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'I/A' ITEM NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee/Council
No. prev. doc.:	ST 9244 2022 REV 1
No. Cion doc.:	COM(2022) 89 final
Subject:	Proposal for a Regulation of the European Parliament and of the Council 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 - General approach

1. On 11 March 2022 the Commission submitted two related proposals: a proposal for a Regulation of the European Parliament and of the Council 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 (the 'Regulation on Autonomous Measures (TFEU)'), as set out in 7158/22; and a proposal for a Council Regulation 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 (the ‘Regulation on Autonomous Measures (Euratom)’), as set out in 7159/22.

2. The aim of these Regulations is to lay down specific rules for the unilateral measures the Union has the right to take in the event of failure to implement the obligations established by the Trade and Cooperation Agreement (the ‘TCA’) or in the event of divergences between standards for products placed on the market in the United Kingdom and the level of protection that existed at the time of the United Kingdom’s withdrawal from the European Union. The cases in which unilateral measures would be justified are listed in the TCA and the Withdrawal Agreement and are reproduced in Article 1(2) of the proposed Regulation on Autonomous Measures (TFEU).
3. This Council general approach only concerns the proposed Regulation on Autonomous Measures (TFEU), which will be adopted under the ordinary legislative procedure. The Council Regulation on Autonomous Measures (Euratom) will be adopted at a later stage, together with the Regulation on Autonomous Measures (TFEU), as soon as agreement has been reached with the European Parliament.
4. The Regulation on Autonomous Measures (TFEU) will replace the framework established by Article 3 of Council Decision (EU) 2021/689 on the conclusion of the TCA¹ for the adoption of measures enforcing the obligations established in the TCA.
5. At its meeting on 24 May, the Working Party on the United Kingdom examined a Presidency compromise proposal and, at its meeting on 3 June, agreed on the text of the Regulation set out in 9244/22 REV 1. Three different types of change have been made.
 - Technical and legal amendments have been made to the legal bases and scope. A specific provision has been added concerning the suspension of access to waters for fishing vessels in order to safeguard the Council’s prerogatives under Article 43(3) TFEU.

¹ Council Decision (EU) 2021/689 of 29 April 2021 on the conclusion, on behalf of the Union, 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, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information, OJ L 149, 30.4.2021, p. 1.

- The Council's role has been reinforced by the addition of reporting requirements for the Commission in two recitals and in a joint Commission and Council statement.
 - The conditions under which the Commission may adopt autonomous measures (TFEU) have been eased by removing points (a) to (e) of Article 2(2). Accordingly, only conditions specifically established in the TCA and in the Withdrawal Agreement will apply. Additional criteria, such as the effectiveness of the measures, the costs generated by the measures or the impact of the measures on downstream undertakings, which could hamper the Union's ability to adopt autonomous measures, have been deleted. To take into account the negative impact that unilateral measures could have on individuals and undertakings downstream, the proportionality of the measures has been explicitly included as a criterion. These changes are intended to equip the Commission with a credible and powerful tool that strikes a balance between, on the one hand, the interest in effectively ensuring that the United Kingdom fulfils the obligations arising from the TCA and from the Withdrawal Agreement and, on the other, the interests of EU individuals and undertakings which might be affected by the measures on the other.
6. In order to take account of the specific situation of Gibraltar, a reference to Article 774(3) of the TCA has been added. It is recalled that the TCA neither applies to Gibraltar nor has any effects in that territory. Should a treaty on Gibraltar be concluded when an agreement is reached with the European Parliament on the Regulation on Autonomous Measures (TFEU), the Regulation could be adapted accordingly.
7. In addition, the Regulation on Autonomous Measures (Euratom) Regulation will be aligned on the final text of the Regulation on Autonomous Measures (TFEU).
8. In that context, it is therefore proposed that the Permanent Representatives Committee:
- examine and approve the texts set out in Annexes I and II to this note;
 - recommend that the Council, at the General Affairs Council meeting on 21 June 2022, confirm the general approach on the draft Regulation set out in Annex I.

2022/0068 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 43(2), 91(1), 100(2), 173(3), 182(5), 188, 189(2) and 207(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee²,

Having regard to the opinion of the Committee of the Regions³,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) On 30 January 2020, the Council concluded the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community⁴ (the 'Withdrawal Agreement'). That Agreement entered into force on 1 February 2020.

² OJ C , , p. .

³ OJ C , , p. .

⁴ OJ L 29, 31.1.2020, p. 7.

