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From:	PT Delegation
To:	Working Party on Trade Questions
Subject:	Anti-Coercion Instrument (ACI) – PT comments

Presidency's third compromise proposal on the Regulation on the Protection of the Union and its Member States from Economic Coercion by Third Countries (Anti-Coercion Instrument – ACI) – Portugal comments

Portugal recognizes the Presidency's effort to accommodate Member States concerns on the Anti-Coercion Instrument, presented in Working Party on Trade Questions.

Several issues remain far from a consensus. Portugal's position on some of those topics is the following one:

1. Implementing powers remain a key issue. We welcome the conferral of such powers to the Council in the first stage of the ACI (**article 4**).

As for the second stage, Portugal maintains its concern on the large scope proposed for the response measures to be adopted, that could go beyond trade policy as they may imply significant collateral damages to relevant political and economic interests of the Member States. If the set of measures remains as proposed in Annex 1, a substantial and effective involvement of Member States is required. As such, the implementing decisions mentioned in **articles 7, 8 and 10** should be taken by the Council. Portugal supports **Option D**.

We took note of Commission's draft declaration, and we recognize its willingness to reach a common ground. Such a declaration would be the basis for Option B and there is no agreement on the approach to be followed.

2. The consistency of the Anti-Coercion Instrument with international law remains an aspect of paramount importance. It should be made clear [*e.g.*, by amending **article 2(2)**] that ACI can only be applied to economic coercion that constitutes an internationally wrongful that cannot be adequately addressed through dispute settlement under the WTO or through a multilateral or bilateral agreement binding the EU or the MS concerned. Any other coercive actions from a third country relating to trade and investment which constitute a violation of WTO rules, should be addressed through the WTO's Dispute Settlement Body and the EU's Enforcement Regulation.

We welcome the reference to WTO on **recital 10**. In addition, we welcome the Irish draft proposal for a **new recital on CSFP matters**. It would be important to reflect it also on the Regulation text. Accordingly, the term "insofar" in the last subparagraph on **article 7(1)**, should be deleted, as it is open to misinterpretation.

3. It is important to ensure that the effects of the decisions adopted within this Regulation are periodically reviewed, limiting the duration of its effects to the existence of effective coercion.

4. **Article 7(6)** Immediately applicable acts imposing Union response measures should be limited, taking into account that such measures are meant to be only a last resort, when all previous procedural steps have failed (determination of the existence of economic coercion, engagement with the third country concerned, etc.). Furthermore it should be prevented that it becomes the standard procedure, overcoming a previous consultation and decision by Member States and with third countries involved.

The immediately applicable acts should be, in principle, limited to modification, suspension, or termination of EU response measures.

5. The possibility to make persons linked to the economic coercion of a third country to be liable for any damage suffered by Union natural or legal persons as a result of the economic coercion [**article 8(2)**], is a complex issue. It would require several unfeasible evaluations that allows us to anticipate a very uncertain and eventually unfair implementation. This possibility should be eliminated.

6. We welcome the improvements introduced on **articles 9 and 11**, on the hierarchy of measures. Nevertheless, we maintain our opposition regarding the possibility of imposing response measures with retroactive effects to ongoing procedures or operations within the scope of public procurement and investment. For reasons of legal certainty, the legitimate expectations of economic operators need to be preserved and considered when defining the adequate response measures.

7. **Article 15 (1bis)** [advisory procedure] should be deleted, as advisory procedure is nowhere foreseen.

8. Regarding **Annex I**, its draft continues to include a wide and open list of response measures to achieve the desired deterrence effect and to avoid or minimize the impact on EU's economic operators.

As stated in Point 1, we see with strong concern such an enlarged scope of measures, and the political scope of some of them justifies our preference for a shorter list limited to trade policy measures. It is difficult to foresee the full implications from the implementation of many of the response measures proposed.

As such, we welcome the proposed deletion of **paragraphs j)** (chemicals) and **I)** (the latter following the opinion of the CLS).

We insist on the deletion of **paragraph g)**. We acknowledge the improvements introduced by the Presidency, that limit the scope of such measures to pre-establishment, reducing the risk of triggering litigation concerning investment protection under BITs from Member States with third countries. Nonetheless, the draft proposal still allows the prohibition of foreign direct investments that may be of paramount importance for the economy of many Member States, eventually overriding the policies implemented by their governments.

A final comment to restate that such an extended list constitutes an additional argument to justify the attribution of implementing powers to the Council.

Portugal reserves the right to present additional comments along the discussion.