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Documents considered by the Committee on 11 January 2017

Report, together with formal minutes

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Notes

Numbering of documents

Three separate numbering systems are used in this Report for European Union documents:

Numbers in brackets are the Committee's own reference numbers.

Numbers in the form "5467/05" are Council of Ministers reference numbers. This system is also used by UK Government Departments, by the House of Commons Vote Office and for proceedings in the House.

Numbers preceded by the letters COM or SEC or JOIN are Commission reference numbers.

Where only a Committee number is given, this usually indicates that no official text is available and the Government has submitted an "unnumbered Explanatory Memorandum" discussing what is likely to be included in the document or covering an unofficial text.

Abbreviations used in the headnotes and footnotes

AFSJ	Area of Freedom Security and Justice
CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy
ECA	European Court of Auditors
ECB	European Central Bank
EEAS	European External Action Service
EM	Explanatory Memorandum (submitted by the Government to the Committee)*
EP	European Parliament
EU	European Union
JHA	Justice and Home Affairs
OJ	Official Journal of the European Communities
QMV	Qualified majority voting
SEM	Supplementary Explanatory Memorandum
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

Euros

Where figures in euros have been converted to pounds sterling, this is normally at the market rate for the last working day of the previous month.

Further information

Documents recommended by the Committee for debate, together with the times of forthcoming debates (where known), are listed in the European Union Documents list, which is published in the House of Commons Vote Bundle each Monday, and is also available on the parliamentary website. Documents awaiting consideration by the Committee are listed in "Remaining Business": www.parliament.uk/escom. The website also contains the Committee's Reports.

*Explanatory Memoranda (EMs) and letters issued by the Ministers can be downloaded from the Cabinet Office website: http://europeanmemoranda.cabinetoffice.gov.uk/.

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Meeting Summary

The Committee considered the following of particular interest:

Brexit related issues

The Committee is now looking at documents in the light of the UK decision to withdraw from the EU. Issues are explored in greater detail in report chapters and, where appropriate, in the summaries below, but the Committee notes that in the current week the following issues and questions have arisen in documents or in correspondence with Minsters:

- In Ministerial Correspondence, Thérèse Coffey, Parliamentary Under-Secretary DEFRA, confirms that the EU emissions limits for key pollutants under the Directive on the Reduction of National Emissions of Certain Atmospheric Pollutants will be incorporated into UK legislation by the end of June 2018. Further actions will be set out in the Government's air pollution action plan, to be published by March 2019, detailing measures we will take to meet the ceilings in 2020 and 2030;
- Trade Defence—What Trade Defence instruments will be available post-Brexit?
- The Committee also draws attention a letter from the Minister for Trade giving updates on all EU trade negotiations, published with Ministerial Correspondence;
- Asylum—How will the UK relate to the EU in relation to asylum issues after Brexit? Would it want to retain the Dublin system? What relationship does the Government envisage establishing with the proposed EU Asylum Agency (or, if it continues to exist, the European Asylum Support Office) once the UK leaves the EU?
- Law Enforcement and Security—What steps does the Government intend to take during exit negotiations to mitigate or eliminate the risk that UK law enforcement and immigration control authorities may lose access to important EU data-sharing instruments? Would a bespoke agreement be necessary to enable the UK to replicate, "as far as possible", the UK's existing relationship with Europol?
- Data Protection—Will the UK's domestic data protection laws need broadly to replicate EU laws if information-sharing is to continue to the same or similar extent post-Brexit?
- EU Travel—Does the Government intend to seek visa-free access to the Schengen area for UK nationals post-Brexit? What will its approach be on the application of the proposed ETIAS travel authorisation to UK nationals post-Brexit? If necessary would the Government wish to introduce a reciprocal travel authorisation system for EU nationals travelling to the UK? and
- Import of minerals from conflict areas—Whether the UK will wish, post-Brexit, to apply the terms of new EU legislation designed to ensure the responsible sourcing of minerals from conflict-affected areas?

Chapter Summaries

Financial services regulatory framework: resolution and recovery, capital requirements and central counterparties

Following the financial crisis the EU adopted a considerable amount of regulatory legislation aimed at restoring the stability of the financial services sector and preventing future problems. Much of the legislation was based on internationally agreed standards. Although the legislation has concerned all Member States, implementation of significant parts of it has been centralised for eurozone Member States through development of the Banking Union.

Practical experience of the legislation and further development of international standards have led to the need for amendment of important elements of the EU legislation. The Commission has now presented six legislative proposals, for amendment to present legislation concerning capital requirements for credit institutions and investment firms, bank recovery and resolution, central counterparties and the Banking Union's Single Resolution Mechanism. These complex and technical proposals affect many important aspects of EU financial regulation. They range from measures to ensure the regulation of non-bank entities is more appropriate and proportionate to measures to implement recent significant developments in international standards.

The Government is generally supportive of the Commission's proposals. But its comments to us about the very detailed provisions show its laudable wish to ensure that EU legislation is entirely consistent with agreed international standards, is flexible and proportionate and does not give the European Securities and Markets Authority and the Commission powers to set technical detail which ought to be in the primary legislation. We have cleared the proposed Single Resolution Mechanism Regulation from scrutiny, since it has no direct relevance for the UK.

The other five legislative proposals remain under scrutiny. Clearly the Government will need to negotiate carefully much of the many details it has drawn to our attention to ensure everything in them when adopted meets its concerns. So we wish to be kept informed regularly about negotiating developments on each proposal. More generally we wish to be told soon about the likely implementation dates of the proposals in the context of the probable Brexit date. We should also like to have the Government's assessment of the consequences for the UK of these proposals. In particular would its aim post-Brexit to be closer to the relevant international standards or the EU ones, if there were any divergence between the two.

EU asylum reform

The Immigration Minister (Mr Robert Goodwill) has formally notified the Committee of the Government's decision not to opt into five EU asylum reform proposals concerning changes to the Dublin rules (which allocate responsibility for examining an asylum application made within the EU), the creation of an EU Asylum Agency, qualification for international protection, asylum procedures and reception conditions. The Committee notes the opt-in debate took place after the opt-in deadline on four of the five proposals had expired and seeks an unequivocal assurance that the Government intends to abide by the undertakings made to Parliament by the previous Coalition Government to strengthen

Parliament's role in scrutinising important opt-in decisions. The Minister is also asked to respond to the questions which are still outstanding from the Committee's earlier Reports to inform its scrutiny of these proposals, to provide progress reports on negotiations and to clarify the Government's position on cooperation with EU Member States and agencies in the field of asylum once the UK leaves the EU.

Not cleared from scrutiny; further information awaited/requested; drawn to the attention of the Home Affairs Committee.

The Eurodac system

Mr Goodwill formally notified the Committee of the Government's decision to opt into a proposed Regulation which would develop the EU's asylum database—Eurodac—into a broader migration management tool. If the UK were not to opt in, the Minister suggests that the UK would be at risk of becoming "a blind spot" in terms of data-sharing capabilities. The Committee notes that it has taken the Minister six months to provide an initial update, even though it is clear that negotiations within the Council have proceeded apace. The Committee reiterates its request for an analysis of the feasibility of opting into the revised Eurodac Regulation but not opting into other elements of the Commission's wider asylum reform package, as well as a response to the questions outstanding from its earlier Report on the proposal. The Minister is also asked to explain what steps the Government intends to take during exit negotiations to mitigate or eliminate the risk that UK law enforcement and immigration control authorities may lose access to important EU data-sharing instruments.

Not cleared from scrutiny; further information awaited/requested; drawn to the attention of the Home Affairs Committee.

Enhancing security in a world of mobility

The Commission Communication identifies "key work streams" which are intended to place "strong borders" and "smart intelligence" at the heart of the EU's efforts to maintain security within an open Europe. The Committee continues to press the Government to clarify how it envisages the UK's future relationship with EU partners on migration and security developing once the UK leaves the EU. The Minister for Policing and the Fire Service (Brandon Lewis) provides another disappointing and elliptical response which takes the Committee no further in understanding how the Government intends to secure its objective of "keep[ing] our justice and security arrangements at least as strong as they are" and seeking "as far as possible, to replicate what we already have". The Committee asks the Minister whether the Government intends to seek a bespoke agreement with Europol and whether maintaining access to Europol's databases, analytical resources and secure means for exchanging information will be a priority during exit negotiations. The Committee also asks the Minister whether he accepts that the UK's domestic data protection laws will need broadly to replicate EU laws if information-sharing is to continue to the same or similar extent once the UK leaves the EU.

Not cleared from scrutiny; further information requested; drawn to the attention of the Committee on Exiting the European Union and the Home Affairs Committee.

Establishing a European Travel Information and Authorisation System

This proposal would establish a European Travel Information and Authorisation System (ETIAS) like the ESTA operated by the USA. Its purpose is to strengthen security, reduce the risk of irregular migration and protect public health by requiring nationals of around 60 countries who do not need a visa to visit the Schengen area to complete an online application form and obtain authorisation before they travel. The ETIAS is intended to operate alongside the proposed EU Entry/Exit System (currently under negotiation) which would establish entry and exit records for all third country nationals crossing the external Schengen border.

The Commission envisages that both systems should be operational from 2020, after the expected date for the UK's withdrawal from the EU. The immigration status of UK nationals wishing to travel to the Schengen area post-Brexit is one of the issues to be resolved during Article 50 negotiations.

The UK is not entitled to participate in the ETIAS proposal as it builds on parts of the Schengen rule book which do not apply to the UK. The Immigration Minister is unwilling to speculate on whether UK nationals will require a visa, an ETIAS travel authorisation, or will enjoy a status different from other third country nationals, but makes clear that the Government intends to follow negotiations on the ETIAS proposal closely and to urge the Commission to minimise the impact on travellers as far as possible.

The Committee asks the Minister to indicate what outcome the Government is seeking to achieve in Article 50 negotiations, not least because this will inform its approach to the proposed ETIAS Regulation and also help to reduce uncertainty for individuals and carriers. He is also asked to comment on the provisions on third country access to ETIAS data and the possible implications for future information sharing arrangements (particularly for security and law enforcement purposes) once the UK leaves the EU.

Not cleared from scrutiny; further information requested; drawn to the attention of the Committee on Exiting the European Union and the Home Affairs Committee.

Strengthening trade defence instruments to deal with China Market Economy Status

The Commission's proposal for revisions to two regulations on protection against dumped imports and subsidised imports seeks to address the fact that the expiry in December 2016 of provisions of China's WTO Accession Protocol means that EU trade defence measures will become less effective.

The proposal introduces a new anti-dumping methodology, applicable to all countries, that aims to ensure that dumping margins reflect all distortions affecting prices and costs in exporters' home markets. It also extends the scope of anti-subsidy investigations to enable action against subsidies discovered during the course of an investigation.

Given the importance of trade defence instruments to the UK's trade policy post-Brexit, and the Committee's continued focus on the EU steel industry, the Committee looks forward to receiving from the Government analysis relating to post-Brexit trade defence

options, the Government's views on the merits of this specific proposal, an assessment of the implications of granting Market Economy Status to China, and updates on the progress of negotiations on the modernisation of trade defence instruments.

Not cleared; further information requested; drawn to the attention of the International Trade Committee, the Business, Energy and Industrial Strategy Committee and the Exiting the European Union Committee.

EU-US data transfer for law enforcement purposes under the Umbrella Agreement

The Umbrella Agreement was politically agreed between the EU and US in June 2016. It covers the transfer of all personal data (for example names, addresses, criminal records) exchanged between the EU and US for the purpose of prevention, detection, investigation and prosecution of criminal offences, including terrorism. From an EU perspective, it has been important to provide adequate safeguards in the Agreement to meet both EU data protection law standards and comply with EU fundamental rights.

We granted the Government a scrutiny waiver on the Council Decision to conclude the Agreement on the condition that the Minister promptly clarify Government statements about competence issues. The Government did not provide the necessary clarification in time, so scrutiny was overridden. The Minister blames this latest override on the expedited timetable for the Conclusion Decision's adoption, but now provides a better response on the exercise of competences. We ask him to update us if there is any legal challenge to the Agreement, noting such challenge has already been lodged in respect of the EU-US Privacy Shield relating to the transfer of EU citizens' data for commercial purposes.

