Department for International Trade

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The Earl of Kinnoull
Chair
House of Lords European Union Select Committee
House of Lords
London, SW1A 0PW

31st January 2020

Dear Charles,

15088/19 - Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 654/2014 of the European Parliament and of the Council concerning the exercise of the Union's rights for the application and enforcement of international trade rules

15090/19 - Report from the Commission to the European Parliament and the Council, Review of the scope of the Regulation No 654/2014 of the European Parliament and of the Council of 15 May 2014

Thank you for your letter dated 24 January 2020 which concerns the Explanatory Memorandum (EM) of 5 November 2019, regarding the above documents which were considered by the External Affairs Sub-Committee on 23 January 2020.

I am happy to address your specific questions as follows:

1. *Whether the Government is supportive of this proposal in principle and whether UK officials attended any meetings or working groups at which the proposed regulation was discussed? Could you provide further clarity on the Government's position and the UK's representations, if any, at relevant meetings?*

The Government is supportive of the amended Enforcement Regulation's objectives around ensuring the Union's (and during the Transition Period, the UK's) interests under international trade agreements remain protected when third countries adopt illegal measures and simultaneously there is a block in the dispute settlement process.

The UK has attended working groups on this issue. Less than half of all EU Member States have made representations[1]. The Government has yet to make any representations on the proposal to amend the Enforcement Regulation No 654/2014 at relevant meetings but the proposals regarding the amendment

[1] Representations have been made by Sweden, France, Italy Portugal, Poland, Spain, Germany, Denmark the Czech Republic and Austria, Latvia and the Netherlands.

to the Enforcement Regulation continue to be discussed by EU Member States. The Government is following these developments closely and reserves the right to make representations as necessary.

2. *Will the Government seek to establish similar alternative interim dispute settlement arrangements with the EU, as part of the negotiations over the future relationship?*

3. *Will the Government seek to establish interim dispute settlement mechanisms with other future trading partners?*

The UK remains a strong supporter of the multilateral trading system and the World Trade Organization (WTO) dispute settlement system. A fully-functioning, compulsory, binding, and impartial dispute settlement system with an appeal function is important in providing certainty and stability to the WTO system. The UK urges Members to continue to work together to seek a resolution to the Appellate Body impasse.

The UK's focus remains on finding a permanent resolution to the Appellate Body impasse. The UK intends to engage closely in the deeper interrogation of Appellate Body issues through the consultations now being led by Director-General Roberto Azevêdo.

The UK notes that the European Union has previously established bilateral interim appeal arrangements with Canada and Norway. The UK also notes that some WTO Members, including the European Union, are now considering multi-party interim appeal arrangements. A joint statement was issued by 17 WTO Members[2] on 24 January 2020 committing to working with the whole WTO membership to find a permanent resolution to the Appellate Body impasse. The statement also set out that the 17 Members will work together to finalise a multi-party interim appeal arrangement whilst the Appellate Body is inquorate. The final proposal for such an interim arrangement has not yet been published. We will follow developments on this closely.

I am copying this letter to the Chair of the European Scrutiny Committee in the House of Commons as well as Leigh Gibson, Parliamentary Scrutiny Clerk (Commons), Jennifer Martin-Kohlmorgan, Parliamentary Scrutiny Clerk (Lords), Les Saunders, Department for Exiting the EU (DExEU) and Edwina Osborne, Department for International Trade Departmental Scrutiny Co-ordinator.

Yours sincerely,

THE RT HON CONOR BURNS

Minister of State

Department for International Trade

[2] Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, European Union, Guatemala, Republic of Korea, Mexico, New Zealand, Norway, Panama, Singapore, Switzerland, Uruguay

Annex A:

15088/19
COM(2019) 623 final

15090/19
COM(2019) 639 final

EXPLANATORY MEMORANDUM FOR EUROPEAN UNION LEGISLATION AND DOCUMENTS

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EU) No 654/2014 of the European Parliament and of the Council concerning the exercise of the Union's rights for the application and enforcement of international trade rules.

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Review of the scope of the Regulation No 654/2014 of the European Parliament and of the Council of 15 May 2014

Submitted by the Department for International Trade on 7 January 2020

SUBJECT MATTER

1. The proposal aims to ensure the Union's interests under international trade agreements are protected in situations when third countries adopt illegal measures and simultaneously block a dispute settlement process. On 11 December 2019, the number of the World Trade Organization (WTO) Appellate Body Members dropped to one and the Appellate Body is no longer able to hear new appeals. This is a result of continuous blockage of new appointments over the past two years.

