

EXPLANATORY MEMORANDUM ON EU LEGISLATION RELATING TO EU PROCESSES FOR THE IMPLEMENTATION AND ENFORCEMENT OF THE UK-EU TRADE AND COOPERATION AGREEMENT AND THE WITHDRAWAL AGREEMENT.

Unnumbered Document

Council Regulation (Euratom) 2023/1479 of 14/07/23 laying down rules for the exercise of the Community's rights in the implementation of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (OJ L182/86).

Unnumbered Document

Regulation (EU) 2023/657 of the European Parliament and of the Council of 15/03/23 laying down rules for the exercise of the Union's rights in the implementation and enforcement of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community and of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (OJ L83/1).

Submitted by the Foreign, Commonwealth and Development Office, 29/08/2023.

SUBJECT MATTER

1. The Withdrawal Agreement (WA) and the Trade and Cooperation Agreement (TCA) contain provisions that enable a Party to take specific unilateral measures in certain cases and under certain conditions. These include, for example, measures to enforce compliance with obligations under the Agreements. The full list of measures that these regulations address is set out in Annex A.
2. The Council of the EU ('Council'), in its decision on the conclusion of the TCA empowered the European Commission ('Commission') to adopt most of these measures (those under the TCA) on behalf of the EU until a specific legislative act regulating the adoption of the measures entered into force. These regulations fulfil this commitment.
3. The regulations set out the EU's internal process for taking decisions on whether to use the unilateral measures. They do not alter the terms of the TCA or WA, to which the EU is still bound. The regulations simply define the process by which decisions on unilateral measures can be taken, including the involvement of the Commission's comitology structures.
4. The two separate regulations reflect the two different treaties that underpin the unilateral measures. The Treaty of the Functioning of the European Union

(TFEU) and the Treaty Establishing the European Atomic Energy Community (the Euratom Treaty). The TFEU provides the legal basis for the majority of the measures; while the Euratom Treaty underpins measures for suspending or terminating UK participation in specific programmes only. This also explains why the TFEU regulation is one of the European Parliament and the Council, while the Euratom Treaty regulation is a Council regulation only.

5. For the most part, the regulations mirror existing EU legislation that governs enforcement of trade rules for both Free Trade Agreement (FTA) and non-FTA partners as set out in the Enforcement Regulation (EU) No. 654/2014. That regulation empowers the EU to take unilateral measures to defend its rights and interests authorising, for example, the imposition of rebalancing or retaliatory measures (further information about how and to which measures in the WA and TCA the regulations discussed in this EM apply is set out the annex of this EM). There are, however, some differences that resulted from the legislative negotiations within the EU. These include:
 - Five economic criteria that the Commission must consider when deciding what unilateral measures to take that are found in equivalent legislation do not appear in these regulations. This gives greater discretion to the Commission in its internal design of retaliatory measures.
 - The text makes clear that action on fisheries will remain a Council decision and is not within the competence of the Commission.
 - There are commitments for the Commission to keep the European Parliament immediately and fully informed of all difficulties that may arise including breaches of the WA and of the TCA and other situations that might result in measures being taken pursuant to these regulations.
 - There is a reference in the recitals that makes clear that Gibraltar is not subject to measures under the TCA, as it is out of scope.
 - Regulation (EU) 2023/657 will be reviewed after three years, instead of five. In the case of Council Regulation (Euratom) 2023/1479, this review will take place no later than 09/08/2028.

SCRUTINY HISTORY

6. Following correspondence with the House of Lords European Affairs Committee Chairman arising from the Committee's consideration of the FCDO EM submitted on the European Commission's report on TCA implementation for 2021 (COM(22)126), the Government committed to providing an EM on the final texts of the two EU regulations relating to the implementation and enforcement of the TCA when both regulations had been adopted.

7. This EM meets that commitment. Since considering the EU's 2021 report, the Government has submitted a further EM on the EU's 2022 TCA implementation report (EM COM(23)118, 12/04/23). The House of Lords European Affairs Committee completed their examination of that report without follow up (Sift 33, 21/04/23). The House of Commons European Scrutiny Committee is yet to consider the 2022 report and EM.

MINISTERIAL RESPONSIBILITY

8. The Secretary of State for Foreign, Commonwealth and Development Affairs has central responsibility for relations with the EU and is the UK Co-Chair of both the TCA Partnership Council and the WA Joint Committee.