Council Decision on conclusion cleared; further information requested

Documents drawn to the attention of select committees:

('NC' indicates document is 'not cleared' from scrutiny; 'C' indicates document is 'cleared')

Business, Energy and Industrial Strategy Committee: Strengthening trade defence instruments to deal with China market economy status [Proposed Regulation (NC)]

Exiting the European Union Committee: Enhancing security in a world of mobility [Commission Communication (NC)]; Establishing a European Travel Information and Authorisation System [Proposed Regulation (NC)]; Strengthening trade defence instruments to deal with China market economy status [Proposed Regulation (NC)]; EU asylum reform: revision of the Dublin rules and the establishment of an EU Agency for Asylum [(a) Proposed Regulation, (b) Proposed Regulation (NC)]

Foreign Affairs Committee: Import of minerals from conflict areas [(a) Proposed Regulation, (b) Joint Communication (NC)]

Home Affairs Committee: Enhancing security in a world of mobility [Commission Communication (NC)]; Establishing a European Travel Information and Authorisation System [Proposed Regulation (NC)]; A uniform residence permit for third country nationals [Proposed Regulation (NC)]; Fingerprinting of asylum applicants and irregular migrants: the Eurodac system [Proposed Regulation (NC)]; EU asylum reform: revision

of the Dublin rules and the establishment of an EU Agency for Asylum [(a) Proposed Regulation, (b) Proposed Regulation (NC)]; EU asylum reform [(a) Proposed Regulation, (b) Proposed Regulation, (c) Proposed Directive (NC)]

International Development Committee: Import of minerals from conflict areas [(a) Proposed Regulation, (b) Joint Communication (NC)]

International Trade Committee: Strengthening trade defence instruments to deal with China market economy status [Proposed Regulation (NC)]

1 Funds to help Member States affected by natural disasters

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested
Document details	Proposal for a Regulation amending Regulation (EU) No 1303/2013 as regards specific measures to provide additional assistance to Member States affected by natural disasters
Legal base	Article 177 TFEU, QMV, Ordinary Legislative Procedure
Department	Business, Energy and Industrial Strategy
Document Number	(38330), 15058/16, COM(16) 778

Summary and Committee's conclusions

1.1 Recent earthquakes in Italy have had a devastating effect on the region, causing death, displacement and substantial physical and cultural damage. The Commission notes that large scale reconstruction works will be required, notably to restore the cultural heritage of the affected areas. It considers that the EU ought to be able to provide support from its structural funds to Member States and regions hit by major or regional natural disasters, complementing the means already available under the European Union Solidarity Fund.

1.2 The Commission proposes to allow the European Regional Development Fund (ERDF) to support reconstruction operations, which can be backdated to 2014 onwards. Under the proposal, such operations could be financed fully from the ERDF, without the need for national co-financing. Normally, the ERDF co-finances projects alongside national funding, with the proportion of ERDF and national funding varying according to the wealth of a particular region.

1.3 The Minister for Small Business, Consumers and Corporate Responsibility, (Margot James), recognises the need for a fast and efficient mechanism to assist Member States affected by natural disasters. She notes that the proposal is within the financial limits set by the 2014–2020 financial framework. While generally supportive, the Government will be looking for the Commission to provide stronger justification for the proposal to allow up to a 100% ERDF contribution. Current rules already permit a 90% ERDF contribution for Member States in serious financial difficulties.

1.4 **We understand the wish to support Member States affected by natural disasters and we note that the proposal does not require any amendment to the agreed 2014–2020 financial framework. Equally, we agree with the Government's position that a clearer justification for the 100% ERDF support is required. Co-financing is an important principle for EU structural funding and there is a risk that this new proposal—however well intended—could start to erode the principle.**

1.5 **We retain the proposal under scrutiny and look forward to further information from the Minister once the Commission has responded to her request for a clearer**

justification. We would also welcome an indication of the likely speed of progress through the European Parliament and Council, assuming that there is likely to be strong support from some Member States and MEPs for swift adoption.

Full details of the documents

Proposal for a Regulation amending Regulation (EU) No 1303/2013 as regards specific measures to provide additional assistance to Member States affected by natural disasters: (38330), 15058/16, COM(16) 778.

European Commission proposal

1.6 In order to provide additional assistance to Member States affected by natural disasters, the Commission proposes the introduction of a new option ("priority axis") under the ERDF with a co-financing rate of up to 100%. The operations that may be supported under this option are those linked to reconstruction in response to major or regional natural disasters as defined in the European Union Solidarity Fund (EUSF). For these operations, expenditure incurred as from the date of the natural disaster can be declared for reimbursement (as long as it was after the beginning of the current funding cycle in 2014).

Minister's Explanatory Memorandum of 15 December 2016

1.7 The Minister sets out the Government's position in the following terms:

> "The United Kingdom recognises the need for a fast and efficient mechanism to assist reconstruction mechanisms in Member States or regions affected by major natural disasters. The United Kingdom notes that the proposal is intended to complement the existing possibility to apply for EUSF funding by providing an opportunity to draw on existing ERDF funds. The United Kingdom notes that the proposal is not intended to increase the existing budget over the course of this Multiannual Financial Framework, 2014–2020.
>
> "The United Kingdom believes that requirements for co-financing provide an important means to reinforce the commitment of Member States to programmes and projects, improving their quality. It will be looking for the Commission to provide stronger justification for the proposal to allow up to a 100% co-financing rate in these circumstances. The United Kingdom notes that Article 24 of the Common Provisions Regulation allows Member States who are in serious financial difficulties to have only an additional 10 per cent co-financing."

Previous Committee Reports

None.

2 Strengthening trade defence instruments to deal with China Market Economy Status

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the International Trade Committee, the Business, Energy and Industrial Strategy Committee and the Committee for Exiting the European Union
Document details	Proposal for a Regulation amending Regulation (EU) 2016/1036 on protection against dumped imports and Regulation (EU) 2016/1037 on protection against subsidised imports
Legal base	Article 207(2) TFEU; ordinary legislative procedure/ QMV
Department	International Trade
Document Number	(38310), 14249/16 + ADDs 1–2, COM(16) 721

Summary and Committee's conclusions

2.1 China currently has over 50 EU trade defence measures imposed against it, and is the focus of the most EU trade investigations and measures. However, these only affect between 2 to 5% of total EU trade with China. This proposal comes as a response to the expiry in December 2016, on the fifteenth anniversary of China's accession to the World Trade Organisation (WTO), of provisions in its Accession Protocol relating to its status as a Non-Market Economy.

2.2 The EU has not yet made a determination on China's Market Economy Status (MES), and China on 12 December 2016 lodged a complaint at the WTO against the EU and USA in this regard. While determination of the complaint is likely to take several years, the efficacy of EU trade defence instruments will be compromised unless relevant regulations are amended.

2.3 This proposal introduces a new anti-dumping methodology, applicable to all countries, that aims to ensure that dumping margins reflect all distortions affecting prices and costs in exporters' home markets. This involves consideration of production costs and prices prevailing in third countries rather than those reported by exporters in the country of export.

2.4 The Commission also proposes to act against subsidies identified during the course of an investigation.

2.5 The Minister of State for Trade Policy (Lord Price) states in the Government's Explanatory Memorandum that:

> "The UK has pressed the Commission to bring forward a proposal on how the EU should deal with the question of MES for China, including whether this is a legal requirement. The Government wishes for a proposal that meets the EU's WTO commitments but continues to provide effective protection against unfair trade. The Commission published its proposal and impact assessment on 9 November 2016. We will need to examine the full Commission proposal and impact assessment before we can prepare our own impact assessment."

2.6 We note that on 12 December 2016, following the expiry of section 15 of its WTO Accession Protocol, China lodged a complaint against the EU and US regarding their failure to treat China as a Market Economy. While determination of this matter will undoubtedly take some time, the measures set out in this draft Regulation attempt to address the implications of the expiry of these provisions.

2.7 **In our recent report on the EU steel industry[1] we reminded the Minister of State for Business, Energy and Industrial Strategy (Mr Nick Hurd) that we looked forward to receiving the Government's analysis of the potential economic, social, legal and political impacts of granting China MES. We repeat that request here. The Government's Explanatory Memorandum does not appear to take a view on the merits of the proposals in the current Regulation. We look forward to receiving more information setting out the Government position.**

2.8 **The Government has previously told us that it is considering options on the form of trade defence regime it wishes to have on leaving the EU. We think it appropriate to remind the Government that we retain the 2013 draft Regulation on modernising trade defence instruments under scrutiny, and that we have previously requested updates on progress both on those negotiations and on the Government's analysis of potential post-Brexit trade defence options.**

2.9 **We retain the draft Regulation under scrutiny and draw our observations to the attention of the International Trade Committee, the Business, Energy and Industrial Strategy Committee, and the Committee for Exiting the European Union.**

Full details of the documents

Proposal for a Regulation amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union: (38310), 14249/16 + ADDs 1–2, COM(16) 721.

Background

2.10 The Commission proposes a series of targeted amendments to two Regulations dealing with protection against dumped imports and subsidised imports from countries

1 See (37608), 7195/16: Twenty-fourth Report HC 71-xxii (2016–17), chapter 1 (14 December 2016).

not members of the European Union. This is in response to the expiry on 11 December 2016 of provisions in the WTO Accession Protocol of China relating to its status as a Non-Market Economy.

2.11 Under the EU's existing Trade Defence Instruments, it is mandatory to apply an 'analogue country methodology' to Non-Market Economies to determine the normal value of a product in anti-dumping and anti-subsidy investigations. This methodology disregards the prices and costs in the country of export, and uses instead prevailing production costs and prices in a market economy at a comparable state of development to the exporting country.

2.12 The WTO Protocol contains provisions for the expiry of this provision. Its interpretation is highly contentious, and the EU has not yet made a determination on the granting of MES to China. However, unless changes are made to the current regulations, trade defence measures hitherto taken against China will become less effective, with the steel and chemicals industries particularly vulnerable.

2.13 We considered, in our 24th Report, some of the background to this issue.[2] On 12 December 2016, China lodged a complaint against the EU and US at the WTO regarding their failure to accord it Market Economy Status.

The Commission's Proposal

2.14 The new methodology, which aims to ensure that dumping margins reflect all distortions and costs in exporters' home markets, would apply to all members of the World Trade Organisation as well as non-members. Reference to Non-Market Economies, and specific reference to China (and two other named countries) is removed. Following an approach currently used by the US and Canada, it would enable the use of third country comparators rather than the country of supply to assess whether price and cost distortions exist.

2.15 The Commission considered three options:

- no policy change: this was discounted because the relevant legal and policy framework would change following the expiry of section 15 of China's Accession Protocol;
- applying standard methodology (i.e. using Chinese domestic production costs and prices as a comparator): this was rejected as it would weaken significantly the EU's trade defence instruments. The Impact Assessment cites an independent study which found that using Chinese prices and costs to calculate dumping could lead to a decrease in duty levels of up to 30%, and place around 200,000 EU jobs at risk; and
- applying a new methodology aiming to effectively capture market distortions and further strengthen TDIs.

2.16 This last option comprises two sub-options. This first deals with market distortions and transition periods in order to ensure the effectiveness of methods already in place. The second deals with the lesser duty rule and the anti-subsidy element.

2 See (38180), 13500/16: Twenty-fourth Report HC 71-xxii (2016–17), chapter 8 (14 December 2016).

2.17 The Commission's preferred option is the third option in its entirety. However, its 2013 proposed Regulation on the modernisation of trade defence instruments has until recently failed to make progress,[3] due to opposition from a number of Member States, including the UK, on its core proposal to limit the use of the lesser duty rule. The previous Committee therefore held the 2013 draft Regulation under scrutiny, requesting updates to any revisions and to the Government's position.[4]

2.18 Consequently, the Commission has separated out the proposed adjustments to the lesser duty rule, and presents in this draft Regulation only a new anti-dumping methodology and changes to anti-subsidy legislation.

Amendments to the Basic Anti-Dumping Regulation

Basis of determination of normal value in the presence of market distortions

2.19 Normal value is usually determined on the basis of domestic prices of the like product. However, there are circumstances where this would not provide a reasonable basis for determination, such as when where prices and costs are not the result of free market forces but subject to government intervention.

2.20 Such a situation could be evidenced by the following:

- the market in question is to a significant extent served by enterprises which operate under the ownership, control or policy supervision or guidance of the authorities of the exporting country;
- state presence in firms allowing the state to interfere with respect to prices or costs;
- public policies or measures discriminating in favour of domestic suppliers or otherwise influencing free market forces; and
- access to finance granted by institutions implementing public policy objectives.

2.21 In such circumstances it would be inappropriate to use domestic prices and costs, and the Commission proposes to determine normal value by looking at undistorted costs of production and sale in "an appropriate representative country with a similar level of economic development as the exporting country". This would enable the Commission to establish and measure the actual magnitude of dumping being practised in normal market conditions.

Transition to new system

2.22 The new system would only apply to cases initiated upon entry into force of the amended provisions. Ongoing anti-dumping investigations at the time of entry into force would remain governed by the existing provisions.

3 See the negotiating mandate agreed by the Council on 13 December 2016 http://www.consilium.europa.eu/en/press/press-releases/2016/12/13-trade-defence-instruments-general-approach/.

4 See (34838), 8493/13 and (34863), 8495/14: Third Report HC 83-iii (2013–14), chapter 6 (21 May 2013).

Amendments to the Basic Anti-Subsidy Regulation

2.23 The Commission notes that the actual magnitude of subsidisation is not always evident at the time of initiation of an investigation. Exporters under investigation have often been found to benefit from subsidies whose existence could not have been reasonably known before commencing the investigation. The Commission states that it is essential that such subsidies be adequately captured in the final analysis, and an appropriate level of duty imposed.

2.24 The proposed amendment provides that when such subsidies are found in the course of an investigation or review, the Commission will offer additional consultations to the country of origin and/or export. Such countries will be provided a summary of the main elements of the newly discovered subsidies, with a view to ensuring productive consultations.

The Government's Explanatory Memorandum

2.25 The Minister of State for Trade Policy notes that the EU currently lists China and 14 other countries as being non-market economies, and deals with them by selecting an analogous country for the calculation of normal values of production and cost in the course of an investigation.

