding food safety or standards for consumer products. Other countries may abuse these regulatory processes for political gains, but we should not go down that road. But above all, it means that competition and state aid law should remain outside the realm for political intervention. All such decisions should be made on their own technical and legal merits and not be drawn into a geopolitical struggle. Finally, we should not forget the EU's global regulatory power, which is a great asset, and will become eroded if regulatory decisions are becoming politicized or even abused.

Secondly, we oppose measures that disrespect property which in this case means any restrictions on third country IPR in the EU. Such IPR is their property and the EU should not engage in confiscation (not even temporary) of property. We must also not forget how dependent the EU economy itself is of IPR and therefore any measures to weaken respect for global IPR must be rejected.

Finally, we are opposed to digital restrictions, such as restrictions on data transfers or data localization requirements. We want the EU to be open for data flows and to be a role model in this regard, and we are also dependent on the free flow of data for our own sake.

Acceptable measures

There are already several instruments in place to defend the EU's interests and values and also several new ones being developed. The new FDI-screening will facilitate measures to stop investments that might be detrimental to European security and safety and the EU Magnitsky Act can target foreign officials who carry out human rights abuses. The foreign subsidy instrument will enable the EU to stop state sponsored firms from third countries to engage in unfair competition in the EU. There are also other opportunities to introduce sanctions. Etc.

But if we accept that this instrument should be created we must also accept that it must have some new teeth. What remains then that is more acceptable are various policies to increase the costs for

firms from countries that coerce us. This means customs duties, fees or fines, for goods and (when possible) services.

We may also be able to support measures to stop firms from some countries doing business in the EU by targeted restrictions to inward FDI, or restricting outward FDI or exports in some targeted sensitive sectors to hinder vital tech transfer to countries that attempts to coerce us.

None of this is in any way desirable but it should be borne in mind that that any of these measures will only be directed against firms from a country that constitutes a threat to us. There is a cost for business in doing nothing as well. However, any measures taken by the EU must only be imposed in proportion to the damage coercion has inflicted upon us.

Finally, we view as vital that the list of measures are quite clear and transparent so that this instrument does not cause more uncertainty for businesses than absolutely necessary. Ideally, the instrument should serve to provide the EU business community with more, and not less, certainty as it would deter aggressive acts and coercion and thus enable a favorable business climate.