2. The paralysis of the Appellate Body affects the EU's ability to enforce its rights under multilateral trade rules. WTO members will be able to avoid binding rulings by appealing panel reports. When a panel report is appealed but the Appellate Body is not functioning, the report will be appealed 'into the void' and thus remain unresolved. Following the Appellate Body becoming inquorate on 11 December, on 12 December 2019, the EU published a review of the scope of the Enforcement Regulation (Regulation (EU) No 654/2014) alongside a legislative proposal to amend the existing Enforcement Regulation.

3. The current Enforcement Regulation – a basis under EU law for adopting trade countermeasures – authorizes imposition of rebalancing or retaliatory measures permitted under international trade agreements or following the conclusion of binding dispute settlement procedures.

4. Both the review and the legislative proposal are summarised briefly further below.

Review

5. This is the EU's second review of the Enforcement Regulation since it came into force in 2014.
6. The Commission undertook an initial review in July 2017 and a further review was scheduled to take place by 18 July 2019.

7. The Enforcement Regulation concerns the EU's right in applying countermeasures in specific situations (as outlined under Article 3). Countermeasures, as outlined above, can take the form of different measures and are recognised instruments under international law to encourage compliance with international obligations.

8. Currently the Enforcement Regulations apply only in three scenarios:

    a. following a binding adjudication of a trade dispute, in favour of the EU.

   b. for the purpose of EU rebalancing measures in reaction to safeguard measures imposed by another country as foreseen under applicable international rules.
   c. when a WTO member modifies or withdraws its concessions and no compensatory adjustment is agreed.

9. The Enforcement Regulation also details a specific list of countermeasures (as detailed in Article 5) which are to:
   a. suspend tariff concessions and impose new or increased customs duties
   b. introduce or increase quantitative restrictions on the import or export of goods
   c. suspend concessions in the area of public procurement

10. The Enforcement Regulation has, to date, only been used once, in relation to the import duties on steel and aluminium imposed on the United States in 2018. The EU Commission consider that the Regulation has enabled the EU to act swiftly and send a strong message on defending its rights in trade disputes.

11. The Commission intends to continue to monitor the overall use and effectiveness of the Enforcement Regulation.

Proposed amending Regulation

12. The EU's proposals envisage amending Articles 3, 4 and 10 of the Enforcement Regulation. The most significant change would be the proposed addition of points (aa) and (bb) to Article 3.

13. Under the current rules concerning trade disputes in the context of multilateral trade law, the EU can adopt countermeasures only at the end of a dispute settlement procedure, having received an authorisation from the WTO. The proposed amendment will permit the Commission to trigger countermeasures in situations where a partner prevents the dispute from reaching the point where such authorisation could be granted.

14. The proposal applies to a limited number of amendments to the existing Enforcement Regulation:

    a. The proposal will enable the EU to react following a WTO dispute where the panel sides with the EU but an appeal then goes 'into the void'. It will also apply to the dispute settlement provisions included in regional or bilateral trade agreements when a third country impedes the functioning of the dispute settlement procedures. (Article 3, points (aa) and (bb)).

    b. A new provision is added to set out the requirement that the Union's countermeasures taken in the above situation should not exceed the nullification or impairment caused by a measure of the third country (Article 4, point (bb)).

    c. There is a technical amendment so as to renew the Commission's obligation to review the scope of the Regulation after a period of five years (Article 10).

15. The proposed legislative changes are considered by the EU to be in line with the priority of effectively enforcing the EU's rights under international trade agreements, as well as being in line with other EU policies. They also reiterate the EU's commitment to multilateralism and independent adjudication.

SCRUTINY HISTORY

16. The current Enforcement Regulation was put forward for scrutiny prior to adoption in 2013 in relation to the EU's proposal for a "Draft Regulation concerning the exercise of the Union's rights for the application and enforcement of international trade rules". (published on 18 December 2012). The former Department for Business, Innovation and Skills (BIS) published an Explanatory Memorandum on EU document 18079/12 (COM(12) 773) on 14 January 2013. The House of Commons European Scrutiny Committee considered the file as politically important and cleared it in its 29th Report (Session 2012-2013). The House of Lords European Union Committee (EUC) sifted it at sub-committee C (Sift 1493) and cleared on 5 December 2013 (Session 2012-2013).

17. As referred to above, the European Commission published a “Report from the Commission to the European Parliament and the Council – Initial Review of the scope of the Enforcement Regulation” in 2017 (EU document 11243/17). The Department for International Trade (DIT) published an Explanatory Memorandum summarising the report on 26 July 2017. The House of Commons ESC cleared on 19 December 2017 (Session 2017-2019) as a file of insufficient legal or political importance to warrant a substantive report to the House. The House of Lords EUC cleared at Chairman’s Sift 1664 on 6 September 2017 (Session 2017-2019).