2.26 While this proposal does not involve any determination of China's MES status, the Minister notes that "the UK has pressed the Commission to bring forward a proposal on how the EU should deal with the question of MES for China, including whether this is a legal requirement. The Government wishes for a proposal that meets the EU's WTO commitments but continues to provide effective protection against unfair trade".

2.27 The Minister further notes that while the Government has not yet prepared a full Impact Assessment, "the proposal is unlikely to have significant costs or benefits to the UK in the short to medium term".

2.28 He adds that the Commission's Impact Assessment has found that adoption of the new anti-dumping methodology is "unlikely to have a significant impact on the level of duties imposed on China; indeed, the Commission's aim is to maintain broadly the same level of protection as under the current methodology, while respecting the EU's WTO commitments".

2.29 In terms of financial implications, the Minister states that "the proposal is expected to lead to a very small decline in EU's trade defence tariffs".

Previous Committee Reports

None, but our Twenty-Fourth Report, chapters 1 and 8 (14 December 2016) contains background on trade defence instruments and the China Market Economy Status issue.

3 Import of minerals from conflict areas

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the International Development Committee and the Foreign Affairs Committee
Document details	(a) Proposed Regulation setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas; (b) Joint Communication: Responsible sourcing of minerals originating in conflict-affected and high-risk areas: Towards an integrated EU approach
Legal base	(a) Article 207 TFEU; QMV (b) —
Department	Foreign and Commonwealth Office
Document Numbers	(a) (35879), 7701/14 + ADDs 1–9, COM(14) 111; (b) (35908), 7704/14, JOIN(14) 8

Summary and Committee's conclusions

3.1 The draft Regulation (document (a)) covers tin, tantalum, tungsten, their ores, and gold, whose supply chains have been identified as contributing to armed conflict, particularly in the eastern Democratic Republic of Congo. This is part of the Commission's response to the 2011 OECD Due Diligence Guidance. In its proposal—published in 2014—the Commission proposed a voluntary due diligence scheme, but one that would be binding on companies once they had volunteered.

3.2 The accompanying Communication (document (b)) sets out an overall integrated approach, of which the draft Regulation is a part, to the responsible sourcing of minerals originating in conflict-affected and high-risk areas.

3.3 While Member States were supportive of the Commission's voluntary approach, the European Parliament pushed for a mandatory approach. In his latest letter, the Minister for Europe and the Americas, (Sir Alan Duncan), reports that a compromise has been struck whereby large importers will be required to carry out due diligence while importers of smaller quantities are exempt.

3.4 The Minister does not set out the Government's view of the compromise, although the Government did consider the informal political understanding in June (which signposted the likely direction of compromise) to be "satisfactory as a basis for future discussions" given that the proposal "ensured that the overall administrative burden was slight while maintaining the efficacy of the Regulation".

3.5 Writing on 13 December, the Minister explains that the informal agreement reached with the European Parliament was due to go to the Committee of Permanent Representatives (COREPER) on 7 December. His letter gives no indication of the outcome of that meeting.

He states that the European Parliament is expecting to vote on the text in early 2017, with the text then passing to the Council for final agreement. Finally, the Minister promises to send the full text of the agreement along with an Explanatory Memorandum later in the process, when the Government is certain what the final text will be.

3.6 In the Committee's last Report on these documents, of 8 June 2016,[5] the Committee reminded the Government of its expectations concerning the prior scrutiny of the latter stages of negotiations. Noting the increasing tendency to agree dossiers before they go to Council for formal agreement, the Committee considered it imperative to hear from the Minister beforehand. It did not wish to be presented, on the eve of a Council meeting, with a text that had already effectively been agreed.

3.7 **We are pleased that a compromise has been reached in order that this important legislation may enter into force.**

3.8 **The obligations will apply to companies from 2021, by which time the United Kingdom is expected to have left the European Union. Can the Minister indicate whether or not the UK will wish to apply the terms of this legislation to the UK post-Brexit? If he is not in a position to respond at this point, it would nevertheless be helpful if the Minister could set out the issues that would be taken into account in making that decision.**

3.9 **We note that the Minister is writing to us well before any Council agreement, as we asked. Nevertheless, we suspect that the text has already been effectively agreed, despite our request for further information prior to effective agreement. We ask that the Minister confirms the status of the agreement and, if he does not expect either the European Parliament or the Council to re-open discussions, tell us why he did not communicate with the Committee towards the end of the trilogue process and in advance of the COREPER meeting. Best practice in keeping Committees informed as negotiations move towards final agreement has clearly not been applied.**

3.10 **Ironically, the Minister commits to depositing the final text of the agreement with Parliament, along with an Explanatory Memorandum. While we would appreciate sight of the final text, the Minister's commitment suggests a misunderstanding of parliamentary scrutiny of EU documents. Parliament scrutinises the Government approach to draft EU legislation and it is for that reason that we require the most comprehensive information possible as negotiations proceed. The Committee cannot effectively scrutinise the Government's approach once a final text has been agreed.**

3.11 **The Minister's response to us should include confirmation of the outcome of the COREPER agreement on 7 December, the position taken by the UK's representative at that meeting and the position that the Government intends to take in Council. The proposal remains under scrutiny. It is therefore imperative that the Minister responds as soon as possible—ideally by the end of January—in order that the Committee may give due consideration to scrutiny clearance ahead of Council.**

3.12 **We retain the documents under scrutiny and draw them to the attention of the Foreign Affairs Committee and the International Development Committee in order that they are aware of the compromise reached.**

5 See (35879), 7701/14 + ADDs 1–9 and (35908), 7704/12: Fourth Report HC 71-iii (2016–17), chapter 3 (8 June 2016)

Full details of the documents

(a) Proposed Regulation setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas: (35879), 7701/14 + ADDs 1–9, COM(14) 111; (b) Joint Communication: Responsible sourcing of minerals originating in conflict-affected and high-risk areas: Towards an integrated EU approach: (35908), 7704/14, JOIN(14) 8.

Background

3.13 The 2011 OECD Due Diligence Guidance sets out a process to be followed by countries interested in developing responsible sourcing capabilities. In 2011, the EU took a political commitment in the OECD framework to support the further uptake of the Guidance.

3.14 The Commission is proposing a voluntary scheme, but one that would be binding on companies once they had volunteered. Such companies would be required to present, annually, evidence from a third-party auditor that they had carried out due diligence in line with the OECD guidance on the smelters or refiners in their supply chain. Member States would report annually to the Commission on implementation, and provide information on self-certified responsible importers. The Commission would use the information to develop a list of responsible smelters and refiners. The Regulation would be global in scope. The scheme would be evaluated after three years, and the results used for determining the ongoing EU approach—including amendments to the regulatory framework, making it mandatory, if appropriate, on the basis of a further impact assessment.

3.15 The full background thus far is set out in detail in our earlier Reports, including those of our predecessors (see "Previous Committee Reports").

The Minister's letter of 13 December 2016

3.16 The Minister explains that an "informal political understanding" was reached in June 2016. This formed the basis of the compromise later agreed (see below). The Government considered the June proposal to be "satisfactory as a basis for future discussions." He goes on to explain:

> "Given the possibility of covering the vast majority of imports into the EU by imposing a mandatory due diligence requirement on only a small minority of companies, the concept ensured that the overall administrative burden was slight while maintaining the efficacy of the Regulation."

3.17 On the progress of discussions since June, the Minister says:

> "Discussions have in recent months advanced significantly. An informal agreement was reached in trilogue negotiations on 22 November, in line with the above-mentioned political understanding of June 2016. This text is going to the Committee of Permanent Representatives (COREPER) on 7 December. The European Parliament is expected to vote on the text in Plenary early next year. The text will then be passed back to the Council for final agreement."

3.18 The Minister describes the key elements of the compromise in the following terms:

- "EU importers of large quantities of gold, tin, tungsten and tantalum will need to carry out due diligence on their supply chains, in line with the OECD guidance. Importers of smaller quantities are exempt from these mandatory obligations.
- "The thresholds cover no less than 95% of mineral imports but only a minority of companies (the largest importers).
- "These obligations will apply to companies from 2021, with the Commission starting preparatory work immediately.
- "Some of the thresholds above which due diligence obligations apply are in the text of the Regulation, while others will be set by the Commission via Delegated Acts.
- "Companies already accredited by certain industry-led due diligence certification schemes will be recognised as showing compliance with the Regulation, according to criteria decided by the Commission.
- "The import thresholds and the Regulation as a whole will be regularly reviewed, to ensure that the Regulation is working properly.
- "The Regulation will be global in scope. This means that it will not pre-define specific conflict-affected or high-risk areas. Instead, an accompanying handbook will help companies implement the Regulation."

3.19 He concludes by making a commitment to sending "the full text of the agreement along with an Explanatory Memorandum later in the process, when we are certain what the final text will be".

Previous Committee Reports

Fourth Report HC 71-iii (2016–17), chapter 3 (8 June 2016), Sixteenth Report HC 342-xv (2015–16), chapter 7 (6 January 2016), Tenth Report HC 342-x (2015–16), chapter 3 (25 November 2015), Fourth Report HC 342-iv (2015–16), chapter 6 (16 September 2015), Thirty-ninth Report HC 219-xxxvii (2014–15), chapter 11 (24 March 2015), Eighth Report HC 219-viii (2014–15), chapter 6 (16 July 2014) and Forty-sixth Report HC 83-xli (2013–14), chapter 5 (9 April 2014).

4 Strategic Partnership Agreement between the EU and Canada

Committee's assessment	Legally important
Committee's decision	Not cleared from scrutiny; further information requested
Document details	Joint Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part
Legal base	Article 37 TEU, and Articles 212(1) 218(6)(a) and 218(8) second paragraph; unanimity; EP consent
Department	Foreign and Commonwealth Office
Document Number	(38308), 14763/16 + ADD 1, JOIN(16)56

Summary and Committee's conclusions

4.1 This proposal would enable the EU to conclude (ratify) a Strategic Partnership Agreement (SPA) with Canada intended to:

- enhance EU-Canada political ties and co-operation on foreign policy and security issues by taking their relationship to the level of a strategic partnership; and
- upgrade cooperation in a large number of policy areas going beyond trade and economics.

4.2 The Council decided to sign the SPA and provisional apply specific parts of it.[6]

4.3 When the Committee considered the proposal to enable the EU to sign and provisionally apply the SPA it welcomed it from a policy perspective but raised legal issues concerning the applicability of the UK opt-in and transparency as to the extent that the EU and the Member States are respectively exercising competence.

4.4 **We note the Government's claim that the UK opt-in applies despite the absence of a legal base for the proposal from Title V of Part Three TFEU. We share the predominantly held view that the UK opt-in is not engaged, in the absence of such a legal base.**

4.5 **We reiterate our deprecation of the fact that the SPA itself indicates that the UK opt-in applies but the Decision does not acknowledge this to be the case.**

4.6 **We infer from the assessment of the Government that the JHA content of the SPA is "incidental to the predominant purpose of the agreement" that the Government will not be seeking to add a Title V legal base, which is also absent from the Decision to**

6 Decision 2016/2118 is the authority for this.

sign and provisionally apply the SPA. We therefore ask the Minister (Sir Alan Duncan) whether the Government intends to opt-in. If it does not, we ask the Minister to indicate the extent to which he considers the Decision to be valid.

4.7 **The Government's policy is that the EU should normally only exercise competence in respect of external agreements to the extent that such competence is exclusive, leaving Member States to exercise competence which they share with the EU.[7] We consider that there should be some transparency that this is the case either in the wording of the proposal or by a minute statement from the UK. With this in mind we ask the Minister what steps he intends to take to make it clear that the EU is only exercising competence to conclude the SPA to the extent that such competence is exclusive.**

4.8 **We note that in his letter of 14 December 2016 concerning the Cuba Political Dialogue and Cooperation Agreement (see chapter 14 of this report) the Minister uses the EU-Cuba SPA (which we take to mean the EU-Canada Agreement) as an example where the Committee cleared a proposal in the face of similar language to that used in the proposal for the signature of the EU Canada SPA. In this context we note that in his letter of 3 October 2016 he indicated that the proposal would be amended to limit matters to be provisionally applied to specific listed Articles of the SPA and that "The UK has managed to secure 'limiting' language in the Council Decision text, which sets out that provisional application of these articles "are limited to matters for which the Union has already exercised competence internally". However Decision 2016/2118 applies this language only to some parts of Article 12 (Sustainable Development)—but not others—and Article 13 (Dialogue on other matters of mutual interest) out of more than 20 Articles provisionally applied. We therefore ask him to explain:**

- **the discrepancy between his letter and Decision 2016/2118; and**
- **what effect the absence of this restrictive wording has in respect of the majority of the Articles of the SPA which are provisionally applied.**

Full details of the documents

Joint Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part: (38308), 14763/16 + ADD.1 JOIN(2016)56.