INTEREST OF THE DEVOLVED GOVERNMENTS

9. The enforcement provisions under the TCA and WA are reserved, but their use could impact the Devolved Governments (DGs) directly or indirectly. We therefore consulted the DGs on the preparation of this EM but none made any comments.

LEGAL AND PROCEDURAL ISSUES

10. **(i.) Legal Base:** The legal bases for the unilateral measures are provided for by the TCA and WA respectively. The basis for these regulations are: for Regulation (EU) 2023/657, the following provisions of the TFEU which governs the areas in which unilateral measures may have to be adopted, namely:
 - Article 43 TFEU (fisheries);
 - Articles 91 and 100 TFEU (transport);
 - Articles 173, 182, 188 and 189 TFEU (Union programmes);
 - Article 207 TFEU (common commercial policy).
11. The legal bases for Council Regulation (Euratom) 2023/1479 are Articles 7, 47 and 48 of the Euratom Treaty.
12. **(ii) Voting Procedure:** Regulation (EU) 2023/657 was adopted in accordance with the ordinary legislative procedure. Council Regulation (Euratom) 2023/1479 was adopted unanimously, as required by Article 47, point (b) of the fourth paragraph, and Article 48 of the Treaty establishing the European Atomic Energy Community.

13. **(iii) Timetable for adoption and implementation:** These proposals were adopted on 15/03/23 and 14/07/23 respectively and they entered into force on the twentieth day following that of their publication in the Official Journal of the European Union (12/04/23 and 08/08/23 respectively).

POLICY AND LEGAL IMPLICATIONS

14. These regulations do not alter the rights of the EU to take unilateral action under the TCA or WA. They simply set out the EU's internal procedures for doing so and so have no policy implications for the UK.

CONSULTATION

15. None required.

FINANCIAL IMPLICATIONS

16. None.

MINISTERIAL NAME AND SIGNATURE



Leo Docherty MP

29/08/23

Minister for Europe

Foreign, Commonwealth and Development Office.

ANNEX A:

The regulations apply to the following measures under the TCA and WA:

- (a) the temporary suspension of the relevant preferential treatment of the product or products concerned as set out in Article 34 of the Trade and Cooperation Agreement;
- (b) remedial measures and the suspension of obligations as set out in Article 374 of the Trade and Cooperation Agreement;
- (c) rebalancing measures and countermeasures as set out in Article 411 of the Trade and Cooperation Agreement;
- (d) the refusal, revocation, suspension, limitation of and the imposition of conditions on the operating authorisations or technical permissions of air carriers of the United Kingdom, as well as the refusal, revocation, suspension, limitation of and the imposition of conditions on the operation of those air carriers, as set out in Articles 434(4) and 435(12) of the Trade and Cooperation Agreement;
- (e) the suspension of acceptance obligations as set out in Article 457 of the Trade and Cooperation Agreement;
- (f) remedial measures as set out in Article 469 of the Trade and Cooperation Agreement;
- (g) compensatory measures, in particular the suspension of obligations as set out in Article 501 of the Trade and Cooperation Agreement;
- (h) remedial measures and the suspension of obligations as set out in Article 506 of the Trade and Cooperation Agreement;
- (i) the suspension or termination of the application of Protocol I to the Trade and Cooperation Agreement in relation to one or more Union programmes or activities adopted on the basis of the TFEU, or parts thereof, as set out in Articles 718 and 719 of the Trade and Cooperation Agreement;
- (j) an offer or acceptance of temporary compensation or the suspension of obligations in the context of compliance following an arbitration or panel of experts procedure under Article 749 of the Trade and Cooperation Agreement;

- (k) safeguard measures and rebalancing measures as set out in Article 773 of the Trade and Cooperation Agreement;
- (l) measures restricting trade, investment or other activities within the scope of the Trade and Cooperation Agreement, if adjudication is not possible because the United Kingdom is not taking the steps that are necessary for a dispute settlement procedure under that Agreement or the Withdrawal Agreement to function, including unduly delaying the proceedings amounting to non-cooperation in the process (this measure is not expressly provided for in the TCA or WA but was relatively recently added to the general EU Enforcement Regulation);
- (m) the suspension of obligations under Article 178 of the Withdrawal Agreement in the context of compliance with an arbitration panel ruling;
- (n) remedial measures as set out in Article 13 of the Protocol on Ireland/Northern Ireland to the Withdrawal Agreement;
- (o) safeguard measures and rebalancing measures as set out in Article 16 of the Protocol on Ireland/Northern Ireland to the Withdrawal Agreement.