MINISTERIAL RESPONSIBILITY

18. The Secretary of State for International Trade has primary responsibility for trade policy matters including in the area of anti-dumping, trade disputes, countermeasures and multilateral agreement through the World Trade Organization (WTO). The Foreign Secretary also has an interest from a foreign policy perspective and the Business Secretary from a business and industry perspective.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

19. The UK’s policy on international trade is a reserved matter under the devolution settlements and no devolved administration issues arise. However, the Devolved Administrations have been consulted in the preparation of this Explanatory Memorandum.

LEGAL AND PROCEDURAL ISSUES

Legal basis

20. The legal basis for the EU’s proposed amendment to the Enforcement Regulation is Article 207 on the Treaty on the Functioning of the European Union (TFEU). This is because the proposal relates to the common commercial policy and enforcement of the Union’s international trade agreements, rights and obligations.

21. The legislative proposal as outlined do not currently impact on Justice and Home Affairs (JHA) considerations. As such, no issues arise under our JHA opt-in.

22. The associated review does not give rise to any additional legal or procedural issues.

European Parliament Procedure

23. The proposal will be subject to validation by the European Parliament and the Council of the EU under the ordinary legislative procedure.

Voting procedure

24. Qualified Majority Voting

Impact on United Kingdom Law

25. Regulation No 654/2014 is directly applicable to the UK and upon EU Exit will continue to apply during the Implementation Period under Article 127 of the Withdrawal Agreement. The Regulation is also listed as European Union law which will continue to apply to Northern Ireland under the Northern Ireland Protocol (Article 5(4) and Annex 2).

Application on Gibraltar

26. Not applicable.

Fundamental rights analysis

27. No issues of fundamental rights apply in relation to this proposal to amend the EU's Enforcement Regulation

APPLICATION TO THE EUROPEAN ECONOMIC AREA

28. The Regulation relates to the EU's internal legislative procedures and does not apply to the EEA states.

SUBSIDIARITY

29. The proposed amending legislation and the report both relate to an area of exclusive European Union competence and therefore no subsidiarity issues arise.

POLICY IMPLICATIONS (including Exit implications where appropriate)

30. On 23 June 2016, the EU referendum took place and the people of the United Kingdom voted to leave the European Union (EU).

31. From 1 September 2019 until exit day, the UK will no longer attend most EU meetings, in order to make the best possible use of UK resources. The UK will continue to attend if and when it is in our interests, with particular regard to meetings on UK exit, sovereignty, international relations, security, or finance. The Government will make these decisions on a case by case basis.

32. The UK is still committed to the duty of sincere cooperation and this decision is not intended in any way to frustrate the functioning of the EU.

33. This regulation will apply to the UK in an Implementation Period insofar as the UK will be bound by any measures applied in accordance with this regulation. On exit the UK will operate an independent trade disputes function and retaliatory measures will be applied in accordance to domestic law, under Section 15 of the Taxation (Cross-border Trade) Act, 2018. Regulation No 654/2014 is listed as European Union law which will continue to apply to Northern Ireland under the Northern Ireland Protocol (Article 5(4) and Annex 2).

CONSULTATION

34. The European Commission did not carry out a public consultation for this initiative. The proposed amendments to the current Enforcement Regulation would only insert new triggers for use of the Regulation with respect to the emergency arising in the WTO.

35. However, the Commission is under an obligation to carry out an information gathering exercise and follow an implementing act procedure in each individual case of application. Through this exercise, the Commission must consider the views of stakeholders regarding the Union's economic interests in specific sectors in which countermeasures might be contemplated.

IMPACT ASSESSMENT

36. Neither the EU nor the UK Government have conducted an impact assessment of the proposed amendment to the Enforcement Regulation. This is because the proposal does not have a direct economic, social or environmental impact and UK businesses are not impacted by being required to alter working practices.

FINANCIAL IMPLICATIONS

37. There are no budgetary implications on either the EU or UK related either to the review report or to the proposed legislative amendments.

TIMETABLE

38. There are not expected to be any further discussions on the report at either COREPER or Council. The legislative proposal is expected to be discussed in the Working Group on Trade Questions in January 2020. No definitive timetable for when the proposals will be put to a vote have been confirmed by the new Croatian Presidency. The Commission anticipates the amendments to the Enforcement Regulation to be finalised by the middle of 2020 following approval by the Council and the European Parliament.

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