The Explanatory Memorandum of 15 December 2016

4.9 In his Explanatory Memorandum the Minister first describes the context of the SPA as follows:

> "The SPA is a framework political agreement between the EU and its Member States on the one part, and Canada, which the EEAS and Canada have been negotiating since 2011 to update the 1976 framework agreement between the then European Communities and Canada. Since then, the two sides have issued a number of political declarations and statements, including the 1990 Declaration on Transatlantic Relations between

7 Shared competence can be exercised by either the Member States or the EU. The choice is political.

> the then EC, its Member States and Canada; the 1996 Canada-EU Joint Political Declaration and Action Plan; the 2004 EU-Canada Partnership Agenda; and the 2005 Agreement between the EU and Canada establishing a framework for the participation of Canada in the European Union crisis management operations.
>
> "The 1976 Agreement is the only precursor framework agreement between the two sides, and it addressed the commercial relationship. The SPA is the first comprehensive political agreement between the EU, its Member States and Canada. It has been negotiated alongside the EU-Canada Comprehensive Economic and Trade Agreement (CETA)".

4.10 He sets out the policy background as follows:

- "The aim of the SPA is twofold: (i) to enhance EU-Canada political ties and cooperation on foreign policy and security issues and (ii) to upgrade their cooperation in a large number of policy areas going beyond trade and economics. As a framework political agreement the SPA covers a wide range of policy areas including upholding and advancing democratic principles, human rights and fundamental freedoms (Title II); international peace and security and effective multilateralism (Title III); economic and sustainable development (Title IV), and justice, freedom and security (Title V).

- "The signature of the SPA alongside CETA is key to strengthening the EU's and Member States' relationships with a key bilateral partner. The SPA will bring up to date the formal framework between the EU and its Member States and Canada. The UK has a strong and longstanding bilateral relationship with Canada, underpinned by the Canada-UK Joint Declaration. The SPA will support our wider prosperity objectives with Canada, as well as broadening engagement, dialogue and cooperation with Canada on a number of bilateral issues to include Member States as a result.

- "Agreement on provisional application of the SPA was agreed on a 'listing basis' whereby the Council Decision on signing and provisional application clearly set out which parts of the agreement would be provisionally applied. The publication of the Council Decision on the conclusion of the SPA, does not change in any way the content of the Agreement, which remains the same as the version of the Agreement cleared by your committee on 12 October 2016. The Council Decision on Conclusion sets out the 'Context of the proposal' and the Legal basis' for the agreement."

4.11 He then provides the Justice and Home Affairs implications:

> "The Government considers that Article 18(2), which relates to judicial cooperation in civil and commercial matters, engages the UK's JHA opt-in. While the provisions in Article 18(2) are not specific about the type of cooperation that may be envisaged there is exclusive EU external competence for certain of the Hague Conventions covered by that Article, which means that only the EU can sign up to the commitment to develop cooperation

with Canada as regards the negotiation, ratification and implementation of the Conventions concerned. As a party to these Conventions as part of the EU, it is possible that such cooperation may have an impact on the UK.

"The JHA content contained within this agreement is incidental to the predominant purpose of the agreement, and in line with the usual approach, the Government considers that the opt-in has been triggered. The SPA will be formally adopted in early 2017, and a written update will be provided to you in due course.

"For other provisions related to JHA: Article 6 (cooperation in combating terrorism); Article 18(1) (judicial cooperation in criminal matters); Article 19 (cooperation against illicit drugs); Article 20 (fight against organised crime); Article 21 (money laundering); and Article 22 (cybercrime), we are able to assume these in our own right as a signatory to the SPA, and so the opt-in is not engaged".

Previous Committee Reports

None, but see in respect of the signing and provisional application of the SPA: Thirteenth Report HC71-xi (2015–16), chapter 15, (12 October 2016); First Report HC 342-i (2015–16), chapter 25, (21 July 2015); Third Report HC 342-iii (2015–16), chapter 20, (9 September 2015).

5 Financial services: requirements for a prospectus

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny, further information requested
Document details	(a) Proposed Regulation on requirements for a prospectus; (b) European Central Bank Opinion on the proposed Regulation
Legal base	(a) Article 114 TFEU, ordinary legislative procedure, QMV; (b) —
Department	HM Treasury
Document Numbers	(a) (37356), 14890/15 + ADDs 1–3, COM(15) 583; (b) (37610), 7283/16, —

Summary and Committee's conclusions

5.1 The 2003 Prospectus Directive sets out disclosure requirements which apply, in broad terms, whenever an issuer seeks to admit securities to a regulated market in the EU or to offer securities to the public. The Commission has proposed, in the context of the developing Capital Markets Union, a new Regulation to replace the Prospectus Directive. The European Central Bank has issued an Opinion on the proposed Regulation, in which it generally welcomed and supported the aims of the proposal.

5.2 The Government has told us that it welcomed the Commission's text as a step in the right direction and that it agreed with the policy intentions. It has also said that the European Central Bank's Opinion is broadly consistent with its position.

5.3 When we last considered this matter, in April 2016, we reminded the Government that we wanted to hear about the progress it was making in improving the text of the proposed Regulation. We asked that, when reporting that progress, the Government tell us how the European Central Bank's Opinion was playing into the Council working group negotiations. Meanwhile both documents remained under scrutiny.

5.4 The Government now tells us that in fact that trilogue discussions of the proposed Regulation have concluded and that an agreed text is due to go for adoption by the ECOFIN Council later this month. It comments that it welcomes the agreement reached in trilogues as a positive outcome of the negotiations and asks us to clear the file from scrutiny. The Government also says that it has informed the Council that it considers that a provision concerning criminal sanctions for breaches of some elements of the proposal (which the UK will not be using) falls under the scope of Part Three, Title V TFEU concerning an Area of Freedom Security and Justice and that it intended not to exercise its right to opt-in.

5.5 **We recognise that the Government has achieved a satisfactory outcome to the negotiation of this proposed Regulation and that it abstained from the Council vote on the General Approach on scrutiny grounds. However, we are very concerned that it has singularly failed to keep us informed of important developments in the negotiation, for**

instance, adoption in June 2016 of a General Approach by the Council. This undermines the scrutiny process, even if there has been no technical breach of the scrutiny reserve. Moreover, the Government has not addressed our request for information as to how the European Central Bank's Opinion has played into the Council working group negotiations. So we are not yet ready to clear the documents from scrutiny. Rather we will await information from the Government as to:

- **why we were not kept in touch with negotiating developments; and**
- **the role of the European Central Bank Opinion in the negotiation.**

5.6 **As for the Government's claim not to have opted into a Justice and Home Affairs provision, we remind it yet again that we do not believe that the UK opt-in is engaged in the absence of a Justice and Home Affairs legal base. So we continue to consider that the proposed Regulation will apply in its entirety to the UK. However, given the Government position, we would ask what steps are being taken to ensure that the legal text reflects its contention that part of the Regulation will not apply to the UK; and, if this is not achieved, its analysis of the validity of the Regulation.**

Full details of the documents

(a) Proposed Regulation on the prospectus to be published when securities are offered to the public or admitted to trading: (37356), 14890/15 + ADDs 1–3, COM(15) 583; (b) European Central Bank Opinion on a proposed Regulation on the prospectus to be published when securities are offered to the public or admitted to trading: (37610), 7283/16, —.

Background

5.7 The 2003 Prospectus Directive sets out disclosure requirements which apply, in broad terms, whenever an issuer seeks to admit securities to a regulated market in the EU or to offer securities to the public. In November 2015 the Commission proposed a Prospectus Regulation intended to replace the Prospectus Directive. The proposal was made in the context of the developing Capital Markets Union.

5.8 In January 2016, having heard that the Government welcomed the Commission's text as a step in the right direction and that it agreed with the policy intentions, we said that before we would consider this important proposal further we wished to hear from the Government about the progress it was making in improving the text of the proposed Regulation during its consideration in the Council working group. Meanwhile the document remained under scrutiny.

5.9 In March 2016 the European Central Bank issued its Opinion on the proposed Regulation, in which it generally welcomed and supported the aims pursued by the proposal. It viewed the proposed Regulation as a positive step towards the completion of the Capital Markets Union. In addition to a number of minor and technical drafting suggestions the Bank made four specific observations.

5.10 In April 2016 we heard from the Government that the Opinion is broadly consistent with its position and commented briefly on some of the content. We remind the Government that we wanted to hear about the progress it was making in improving the text of the

proposed Regulation. We asked that, when reporting that progress, the Government tell us how the European Central Bank's Opinion was playing into the Council working group negotiations. Meanwhile both documents remained under scrutiny.

The Minister's letter of 19 December 2016

5.11 The Economic Secretary to the Treasury (Simon Kirby) writes now about the current state of discussions and the improvements made to the text of the proposed Regulation. He says that;

- the speed of negotiations picked up significantly in the last weeks of the Dutch Presidency and a General Approach was agreed by the Council in June 2016;
- the Government abstained from the vote on scrutiny grounds;
- trilogues began in November 2016, with negotiations continuing quickly under the Slovakian Presidency and a deal was agreed on 5 December 2016; and
- overall, the Government is confident that the trilogue agreement on the proposal will make it easier for companies to raise capital on public markets throughout the EU and is likely to make the prospectus a more relevant tool for investors.

5.12 The Minister comments further that:

- in particular, the Government welcomes the proposals for alleviated disclosure requirements for secondary offers and small and medium enterprises (SMEs), as set out in his predecessor's Explanatory Memorandum of 14 December 2015;
- the secondary offers regime developed positively during Council and trilogue negotiations, and will sensibly lighten the burden on secondary issuers—the government is confident that this will be a real improvement for issuers, given that 70% of all prospectuses are produced in the context of a secondary issuance;
- with regard to the SME regime, more detail has been added to the principles according to which the disclosure requirements will be defined in detail in delegated acts;
- for example, the text now requires the Commission to take into account the need to facilitate access to capital markets for SMEs and minimise costs for SMEs;
- the Government is pleased that the wider definition of SMEs, €200 million (£171 million) rather than €100 million (£85.6 million) market capitalisation, as proposed by the Commission, was not a contentious issue during the trilogues and has been included in the final text;
- overall, the Government thinks the SME regime will make access to capital markets less burdensome for SMEs;
- turning to the scope of the regime, the cost of preparing a prospectus is excluding many SMEs from using capital markets;
- the Government therefore pushed to exclude more small offers from the prospectus obligation altogether—the threshold below which Member States

have discretion to exclude small offers from the prospectus requirement has been increased to €8 million (£6.81 million), up from €5 million (£4.28 million) under the current regime, despite opposition from many Member States;

- the Commission's proposal limited this small offer exemption to domestic offers only, which the Government thinks contradicted the spirit of Capital Markets Union—it argued in favour of deleting this limitation and the General Approach text did not include this limitation and it was not re-introduced in trilogues;
- as set out previously in its Explanatory Memorandum, the Government thinks the proposal for a universal registration document (URD) is a welcome idea in principle;
- however, it is unclear whether the URD regime is sufficiently attractive to deliver material benefits for UK issuers, but given that it is optional for issuers, there is no downside to its inclusion—there may be some take up by UK firms, but this remains to be seen;
- with regard to the treatment of non-equity securities of high-denomination per unit, the Government's position was that it is in principle supportive of the intention to remove the two-tier system, but wanted to consider potentially adverse consequences of these changes for the EU wholesale debt market;
- after careful consideration and consultation with industry stakeholders the Government came to the conclusion that this change is unlikely to achieve its desired outcome of making blue-chip debt products available to retail investors and will impose heavy new burdens on issuers of a range of purely wholesale debt products;
- other Member States and the Commission have taken these concerns on board and the final trilogue compromise has moved back to a two tier system, which is a solution the Government can support;
- the Government is not convinced that the allocation of risk factors across two or three categories based on materiality as originally proposed by the Commission is workable in practice or would achieve the objective of making risk factors more relevant to investors;
- on the contrary, this change would have exposed issuers to new liability and mislead investors;
- other Member States understood the Government's concerns in this area and the negotiated text in trilogues sets out an acceptable compromise in which issuers would allocate risk factors across different thematic categories and state those risk factors with the highest materiality first;
- the Commission's proposed text included a provision that would require third country issuers to appoint a legal representative in the EU to take responsibility for the compliance of the third country issuer with the proposed Regulation; and

- the Government has argued that this provision would impose a new burden on third country issuers for very limited associated benefits—the Government is pleased that a requirement for a legal representative has been removed in the trilogue compromise text.

5.13 The Minister then reverts to the proposed provision dealing with Member States which have laid down criminal sanctions for breaches of some elements of the proposal in place of administrative sanctions, requiring cooperation involving law enforcement bodies. He recalls the Government's belief that these are incidental Justice and Home Affairs (JHA) obligations and that accordingly the Article 114 TFEU legal basis is not appropriate for the provision. The Minister says that:

- the Government has tried to remove this provision from the proposed Regulation;
- other Member States have explained, however, that they require this provision for constitutional reasons;
- the JHA obligations under this provision would not apply to the UK or have impact as the Government does not intend to apply a criminal sanctions regime; and
- further to this, the Government has informed the Council that it considers this provision to fall under the scope of JHA and that it intended not to exercise its right to opt-in.

5.14 Finally the Minister says that, overall, the Government welcomes the agreement reached in trilogues as a positive outcome of the negotiations, asks us to clear the file from scrutiny and tells us that the Government expected the proposed Regulation to go to COREPER in December 2016 and to a vote at the ECOFIN Council in January 2017.