- (2) On 29 April 2021, the Council concluded, on behalf of the Union, 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 part⁵ (the 'Trade and Cooperation Agreement'). The Trade and Cooperation Agreement was applied provisionally as of 1 January 2021 and entered into force on 1 May 2021.
- (3) Both the Withdrawal Agreement and the Trade and Cooperation Agreement provide that a Party may adopt certain measures in the specific cases and subject to the conditions and procedures laid down therein. These measures may entail the suspension of certain obligations under the Agreement concerned.
- (4) The Union and the United Kingdom may conclude other bilateral agreements between them that constitute supplementing agreements to the Trade and Cooperation Agreement and such supplementing agreements are an integral part of the overall bilateral relations as governed by this Agreement and form part of the overall framework. It is recalled that in accordance with Article 774(3) of the Trade and Cooperation Agreement that agreement neither applies to Gibraltar nor has any effects in that territory.
- (5) Should the need arise to exercise its rights in implementing and enforcing the Withdrawal Agreement and the Trade and Cooperation Agreement, the Union should be in a position to make appropriate use of the instruments available to it swiftly and in a proportionate, effective and flexible manner, while fully involving Member States. The Union should also be able to take appropriate measures if effective recourse to binding dispute settlement under those Agreements is not possible because the United Kingdom does not cooperate in making such recourse possible. It is therefore necessary to lay down rules and procedures governing the adoption of those measures.
- (5a) It is recalled that the procedure for adopting autonomous measures in accordance with Regulation (EU) No 182/2011 pursuant to this Regulation is without prejudice to the continued and permanent exercise by the Council of its policymaking, coordination and decision-making functions conferred by the Treaties as far as the implementation of the Agreements between the European Union and the United Kingdom is concerned.

⁵ OJ L 149, 30.4.2021, p. 10.

- (5b) To give effect to the powers in Article 16(1) of the Treaty on European Union and Article 218(9) of the Treaty on the Functioning of the European Union, the internal decisions making in relation to the implementation of the Withdrawal Agreement and of the Trade and Cooperation Agreement is reflected in Council Decisions (EU) 2020/135 and 2021/689. In order for the Council to be in a position to exercise fully its policymaking, coordination and decision-making functions in this regard, the Council should be continuously informed on a permanent and regular basis of the implementation of these Agreements, including all difficulties that may arise, in particular possible breaches of these Agreements and other situations that may give rise to measures taken pursuant to this Regulation. In this regard, the Council should be timely and duly informed of possible responses at the disposal of the Union to ensure a full and proper implementation of these Agreements, as well as of the follow-up to any measures taken.
- (6) The rules and procedures laid down in this Regulation should take precedence over any provisions of Union law adopted on the basis of the Treaty on the Functioning of the European Union that govern the same subject matter.
- (7) In order to ensure that this Regulation remains fit for purpose, the Commission should undertake, within five years of its entry into force, a review of its scope and implementation and report its findings to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions.
- (8) In order to ensure uniform conditions for the implementation of this Regulation, and in particular in order to ensure the swift, effective and flexible exercise of the corresponding Union's rights under the Withdrawal Agreement and the Trade and Cooperation Agreement, with the exception of access to waters for fisheries, implementing powers should be conferred on the Commission to adopt the measures referred to above and to adopt, as appropriate, measures restricting trade or other activities. Those powers should also extend to the amendment, suspension or repeal of the adopted measures. They should be exercised in light of the Union's general interest in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council⁶. Given that the envisaged measures entail the adoption of acts of general scope, and that most of the envisaged measures relate to the areas referred to in Article 2(2), point (b), of that Regulation, the examination procedure should be used for the adoption of those measures. The Commission should adopt immediately applicable implementing acts where, in duly justified cases, imperative grounds of urgency so require for the appropriate protection of the Union's interests.
- (8a) When the Council decides pursuant to Article 43(3) TFEU to suspend, in whole or in part, access to Union waters by vessels of the United Kingdom for fisheries, it should apply the same criteria to help determine the Union's general interest.

⁶ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

- (9) Since the objective of this Regulation, namely to lay down rules and procedures governing the exercise of Union's rights under the Withdrawal Agreement and the Trade and Cooperation Agreement, and to empower the Commission to adopt the necessary measures including, as appropriate, restrictions in trade, investment or other activities within the scope of the latter Agreement cannot be sufficiently achieved by the Member States but can rather, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. Moreover, since only the Union is Party to the TCA and the WA, action at the level of international law in respect of these agreements can only be taken by the Union. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective,

HAVE ADOPTED THIS REGULATION:

Article 1
Subject matter and scope

1. This Regulation lays down rules and procedures to ensure an effective and timely exercise of the Union's rights in enforcing and implementing 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 ('the Withdrawal Agreement'), 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 ('the Trade and Cooperation Agreement') and supplementing agreements to the Trade and Cooperation Agreement.
2. This Regulation applies to the following measures adopted by the Union (hereinafter: "measures"):
 - (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, in relation to one or more Union programmes or activities adopted on the basis of the Treaty on the Functioning of the European Union, 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;
- (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.