Previous Committee Reports

Twenty-ninth Report HC 342-xxviii (2015–16), chapter 8 (20 April 2016) and Sixteenth Report HC 342-xv (2015–16), chapter 9 (6 January 2016).

6 Financial services regulatory framework: resolution and recovery, capital requirements and central counterparties

Committee's assessment	Politically important
Committee's decision	(a), (b), (d), (e) and (g) not cleared from scrutiny, further information requested; (c) and (f) cleared from scrutiny
Document details	(a) Proposed Directive concerning bank resolution and recovery; (b) Proposed Directive about the ranking of unsecured debt instruments in insolvency hierarchy; (c) Proposed Regulation concerning aspects of the Single Resolution Mechanism; (d) Proposed Directive concerning aspects of capital requirements; (e) Proposed Regulation concerning aspects of capital requirements; (f) Commission Communication concerning the EU regulatory framework for financial services; (g) Proposed Regulation concerning central counterparties
Legal base	(a),(b), (d), (e) and (g) Article 114 TFEU, ordinary legislative procedure, QMV; (c) Article 53(1), ordinary legislative procedure, QMV; (f) —
Department	HM Treasury
Document Number	(a) (38300), 14777/16 + ADDs 1–2, COM(16) 852; (b) (38301), 14778/16 + ADDs 1–2, COM(16) 853; (c) (38302), 14779/16 + ADDs 1–2, COM(16) 851; (d) (38303), 14776/16 + ADDs 1–2 COM(16) 854; (e) (38304), 14775/16 + ADDs 1–3, COM(16) 850; (f) (38311) 14903/16 + ADDs 1–2, COM(16) 855 (g) (38332), 14835/16 + ADDs 1–3, COM(16) 856

Summary and Committee's conclusions

6.1 Following the very severe financial crisis some years ago the EU adopted a considerable amount of regulatory legislation aimed at restoring the stability of the financial services sector and preventing future problems. Much of the legislation was based on internationally agreed standards. Although the legislation has concerned all Member States, implementation of significant parts of it has been centralised for eurozone Member States through development of the Banking Union.

6.2 Practical experience of the legislation and further development of standards in international fora have led to the need for amendment of important elements of the EU legislation. Most recently the Commission has published a Communication analysing the results of a public inquiry it conducted in 2015 and 2016 into the EU regulatory framework for financial services. The Communication also sets out the intentions for

legislative and non-legislative proposals in response to the outcome of the inquiry. At the same time the Commission presented six legislative proposals, for amendment to present legislation concerning capital requirements for credit institutions and investment firms, bank recovery and resolution, central counterparties and the Banking Union's Single Resolution Mechanism.

6.3 These complex and technical proposals affect many important aspects of EU financial regulation. They range from measures to ensure the regulation of non-bank entities is more appropriate and proportionate to measures to implement recent significant developments in international standards. There are significant interrelationships between them, which are not apparent on first reading of the Government's Explanatory Memoranda.

6.4 The Government is generally supportive of the Commission's proposals. But its comments to us about the very detailed provisions show its laudable wish to ensure that EU legislation is entirely consistent with agreed international standards, is flexible and proportionate and does not give the European Securities and Markets Authority and the Commission powers to set technical detail which ought to be in the primary legislation.

6.5 **We clear the Commission Communication and the proposed Single Resolution Mechanism Regulation from scrutiny, since the former covers matters which are now or will be subject to detailed scrutiny and the latter has no direct relevance for the UK.**

6.6 **The other five legislative proposals remain under scrutiny. Clearly the Government will need to negotiate carefully much of the many details it has drawn to our attention to ensure everything in them when adopted meets its concerns. So we wish to be kept informed regularly about negotiating developments on each proposal.**

6.7 **More generally we wish to be told soon about the likely implementation dates of the proposals in the context of the probable Brexit date. We should also like to have the Government's assessment of the consequences for the UK of these proposals. In particular would its aim post-Brexit to be closer to the relevant international standards or the EU ones, if there were any divergence between the two.**

6.8 **Clearly negotiation of each of these proposals may proceed at a different pace to the others. So separate report backs by the Government might be appropriate and if so would be acceptable.**

Full details of the documents

(a) Proposed Directive amending Directive 2014/59/EU on loss-absorbing and recapitalisation capacity of credit institutions and investment firms and amending Directive 98/26/EC, Directive 2002/47/EC, Directive 2012/30/EU, Directive 2011/35/EU, Directive 2005/56/EC, Directive 2004/25/EC and Directive 2007/36/EC: (38300), 14777/16 + ADDs 1–2, COM(16) 852; (b) Proposed Directive on amending Directive 2014/59/EU of the European Parliament and of the Council as regards the ranking of unsecured debt instruments in insolvency hierarchy: (38301), 14778/16 + ADDs 1–2, COM(16) 853; (c) Proposed Regulation amending Regulation (EU) No 806/2014 as regards loss-absorbing and recapitalisation capacity for credit institutions and investment firms: (38302), 14779/16 + ADDs 1–2, COM(16) 851 (d) Proposed Directive amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding

companies, remuneration, supervisory measures and powers and capital conservation measures: (38303), 14776/16 + ADDs 1–2 COM(16) 854; (e) Proposed Regulation amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements and amending Regulation (EU) No 648/2012: (38304), 14775/16 + ADDs 1–3, COM(16) 850; (f) Commission Communication: Call for Evidence — EU regulatory framework for financial services: (38311) 14903/16 + ADDs 1–2, COM(16) 855; (g) Proposed Regulation on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, and (EU) 2015/2365: (38332), 14835/16 + ADDs 1–3, COM(16) 856.

Background

6.9 The EU "single rulebook" legislation collectively governs the financial services sector across the EU. The provisions of the single rulebook are set out in three main legislative acts:

- the Capital Requirements Directive (CRD) and the Capital Requirements Regulation (CRR), together commonly referred to as CRD IV, which implement the Basel III capital requirements for banks;[8]
- the Deposit Guarantee Scheme Directive, which regulates deposit insurance in case of a bank's inability to pay its debts; and
- the Bank Recovery and Resolution Directive (BRRD); Directive 2014/59/EU of 15 May 2014), which establishes a framework for the recovery and resolution of credit institutions and investment firms, introducing a harmonised set of resolution tools for dealing with failing banks and investment firms.

6.10 Central counterparties (CCPs) play an essential role in financial markets and improve overall stability and resilience of financial markets through the management of counterparty, liquidity and market risk. CCPs provide their services directly to clearing members, which are typically banks. In addition, many other market participants such as pension funds access CCPs indirectly through clearing members. Specifically, a CCP intervenes between financial market participants to act as a buyer to every seller and a seller to every buyer of a trade. Performance by the CCP of its side of the transaction is guaranteed and counterparty credit risk for the original parties is reduced. CCPs also facilitate multilateral netting and thereby help to reduce exposures between counterparties.

6.11 The Pittsburgh G20 meeting in 2009 agreed to reforms to derivatives markets to reduce systemic risk and provide greater market transparency.[9] The reforms included a requirement for all standardised over-the-counter (OTC) derivative contracts to be cleared through CCPs by the end of 2012. This is implemented in the EU by means of

8 See http://www.bis.org/bcbs/basel3.htm.
9 http://www.g20.utoronto.ca/2009/2009communique0925.html.

the European Market Information Regulation (EMIR).[10] The G20 has also called for internationally-consistent recovery arrangements and resolution plans for systemically important financial firms, including CCPs.[11]

6.12 The EU's Banking Union is intended to transfer responsibility for banking policy from the national to the EU level. The motivation is the fragility of eurozone banks and the link between credit conditions for some of these banks and the sovereign credit of their respective home countries. The Banking Union has two main components. The first is the Single Supervisory Mechanism which gives the European Central Bank a supervisory role monitoring implementation of the single rulebook and the financial stability of banks based in participating states. Participation is automatic for eurozone Member States and voluntary for others. So far no non-eurozone Member State has opted into the system. The second pillar is the Single Resolution Mechanism (SRM), which is to centrally implement the BRRD in participating Member States, and would establish a Single Resolution Fund to finance their restructuring. The SRM entered into force on 1 January 2016 and all eurozone Member States participate in it.

6.13 In November 2015, the international Financial Stability Board (FSB)[12] agreed a total loss absorbing capacity (TLAC) standard for Global Systemically Important Banks (G-SIBs), set at a level which should ensure that if a G-SIB fails it has sufficient loss-absorbing and recapitalisation capacity available in resolution to implement an orderly resolution that minimises impacts on financial stability, ensures the continuity of critical functions, and avoids exposing public funds to loss.

6.14 Similarly, in the EU, the BRRD requires resolution authorities to set an individual loss absorbing capacity requirement for each bank within its jurisdiction. This is known as the 'minimum requirements for own funds and eligible liabilities' (MREL). Taken in conjunction with the resolution tools, MREL/TLAC implementation should mean that in future when a firm fails, the costs will be borne by the creditors of a failed firm, rather than by the taxpayer.

6.15 On 30 September 2015, the Commission launched a public consultation "Call for Evidence: EU regulatory framework for financial services", which was part of the Commission's 2016 work programme as a REFIT (Regulatory Fitness and Performance Programme) item. The purpose was to consult all interested stakeholders on the benefits, unintended effects, consistency, gaps in and coherence of the EU regulatory framework for financial services. It also aimed to gauge the impact of the regulatory framework on the ability of the economy to finance itself and grow. The consultation closed on 31 January 2016.

6.16 In November 2015 the Commission, in its Communication "Towards the completion of the Banking Union", committed to proposing legislation based on international agreements, in order to address identified weaknesses in the existing prudential framework.[13]

10 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012R0648.

11 https://www.treasury.gov/resource-center/international/g7-g20/Documents/Cannes%20Leaders%20Communiqu%C3%A9%204%20%20November%202011.pdf.

12 See http://www.fsb.org/about/.

13 See (37333), 14650/15: Fifteenth Report, HC 342-xiv (2015–16), chapter 16 (16 December 2015).

The documents

6.17 In November 2016 the Commission published a Communication, document (f), which analysis the results of its consultation on the EU regulatory framework for financial services and summarises its present and intended follow-up action. It refers particularly to six legislative proposals dealt with in this chapter: documents (a)–(e) and (g). Amongst other matters the Commission also refers to a Communication and two Reports, concerning the Capital Markets Union, assignment or subrogation of claims against third parties and OTC derivatives, CCPs and trade repositaries, which we are clearing from scrutiny as they do not raise questions of sufficient legal or political importance to warrant a substantive report to the House.[14]

6.18 In November 2016 the Commission published five legislative proposals, concerning the CRD IV, the BRRD and the SRM, with which it seeks further measures to reduce risk in EU's banking system, in order to strengthen both the resilience of the banking sector as well as to advance completion of the Banking Union. It says that its intention is completion of the post-financial crisis regulatory reforms and implementation of internationally agreed standards that have only recently been finalised by international organisations, such as the Basel Committee on Banking Supervision (BCBS)[15] and the FSB.

6.19 With a proposed Directive, document (d), the Commission suggests amendments to the CRD, as follows:

- changes to Pillar 2 capital requirements and guidance, the tools used by supervisors to supervise firms above minimum standards, introducing new guidance and restrictions on supervisors in their application of additional capital requirements;
- the changes and new amendments set out the options for competent authorities to impose additional own funds requirements, clarify the conditions for setting additional requirements and provide additional guidance for competent authorities—they are designed to reduce diversity in application with the aim of achieving greater harmonisation across the EU;
- introduction of a modified framework for firms to calculate interest rate risk, by including a new common standard approach that institutions might use or be required by supervisors to use if other systems are not deemed satisfactory, with specification of how to calculate risk weights for general interest rate risk (GIRR) and of GIRR risk-factors—this is to better mitigate against any risk arising from changes in interest rates;
- requiring information on potential risks from changes in interest rates to be disclosed;
- mandating the European Banking Authority to provide more details on the criteria and conditions that institutions should follow to identify, evaluate, manage and mitigate interest rate risks and to define the six supervisory shock scenarios applied to interest rates;

14 (38086) 12302/16, (38113) 12773/16, (38314) 14828/16: see chapter 16 of this Report.

15 See https://www.bis.org/bcbs/about.htm?m=3%7C14%7C573.

- clarifying consolidated requirements and supervision of financial holding companies and mixed financial holding companies, with the holding company assuming responsibility for compliance, rather than the subsidiaries—the aim being to bring financial holding companies and mixed holding companies directly within the scope of the EU prudential framework;

- a provision on Intermediate Holding Companies (IHCs), which introduces a new requirement for third country Global Systemically Important Institutions (G-SIIs) to consolidate their authorised EU entities into a single bank or intermediate holding company in the EU;

- this would apply to third country groups that are identified as third country G-SIIs or that have entities in the EU with total assets of €30 billion (£25.66 billion) or more—the Commission saying that this is designed to strengthen the resolution process of third country groups with significant activities in the EU, as well as to facilitate the implementation of internationally agreed standards on internal loss-absorbing capacity for third country G-SIIs;

- changes to the rules regarding remuneration, with introduction of a new limit on the size of firms that need to apply some of the rules on deferral and pay-out in instruments, which would allow the rules on deferral and pay-out in instruments to be disapplied for firms with less than €5 billion (£4.28 billion) of assets; and

- the Commission's review of the efficiency, implementation and enforcement of the CRD remuneration rules showed that some of the rules, such as the rules on deferral and pay-out in instruments, are not workable for the smallest and least complex institutions and for staff with low variable remuneration—the changes proposed therefore aim to address this issue whilst also creating greater harmonisation across the EU in the application of proportionality to smaller firms and staff with low variable remuneration.

6.20 With a proposed Regulation, document (e), the Commission suggests amendments to the CRR, as follows:

- implementation of BCBS standards for equity investments in funds, aimed at clarifying the existing treatment and achieving a more internationally consistent and risk sensitive treatment of such exposures, in order to better reflect both the risk of a fund's underlying investment and its leverage;

- use for this of a hierarchy of approaches—Look Through Approach (LTA), with which banks apply risk weights of funds underlying exposures as if exposures were held directly by the bank, Mandate Based Approach (MBA), with which banks assign risk weights on the basis of information contained in a fund's mandate or in relevant national legislation, and Fall Back Approach (FBA), which applies a 1,250% risk weight to bank's equity investments in funds;

- implementation of BCBS standards on a new standardised method to compute the exposure value of derivatives exposures, in order to address shortcomings of the existing standardised methods and replaces the previous Mark-to-Market method;

- this introduces the new Standardised Approach for Counterparty Credit Risk (SA-CCR) whilst ensuring that the new rules remain proportionate—this method is designed to be suitable for a variety of derivatives transactions, introduce standardisation and avoid undue complexity;
- implementation of BCBS standards on the treatment of exposures to CCPs, seeking to establish a capital treatment that ensures banks' exposures to CCPs are adequately capitalised, while also maintaining incentives for central clearing and promoting robust risk management by banks and CCPs;
- the new BCBS standard, which improved on the shortcomings of the previous interim standard, includes a single approach for calculating capital requirements for a bank's exposure that arises from its contributions to the mutualised default fund of a qualifying CCP (QCCP) and an explicit cap on the capital charges applicable to a bank's exposures to a QCCP;
- it employs a standardised approach for counterparty credit risk to measure the hypothetical capital requirement of a CCP and specifies how to treat multi-level client structures whereby an institution clears its trades through intermediaries linked to a CCP;
- introduction of new, tougher BCBS standards on market risk, which result from the BCBS's fundamental review of the trading book, to address problems of the previous framework, including insufficient capture of the full range of risks to which institutions were exposed to and uncertainty about the boundary between the trading and non-trading (that is, banking) book which created opportunities for regulatory arbitrage;
- the new standard contains revised rules for the use of internal models for calculating own funds for market risk, a new standardised approach which replaces the existing one, and a transitional provision over the course of which the own funds requirements for market risk will be phased in;
- specification, in line with BCBS developments, of large exposures and their limits—the financial crisis demonstrated that a loss in one G-SIB can trigger concerns about solvency in another G-SIB;
- this new large exposures framework therefore introduces new limits to exposures between entities—an exposure is large if its value is equal to or more than 10% of an institutions Tier 1 capital;[16]
- exposure to a client or group of connected clients is limited to no more than 25% of Tier 1 capital, G-SIB to G-SIB exposure is limited to 15% of Tier 1 capital—conditions for exposures on an institution's trading book to exceed those limits are specified and institutions are required to report to competent authorities their ten largest exposures to shadow banking entities;

16 Tier 1 capital is the core measure of a bank's financial strength—it is composed of core capital, primarily common stock and disclosed reserves (or retained earnings), but possibly also non-redeemable non-cumulative preferred stock.

- introduction of a binding leverage ratio of 3%, which is designed to prevent institutions from excessively increasing leverage—further consideration will be given to an additional buffer for G-SIBs when international discussions are complete;

- introduction of Pillar 1 capital requirement for G-SIBs to implement the FSB's TLAC standards through holding a minimum MREL of 18% of their risk weighted assets (RWAs) with a 6.75% leverage backstop (a non-risk based measure) by 2022;

- increasing proportionality by reducing the reporting and disclosure burdens on smaller lenders—the new framework takes into account the relative size and complexity of institutions, with small institutions being required to report only on an annual basis instead of a semi-annual basis, as is the case for all other institutions;

- classification of institutions into three categories, significant, small and other, with disclosure requirements applying to each category on a sliding scale, differing in substance and frequency of disclosures;

- introduction, following a BCBS agreement, of a Net Stable Funding Ratio (NSFR), which is a new long term liquidity requirement, establishing a harmonised standard for how much stable, long term sources of funding an institution needs to withstand periods of market and funding stress—the NSFR is calculated as the ratio of an institution's amount of available stable funding (ASF) to its amount of required stable funding (RSF);

- a transition period for[17] introduction of the new IFRS (International Financial Reporting Standards) 9 accounting requirements, with 'expected loss' measurements that will require more timely recognition of expected credit losses—the transition is introduced in order to mitigate the cliff-edge impact on financial institutions of changes to accounting standards;

- essentially, credit institutions will be allowed to top-up their Tier 1 capital, and the amount by which they are able to do this by will fall every year through to 31 December 2023, subsequent to which IFRS 9 will apply in full;

- recalibration of the capital requirements for exposures to small and medium enterprises (SMEs) and specialised lending, with permanent extension of an existing rule in CRD IV that gives lenders a discount in the amount of capital they need to hold against lending to SMEs, in order to improve access to finance for SMEs—the current capital reduction of 23.81% for exposure to an SME that does not exceed €1.5 million (£1.27 million) is supplemented by a 15% reduction for the remaining exposure over €1.5 million;

- there will be a similar discount to lending for infrastructure in order to promote projects in sectors, such as transport and energy, which are important for the

17 See http://www.ifrs.org/Current-Projects/IASB-Projects/Financial-Instruments-A-Replacement-of-IAS-39-Financial-Instruments-Recognitio/Pages/Financial-Instruments-Replacement-of-IAS-39.aspx.

EU's economic growth, by mobilising private finance for these infrastructure projects—criteria by which safe and sound infrastructure projects will be defined in order to reduce the risk profile of the exposures; and

- introduction of amendments related to the CRD amendments introducing a modified framework for firms to calculate interest rate risk.

6.21 In a first report of its review of investment firms the European Banking Authority found that the bank-like rules under the CRR were not fit for purpose for the majority of investment firms, with the exception of the more systemic ones that pose risks similar to those faced by credit institutions. The Authority's review is now in its second phase, with additional analytical work in order to determine a more appropriate and proportionate capital treatment for investment firms, and it is expected to deliver its final input to the Commission in June 2017. The Commission intends to present legislative proposals setting-up a specific prudential framework for non-systemic investment firms by the end of 2017. In the meantime it is considered appropriate to allow investment firms that are not systemic to apply the present version of the CRR. However, systemic investment firms will be subject to the amended version of the CRR. This will ensure that systemic firms are treated appropriately while reducing the regulatory burden for non-systemic firms.

6.22 With a proposed Directive, document (a), the Commission suggests amendments to the BRRD, as follows:

- introduction of a framework for setting an additional Pillar 2 requirement for G-SIBs and amending the framework for calibrating requirements for non-G-SIBs to support the implementation of the resolution plan—this sets MREL equivalent to a maximum of twice the minimum capital requirement;
- having G-SIBs meet their Pillar 1 requirement with subordinated liabilities, apart from 3.5% which may be unsubordinated if the resolution authority agrees;
- allowing the resolution authority to require an additional amount of the Pillar 2 requirement to be subordinated to avoid no creditor worse off risks—this permits the resolution authority to require a limited amount of subordination for non-G-SIBs;
- provision that 'soft' guidance MREL may be set up to a maximum of the level of the combined buffer requirement, in addition to the 'hard' Pillar 1 and Pillar 2 requirement;
- introduction of a requirement for third country G-SIBs operating in the EU to pre-position internal TLAC (iTLAC) in their EU—the amount of iTLAC pre-positioned is calculated as at least 90% of the projected external TLAC requirement if the EU operations were an independent resolution entity;
- amendment requirements for the contractual recognition of bail-in and introduction of new moratorium powers;
- amendment of a requirement for firms to include a clause in a large number of contracts governed by non-EEA law, acknowledging that the contract may be subject to the bail-in powers of the EU resolution authority, so that it need not apply in instances of legal, contractual and economic impracticability—the

provision has very broad scope and industry has raised concerns that it was extremely difficult and costly to implement and extends to contracts which would be unlikely to be bailed-in; and

- introduction of new pre-resolution moratorium tool which is limited to five days—the moratorium would freeze the flow of payment and delivery obligations for a short period of time (subject to exceptions, including covered deposits).

6.23 With a proposed Regulation, document (c), the Commission suggests amendments to the SRM in order to implement the TLAC standard for firms under the SRM.

6.24 With a proposed Directive, document (b), the Commission suggests further amendment to the BRRD, to introduce a harmonised approach to statutory subordination by requiring Member States to create a new class of 'non-preferred' senior debt. This would require Member States to amend their insolvency creditor hierarchy specific to bank and investment firm insolvencies. The proposed ranking of unsecured debt instruments in the insolvency hierarchy sits alongside the Commission's proposals to introduce the TLAC standard into EU law and to update the framework for setting MREL.

6.25 The BRRD requires, and the UK's Banking Act provides, safeguards for creditors and shareholders of an institution in the event of resolution, including that they are not left worse off than if the institution had entered insolvency instead—the no creditor worse off (NCWO) safeguard. Affected creditors must be compensated if the NCWO safeguard is breached.

6.26 The ability to subordinate MREL resources to senior operating liabilities is important because it aligns the order of loss absorption in resolution and insolvency. Subordination of MREL resources means these resources would rank below liabilities related to the day-to-day operations and critical economic functions of an institution. This ensures that MREL resources can fulfil their purpose of providing the capacity to absorb losses and recapitalise, without the resolution authority needing to treat similarly ranking liabilities differently. Subordination therefore reduces the risk of breaches of the NCWO safeguard in the event of a bail-in. This is important in limiting public funds risks due to the obligation to pay compensation. The subordination of MREL resources to senior operating liabilities can be achieved by different channels: structural, contractual, or statutory subordination.

6.27 With a proposed Regulation, document (g), the Commission suggests a framework for the recovery and resolution of CCPs (as defined in EMIR). It is aligned to the G20 agreements and aims to be consistent with international standards agreed in the FSB's Key Attributes of Effective Resolution Regimes for Financial Institutions.[18]

6.28 The Commission's proposal:

- seeks to safeguard financial stability, to ensure the continuity of functions critical to financial markets and to protect taxpayers in the event of a CCP experiencing financial difficulties, through the application of appropriate and comprehensive recovery and resolution tools;

- seeks to establish an EU recovery and resolution framework that promotes efficient markets and re-aligns risk and reward;

18 See http://www.fsb.org/wp-content/uploads/r_111104cc.pdf.

- aims at reducing moral hazard and addressing the perception of an implicit state guarantee for CCPs and financial institutions;
- responds to the concern that a failure of a CCP would cause severe disruption to the critical services it provides and would negatively impact the wider economy;
- sets out measures that ensure CCPs are better prepared to recover from financial distress caused by a default of a clearing member (or multiple member defaults), or by non-default losses including such diverse risks as treasury losses, cyber-attack, or operational failure;
- provides powers to national supervisory and resolution authorities to give them a common set of tools and powers which will enable them to avert and, where necessary, manage the orderly failure of CCPs; and
- provides a mechanism for improved cooperation and coordination to ensure that measures have effect in all Member States.

6.29 The proposed Regulation covers a number of key areas including:

- recovery planning resolution planning;
- early intervention arrangements;
- use of resolution tools and powers;
- resolution colleges;
- relations with third countries and the role of the European Securities and Markets Authority (ESMA); and
- changes to other EU legislation.

6.30 While recovery measures aim to ensure the CCP is itself capable of restoring its position with a view to long-term viability, resolution measures allow an authority to intervene directly to resolve a CCP if recovery measures fail or threaten to negatively impact financial stability. Together, recovery and resolution planning enables the CCP and the resolution authority to gain a better understanding of the CCP's critical functions, legal status, risk profile and interconnectedness. Shareholders, clearing members and clients would also be better informed of how financial distress in a CCP may affect their rights and obligations in relation to the CCP as part of its recovery plan.

6.31 The Commission proposes:

- requirements for CCPs to draw up and maintain recovery plans—a plan would set out the measures that the CCP itself may take to restore its financial situation following significant deterioration (including as a result of its default management procedure following a member default, or a non-default event such as treasury losses or operational failure);
- require the resolution authority (designated by the Member State in whose jurisdiction the CCP is based) would be required to draw up a resolution strategy for the CCP in question (Article 13);

- the resolution plan would set out actions that the resolution authority may take where the CCP meets the conditions for resolution;
- neither recovery nor resolution plans should assume public funds or extraordinary support from central banks; and
- resolution authorities would be required to assess the resolvability of CCPs in their jurisdiction and, where any barriers to resolution are identified, to require the CCP to take adequate steps to ensure the institution is resolvable, failing which the resolution authority may require the CCP to take specific measures to remove identified obstacles.