Article 2
Exercise of the Union's rights

1. The Commission shall be empowered, by means of implementing acts,
 - (a) to adopt the measures referred to in Article 1(2) of this Regulation, with the exception of measures relating to the access to waters for fisheries under Articles 501 and 506 of the Trade and Cooperation Agreement; and
 - (b) where the measure consists of the suspension of an obligation under any of the agreements referred to in Article 1(1), to impose restrictions on trade, investment or other activities within the scope of the agreement concerned which would otherwise be precluded by the suspended obligation.

Those implementing acts shall be proportionate to the objectives pursued and, where appropriate, specify the duration of the adopted measures.

2. When adopting the implementing acts pursuant to paragraph 1, the Commission shall take into account the effectiveness of the measures in inducing compliance of the United Kingdom with the agreements referred to in Article 1(1) and any specific criteria established in those agreements in connection with the measures referred to in Article 1(2).
3. The Commission shall be empowered to amend, suspend or repeal the measures referred to in Article 1(2) by means of implementing acts. Where appropriate, those implementing acts shall specify the duration of the suspension.
4. Where there is a particular concern of one or more Member States, that or those Member States may request the Commission to adopt measures referred to in Article 1(2). If the Commission does not respond positively to such a request, it shall inform the Council in a timely manner of its reasons.
5. If, due to persisting significant divergences, rebalancing measures referred to in Article 1(2), point (c), of this Regulation last for more than a year, one or more Member States may request the Commission to activate the review clause provided for in Article 411 of the Trade and Cooperation Agreement. The Commission shall examine this request in a timely manner and shall consider seizing as appropriate the Partnership Council of that matter, in accordance with the provisions set out in the Trade and Cooperation Agreement. If the Commission does not respond positively to such a request, it shall inform the Council in a timely manner of its reasons.

6. The implementing acts referred to in paragraphs 1 and 3 of this Article shall be adopted in accordance with the examination procedure referred to in Article 3(2).
7. On duly justified imperative grounds of urgency, the Commission shall adopt immediately applicable implementing acts in accordance with the procedure referred to in Article 3(3).
8. When the Council decides to suspend, in whole or in part, access to Union waters by vessels of the United Kingdom for fisheries pursuant to Articles 501 and 506 of the Trade and Cooperation Agreement, it shall apply the criteria set out in paragraph 2.

Article 3 *Committee procedure*

1. The Commission shall be assisted by the UK Committee. That committee shall be a committee within the meaning of Article 3 of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.
3. Where reference is made to this paragraph, Article 8 of Regulation (EU) No 182/2011, in conjunction with Article 5 thereof, shall apply.

Article 4 *Relation to other provisions of Union law*

This Regulation shall apply notwithstanding any provisions of Union law adopted on the basis of the Treaty on the Functioning of the European Union that govern the same subject matter.

Article 5 *Review*

By [Publications Office: Please insert the date three years after the entry into force of this Regulation], the Commission shall present a report to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of this Regulation.

Article 6
Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

Draft Statement of the Commission and the Council on the implementation of autonomous measures under the Withdrawal Agreement and the Trade and Cooperation Agreement

It is recalled that the procedures for adopting autonomous measures in accordance with Regulation (EU) No 182/2011 pursuant to Regulation XXXX/2022 [TFEU Regulation] and Regulation XXXX/2022 [EURATOM Regulation] Regulations are without prejudice to the continued and permanent exercise by the Council of its policymaking, coordination and decision-making functions conferred by the Treaties as far as the implementation of the Agreements between the European Union and the United Kingdom is concerned.

In this regard, in line with the Statement by the Commission and the Council on the monitoring and implementation of the Trade and Cooperation Agreement⁷, the Commission will keep the Council informed in a timely manner and well in advance of developments that may lead to situations requiring the adoption of autonomous measures governed by Regulation XXXX/2022 [TFEU Regulation] and Regulation XXXX/2022 [EURATOM Regulation], under 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.

The Commission will proceed in the same manner regarding developments that may lead to situations requiring the adoption of autonomous measures governed by Regulation XXXX/2022 [TFEU Regulation], under 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.

⁷ ST 7888/21 ADD 1 Annex 2.