6.32 The Commission proposal sets out early intervention measures which a supervisory authority may adopt during, or prior to, the recovery phase of the CCP with a view to restoring the financial resilience of the financially distressed CCP or other steps to protect financial stability. These measures are in addition to the prudential requirements established by EMIR. As part of the early intervention measures supervisors would be enabled to carry out enhanced monitoring and have powers to require CCPs to replenish their financial resources if they had used their capital to absorb losses during a recovery. The supervisory authority would be enabled to require the total or partial removal of the senior management or board where there is a significant deterioration in the financial situation of the CCP or it infringes its legal requirements or operational rules.

6.33 Should a CCP meet the framework's conditions for resolution, the proposed Regulation provides that the resolution authority should place the CCP in resolution and apply a resolution tool or exercise a resolution power. The use of these resolution tools and powers by the resolution authority is to be guided by the proposal's resolution objectives and general principles. The proposed Regulation provides the resolution authority with a set of resolution tools. First are position allocation tools and loss allocation tools. Position allocation tools enable the resolution authority to restore a CCP to a matched book by for example terminating some or all contracts between the CCP in resolution and other clearing members. Loss allocation tools enable the resolution authority allocate any remaining losses by requiring non-defaulting clearing members to make a cash contribution to the CCP and by haircutting the amounts payable by the CCP on any positions in profit (known as variation margin gain haircutting, or VMGH). Second are write-down and conversion tools, which allow resolution authorities to write-down equity in resolution and convert debt instruments and unsecured debts into instruments of ownership (such as shares). The tools would allow resolution authorities to absorb losses, to recapitalise the CCP or to support the use of the sale of business tool. Next is the sale of business tool, which allows resolution authorities to transfer the CCP under resolution, or shares in it, (or assets, rights or obligations belonging to the CCP) to a purchaser without obtaining the consent of the shareholders or any third party (other than the purchaser) or complying with any procedural requirements under company or securities law. Finally, the bridge CCP tool allows resolution authorities to transfer all (or specified assets, rights or liabilities) of a CCP under resolution to a legal entity controlled by the resolution authority and owned by a public authority without obtaining the consent of the shareholders or any third party.

6.34 The proposal does not mandate the specific tools and powers that should be used by an authority in resolution. This will depend on the resolution plan agreed by the resolution college. However in the case of default losses, position allocation and loss allocation tools will need to be used to restore the CCP to a matched book and to absorb any default-related losses—this cannot be achieved by the sale of business or bridge CCP tools alone.

6.35 Resolution authorities are required to establish and chair resolution colleges. These colleges are to provide a framework for resolution authorities to perform their tasks in relation to resolution planning, assessing the resolvability of CCPs and removing impediments to resolution. For example, resolution colleges are required to approve or propose amendments to the resolution plan proposed by the CCP's resolution authority. Importantly, the home resolution authority would be able to make decisions without having to consult the resolution college at the point of resolution.

6.36 Membership of resolution colleges set out in the proposed Regulation is broad and includes home resolution and competent authorities, including those authorities of the largest clearing members of a CCP, finance ministries and central banks that clear key currencies. It is specified that ESMA should act as a binding mediator in a number of circumstances. Specifically, the resolution college will need to form a joint opinion on a resolution and on any measures identified to address impediments to resolvability of a CCP. If any college member does not agree with an issue, it can escalate the issue to ESMA for binding mediation. In addition, the proposal also applies the binding mediation process to decisions over recovery plans which are to be taken by competent authorities in the colleges.

6.37 The proposal provides for an ESMA Resolution Committee, composed of Member State resolution authorities, to be established for the purpose of preparing ESMA decisions in relation to the proposed Regulation. Resolution Committees would promote the development and coordination of resolution plans and develop methods for the resolution of failing CCPs.

6.38 Many CCPs provide clearing services to members established in other jurisdictions and the failure of such a CCP is likely to have effects across multiple jurisdictions. The proposed Regulation has provisions relating to third countries which enable the Commission to submit proposals to the Council for the negotiation of agreements with third country authorities regarding the cooperation between resolution authorities in connection with recovery and resolution planning. Pending a cooperation agreement, the proposal provides for the recognition and enforcement of third country resolution proceedings and for cooperation agreements to be established bilaterally between Member State resolution authorities and third country resolution authorities.

6.39 The proposed Regulation delegates the development of certain aspects of the technical detail to ESMA, requiring it to submit five draft technical standards and two guidelines to the Commission within 12 months of the proposal coming into force (save for guidelines on cooperation with third country authorities , which ESMA would have 18 months to submit). These technical standards would be drawn up in accordance with the ESMA legislation, which requires the Authority to consider the costs and benefits and to consult publicly, and requires the Commission to consult the European Council and Parliament.

6.40 The proposed Regulation includes consequential changes to EMIR, the ESMA Regulation and the Securities Financing Transactions Regulation. Additionally, the proposed Directive to amend the BRRD, document (a), includes provisions to apply amendments to the Company Law Directives made by BRRD in respect of credit institutions, to CCPs. It also takes CCPs with banking licences out of the BRRD, bringing them exclusively under the arrangements set out in this proposed Regulation, and applies the sanctioning powers of authorities in the BRRD also to CCPs.

6.41 The five legislative proposals concerning CRD IV, the BRRD and the SRM, documents (a)-(e), are each accompanied by the same Commission impact assessment and executive summary of the assessment. The CCP proposal has a separate Commission impact assessment and executive summary.

The Government's view

6.42 The Economic Secretary to the Treasury (Simon Kirby) has provided us with four Explanatory Memoranda in relation to these documents.

6.43 In his Explanatory Memorandum of 14 December 2016 about the Commission Communication, document (f), the Minister says merely that:

- the call for evidence supports the Government's priorities for the financial services sector;
- it anticipates that the follow-up actions will, in part, be given effect through separate legislative proposals in certain areas; and
- the Commission will monitor progress in the implementation of the respective areas and will publish its findings and possible next steps before the end of 2017.

6.44 In his Explanatory Memorandum of 20 December 2016 about one of the legislative proposals on the BRRD and those on CRD IV and the SRM, documents (a), (c)–(e), the Minister first repeats the Government's very familiar ritualistic statement that:

> "On 23rd June the EU referendum took place and the people of the United Kingdom voted to leave the European Union. The UK remains a full member of the EU until withdrawal. Full rights and responsibilities continue to apply and UK will continue to play a constructive role and fulfil our responsibilities in the meantime. Now that the proposal has been adopted by the Commission it will be negotiated in Council and European Parliament in the usual way, and the UK will defend its interests."

6.45 On the CRD IV proposals, documents (d) and (e), the Minister says that:

- the Government welcomes the Commission's proposals and measures to support the financial stability of the EU's banking system;
- these measures will make institutions better capitalised, have more stable sources of funding, prevent them from having excessively leveraged balance sheets and allow them to be resolved more effectively,

- this will put banks in a better position to withstand economic shocks, reduce the likelihood that they would need to be bailed out by the public sector and in the event of failure, minimise the impact on taxpayers and real economy;
- the Government recognises the importance of making sure that the regulatory framework simultaneously facilitates the ability of banks to provide support to the real economy; and
- it welcomes the addition of measures to increase proportionality and reduce the burden on smaller and less complex institutions.

6.46 The Minister continues that the Government strongly supports international harmonisation and the implementation of the internationally agreed BCBS standards and that, as negotiations progress, it will push for EU standards to be updated in line with developments internationally. He comments that international harmonisation provides regulatory certainty and supports financial stability, reducing costs to the wider economy and contributing to collective growth and competitiveness. He says that in that context the Government supports measures implementing international standards on:

- counterparty credit risk;
- exposures to CCPs;
- market risk, although further analysis of the Commission's proposed transition period will need to be undertaken;
- changes to the large exposures framework;
- equity investments in funds;
- interest rate risks implementing international standards agreed by the BCBS;
- the leverage ratio, already applied in the UK by the Bank of England; and
- the NSFR.

6.47 Turning to some of the detail of the CRD IV proposals the Minister says that:

- on Pillar 2 capital requirements and guidance, the Government supports the harmonisation of rules, which will provide certainty to the market, so long as supervisors have the necessary flexibility to allow them to react to, and pre-empt, financial stability risk;
- the Government supports the focus on proportionality in the provisions for reporting and disclosure requirements—these calibrate the prudential rules for smaller firms, which will reduce the compliance costs for smaller and less complex institutions and will all help to support the wider economy as well as competition in the banking sector;
- it recognises that bank-like rules are not appropriate for the majority of investment firms and supports further analysis towards the goal of giving investment firms the dedicated capital regime they require;

- the new IFRS 9 accounting standards will impact bank capital ratios as a lot of own funds may no longer be considered Tier 1 capital—therefore the Government, in agreement with the Bank of England, welcomes the introduction of a transition period for the implementation of the new rules in order to mitigate against any cliff edge effects;
- the Government supports the provisions for SME and specialised lending as these improve SME's access to finance—it aims to ensure that the details are right so that these measures will support economic growth and competitiveness while not compromising financial stability;
- the Government is currently undertaking analysis as to what, if any, implications the IHC measure will have for the UK and the UK's banks;
- it is considering the impact of the proposals on remuneration, which may restrict the ability of the Prudential Regulatory Authority (PRA) and the Financial Conduct Authority (FCA) to apply proportionality when applying remuneration rules to smaller firms;
- the Government is performing analysis and engaging with stakeholders to evaluate the impact of these rules—the UK is at the forefront of global efforts to tackle unacceptable pay practices in the banking sector and has the toughest regime on pay of any major financial centre; and
- currently some remuneration rules are disapplied to firms with asset sizes under £15 billion—the proposals reduce this proportionality threshold to firms under £5 billion, increasing the number of firms to which the remuneration rules apply.

6.48 On the main BRRD proposal, document (a), the Minister says:

- following the global financial crisis, domestic, EU and international consensus was reached that the policy framework for dealing with struggling banks needed to include tools to bail-in struggling banks, to avoid future bail-outs;
- the agreement of the TLAC standard in November 2015 was an important milestone, establishing a clear standard to ensure that G-SIBs will have sufficient loss-absorbing and recapitalisation capacity available for authorities to implement an orderly resolution;
- the Government welcomes the move to transpose the TLAC standard into EU law to provide clarity and consistency in this area;
- however, it has some concerns about the details of the proposal—it is important that the proposal transposes internationally agreed standards fully and truly;
- it is also important that the proposals do not impose constraints on flexibility for the resolution authority to set an appropriate amount and quality of loss absorbing debt to support the resolution strategy;
- the Government welcomes the proposed amendments to requirements for the contractual recognition of bail-in, which are intended to ensure a more proportionate approach to the requirement;

- it will continue to engage with the Commission to ensure that firms must include the contractual provision unless impracticable, which is similar to the approach taken in the UK; and
- the moratorium tool is a key element of effective resolution—however, the Government will explore how these new powers work in relation to the moratorium tool already provided in the BRRD and the existing pre-resolution powers.

6.49 In relation to amending the SRM, document (c), the Minister merely notes that the SRM does not apply to the UK.

6.50 In his Explanatory Memorandum of 14 December 2016 on the second BRRD proposal, document (b), the Minister says that:

- the proposal would require a change to UK law to provide for the new class of debt instruments, which would apply only to future issuances;
- the proposal would not impact on ordinary insolvency proceedings, but would apply to those parts of insolvency law that relate specifically to banks and investment firms or in the occurrence of a bank or investment firm insolvency;
- the Government and the Bank of England agree that certainty about the creditor hierarchy is important and supports the unambiguous implementation of FSB's TLAC standard for G-SIBs, which requires subordination, and recognises the role of different approaches to subordination (structural, contractual, or statutory);
- as set out in the Bank of England's MREL Policy Statement, structural subordination is the UK's preferred approach, except in the case of building societies, and the UK is well advanced in making the structural approach to subordination operational for UK banks;
- the Government and the Bank of England are considering the detail of the proposal to ensure it does not prevent the UK approach to structural subordination; and
- the proposal would not require firms to use this new statutory class to meet subordination requirements, so it should not impact the Bank of England's MREL policy.

6.51 In his Explanatory Memorandum of 14 December 2016 about the CCP proposal, document (g), the Minister discusses first subsidiarity, saying that:

- the Commission argues that given the extent of the cross-border integration of financial services only EU action can ensure that CCPs which may have clearing members located in different Member States are subject to adequate and effective intervention to mitigate or address a crisis situation in a coordinated and coherent manner;
- the Government recognises this assessment, but is still considering the text carefully;

- it is important that the ability of Member States and their national authorities to take steps to enhance the resolvability of institutions and take resolution action is not curtailed by, for example, overly prescriptive procedural arrangements and the roles proposed for the Commission and ESMA—in particular in connection with binding mediation arrangements in relation to recovery and resolution plans; and

- the Government queries the need for the significant number of proposals for the Commission to adopt delegated technical standards drafted by ESMA—the appropriateness of each of the proposed powers is being carefully considered.

6.52 The Minister introduces his comments on the policy implications of the CCP proposal by repeating the Government's ritual Brexit statement. He then says that:

- the Government welcomes the Commission's proposal to introduce a recovery and resolution framework for CCPs in the EU, which forms part of the package of international regulatory reforms being implemented in response to the financial crisis to increase the resilience and resolvability of financial institutions and address the too-big-to-fail problem;

- the Government fully supports implementation of G20 commitments that aim to increase the safety of the OTC derivatives market and address the increasingly important role taken on by CCPs to manage systemic risk internationally;

- the Government has already introduced legislation, between 2011 and 2013, to recover and resolve CCPs, which introduced new resolution powers for the Bank of England—the resolution objectives broadly align with the objectives contained within the EU's proposal and it is important that the EU framework therefore ensures the continuity of critical functions and protects taxpayers in the event of a CCP failing;

- the Government will seek to ensure that the EU's proposal on recovery and resolution of CCPs remains consistent with the international standards, namely the FSB's Key Attributes of Effective Resolution Regimes for Financial Institution and the Annex on resolution of Financial Market Infrastructures (FMIs) and FMI participants and the CPMI-IOSCO[19] Report on the Recovery of Financial Market Infrastructures;[20]

- the Government welcomes the publication of further FSB guidance on CCP resolution planning, strategies and tools in 2017;

- it is important that CCP recovery and resolution reforms are implemented consistently across G20 partners and between Member States consistently to prevent regulatory arbitrage and competitive distortions;

- overall, the Government believes it is important that these proposals should operate in a way which ensures that recovery and resolution planning and, should they be necessary, resolution actions do not discriminate between market

19 The Committee on Payments and Market Infrastructures and the International Organization of Securities Commissions.

20 See http://www.iosco.org/library/pubdocs/pdf/IOSCOPD455.pdf.

participants and CCPs based in different Member States or third countries—equally it is important that the regulatory burden imposed by the proposals is proportionate to the benefits of systemic risk reduction;

- the Government welcomes the balance between the level of flexibility for resolution authorities to intervene in the unprecedented situation of a CCP default and predictability for market participants that this proposal seeks to achieve; and
- it is important that clearing members have sufficient clarity and transparency on potential losses that may be imposed on them—equally, it is vital that resolution authorities have the ability to intervene early, and before the exhaustion of a CCP's recovery process, should it be necessary to safeguard financial stability and minimise losses to taxpayers.

6.53 Turning to the financial implications of the CCP proposal the Minister says that:

- the aim of this proposal and the resolution authority is, amongst other things, to preserve financial stability and minimise any costs associated with the failure of a CCP on the taxpayer;
- the recent banking crisis provides extensive empirical evidence that the existing alternatives of bailout and insolvency are worse in the long-run;
- while there may be costs associated with the framework, it is noted that CCPs are already developing recovery plans as part of their obligations under the international framework; and
- unlike the case for banks, the preferred options foreseen for CCPs do not include those which carry major upfront costs, for example, new prefunded buffers of loss-absorbing resources or resolution funds.

Previous Committee Reports

None.

7 EU asylum reform: revision of the Dublin rules and the establishment of an EU Agency for Asylum

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee and the Committee on Exiting the European Union
Document details	(a) Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (recast) (b) Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010
Legal base	(a) Article 78(2)(e) TFEU, ordinary legislative procedure, QMV (b) Article 78(1) and (2) TFEU, ordinary legislative procedure, QMV
Department	Home Office
Document Numbers	(a) (37747), 8715/16, COM(16) 270 (b) (37749), 8742/16, COM(16) 271

Summary and Committee's conclusions

7.1 These proposals form part of a wider package of EU asylum reforms put forward by the Commission in 2016 in response to unprecedented pressures at the EU's external borders which have placed a strain on the asylum systems of frontline Member States and cast doubt on the sustainability of the Schengen open borders policy. Document (a)—the proposed "Dublin IV" Regulation—would streamline the existing rules and procedures for determining the Member State responsible for examining an application for international protection made in the EU. It is intended to ensure quicker access to an asylum procedure and discourage secondary movements between Member States. More controversially, the proposed Regulation would introduce a new "corrective allocation" or fairness mechanism to redistribute asylum seekers from over-burdened Member States in an attempt to ensure a more equitable and sustainable means of sharing responsibility at times of high migratory flows. Participation in the new fairness mechanism would be optional, but opting out would be costly—€250,000 (£214,045)[21] for each relocated asylum seeker that a Member State refuses to accept.

21 €1= £0.85618 (as at 3 January 2017)

7.2 Document (b) would establish a European Union Agency for Asylum to replace the existing European Asylum Support Office (EASO). The new Agency would have stronger powers to monitor the application of EU asylum rules and to provide operational and technical assistance to Member States whose asylum and reception systems experience "disproportionate pressure".

7.3 The documents were published last May, along with a related proposal to develop the EU's existing asylum database—Eurodac—into a broader migration management tool. The proposals concern areas of asylum cooperation in which the UK has, until now, participated fully. The UK is bound by the current "Dublin III" Regulation and by the Regulation establishing the European Asylum Support Office. The Commission's asylum reform proposals are subject to the UK's Title V (justice and home affairs) opt-in, meaning that they will only apply to the UK if the Government decides to opt in. Under the UK's Title V opt-in Protocol, the Government has three months to decide whether it wishes to opt in at the negotiating stage. Opting in at the outset gives the UK a right to participate fully in the negotiations and to vote on the outcome. The UK will be bound by the final agreed text. If the Government decides not to opt in within the three month deadline, it is still entitled to participate in the negotiations (though its influence may be diminished) and may apply to opt in once a final text has been agreed and formally adopted. The three month opt-in deadline for the proposed EU Asylum Agency proposal—document (b)—expired on 30 September 2016. The three month opt-in deadline for the proposed Dublin Regulation—document (a)—expired on 18 November 2016.

7.4 When we considered documents (a) and (b) in June and July last year, we recommended that the Government's opt-in decisions should be debated on the floor of the House on the grounds that they raised important issues of policy and principle. The UK is a net beneficiary under the existing Dublin arrangements, transferring more asylum seekers to other Member States than it receives. The UK is also an active participant in the European Asylum Support Office which the new EU Agency for Asylum would replace. We considered, moreover, that the opt-in decisions taken by the Government were likely to have a wider significance in light of the referendum outcome, providing an early indication of the Government's approach to future cooperation with EU partners in the asylum and migration field. The opt-in debate took place in European Committee B on 15 November—after the expiry of the opt-in deadline for the proposed EU Asylum Agency Regulation—on the basis of a motion endorsing the Government's decision *not* to opt into either proposal.

7.5 In his first update on the proposals, the Immigration Minister (Mr Robert Goodwill) confirms that the Government has decided *not* to opt into the proposed Dublin Regulation or the proposed EU Asylum Agency Regulation. He reiterates the Government's "principled opposition to redistribution or relocation mechanisms" for asylum seekers, adding:

> "We should maintain our long-standing positon that asylum seekers should claim asylum in the first safe country they enter and not be moved around the EU using allocation quotas. Therefore the UK will not opt into the proposed Dublin IV Regulation."

7.6 He reminds us of the Commission's position that "the proposed Dublin IV Regulation will be operationally compatible with the existing Dublin III Regulation", meaning that a decision not to opt into the proposed Dublin IV Regulation should not prejudice the UK's continuing participation in the Dublin system on the basis of the rules set out in the Dublin III Regulation.

7.7 On the proposed EU Asylum Agency, the Minister notes that it would have "a significant degree of oversight over national asylum systems" and makes clear that "the functioning of the asylum system is a sovereign matter".

7.8 **The Minister offers no explanation for scheduling the opt-in debate on these important proposals after the deadline on the proposed EU Asylum Agency Regulation had expired. This defeats the purpose of opt-in debates which is to enable Parliament to influence and inform the decision making process, significantly strengthen its oversight of EU justice and home affairs matters and make the Government more accountable for the decisions it makes in the EU.[22] Nor has the Minister complied with the Government's own Code of Practice on parliamentary scrutiny of opt-in decisions in which the Government undertakes to inform the scrutiny committees in both Houses of a decision not to opt into an EU legislative proposal "as soon as it has been reached".[23] His initial update does not provide the information we requested in our earlier Reports on the proposed Regulations which we agreed in June and July last year. We ask the Minister to explain the reasons for these delays and omissions. Can he confirm that the Government has excluded the possibility of opting into either proposal once negotiations have concluded, or might the Government wish to review its opt-in decisions in light of the final texts agreed?**

7.9 **When we first considered the proposed Dublin IV Regulation last June, we said that a key consideration in deciding whether or not to opt in would be the UK's ability to continue to participate in the Dublin system on the basis of the current rules (set out in the Dublin III Regulation) rather than the successor arrangements proposed by the Commission. The Minister reiterates the Commission's assurance that the UK could continue to take part in the Dublin system on the basis of the current (Dublin III) arrangements if it does not opt into the successor (Dublin IV) Regulation. As our earlier Report indicated, we treat any such assurances with extreme caution. The extent to which a new set of Dublin rules can operate alongside the existing rules will depend on the final outcome of negotiations and the views of other Member States. We have asked the Minister to explain how two sets of procedural rules applying different time limits throughout the Dublin process and, in some cases, altering the basis on which the responsible Member State is determined, could be made to work and whether changes are needed to the proposed Regulation to make the existing and revised Dublin systems operable. We look forward to receiving his response which is now six months overdue.**

7.10 **We remind the Minister that we have asked for further information to help us evaluate the benefit of the Dublin system for the UK, in particular details of transfers to and from the UK under the current Dublin rules as well as his assessment of the impact of Dublin procedures on the total number of asylum applications examined by**

22 See the Written Ministerial Statement of the then Minister for Europe (Mr David Lidington) on *Enhancing Parliamentary Scrutiny of EU Business*, Hansard, 20 January 2011, col. 51WS.

23 See Annex S of Cabinet Office guidance on Parliamentary Scrutiny of EU Documents.

the UK each year. We have also asked him to explain why the Commission has sought to narrow the scope of the humanitarian clause in its Dublin IV proposal and to indicate whether it is an attempt to constrain the unilateral assumption of responsibility for asylum seekers by individual Member States, as occurred during the summer of 2015 when the German government temporarily suspended the Dublin rules.

7.11 **Turning to the proposed EU Asylum Agency Regulation, we expect the Minister to provide the information requested in our earlier Report agreed last July, In particular, we ask him to explain:**

- **whether the UK will remain bound by the current Regulation establishing EASO—the proposed EU Asylum Agency Regulation would repeal the EASO Regulation but does not indicate the effect of the repeal on Member States not participating in the new Agency; and**
- **whether EASO and the new EU Asylum Agency could co-exist and the extent to which the enhanced mandate and functions of the new Agency could operate alongside EASO's more limited mandate.**

7.12 **We have requested but not yet received an early indication of the reactions of other Member States to the Commission's asylum reform package and look forward to receiving regular progress reports on negotiations.**

7.13 **In light of the referendum outcome, we ask the Minister whether (as part of exit negotiations) the Government intends to seek to maintain UK participation in the Dublin system once the UK leaves the EU and to indicate how readily this could be achieved. Similarly, what relationship does the Government envisage establishing with the proposed EU Asylum Agency or, if it continues to exist, the European Asylum Support Office once the UK leaves the EU?**

7.14 **Pending further information, the proposed Regulations remain under scrutiny. We draw this chapter to the attention of the Home Affairs Committee and the Committee on Exiting the European Union.**

Full details of the documents

(a) Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (recast): (37747), 8715/16, COM(16) 270; (b) Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010: (37749), 8742/16 + COM(16) 271.

Background

7.15 Our earlier Reports listed at the end of this chapter provide a detailed overview of the proposed Regulations and the Government's position.

The Minister's letters of 16 December 2016

7.16 The Minister formally notifies us of the Government's decision *not* to opt into the proposed Dublin IV Regulation and the proposed EU Asylum Agency Regulation.

7.17 Turning first to the proposed Dublin IV Regulation, the Minister comments:

> "There are elements of the proposal that we welcome. For example, it provides a more streamlined process in deciding the Member State responsible for determining an asylum claim and transferring asylum seekers between Member States. However, the proposed Regulation binds Member States to participate in a quota-based distribution scheme. If opted in, the Commission can also impose considerable financial burdens on Member States of €250,000 per applicant not transferred under this mechanism.
>
> "I see no reason to change our principled opposition to redistribution or relocation mechanisms and no reason why such a scheme should be included in the Dublin IV Regulation, as proposed by the Commission.
>
> "I am also clear that we should maintain our long-standing position that asylum seekers should claim asylum in the first safe country they enter and not be moved around the EU using allocation quotas. Therefore, the UK will not opt in to the proposed Dublin IV Regulation."

7.18 The Minister says that the UK will remain bound by the existing Dublin III Regulation in which it does participate, adding:

> "The Commission has been clear that the proposed Dublin IV Regulation will be operationally compatible with the existing Dublin III Regulation."

7.19 The Minister notes that the proposed EU Asylum Agency would replace the European Asylum Support Office in which the UK participates. He continues:

> "The aim of the proposal is an Agency with more powers to promote the implementation and improve the functioning of the Common European Asylum System. The proposal provides the European Union Agency for Asylum with a significant degree of oversight over national asylum systems.
>
> "We are committed to running a high quality and effective asylum system but have always taken the view that the functioning of the asylum system is a sovereign matter."

Previous Committee Reports

Sixth Report HC 71-iv (2016–17), chapter 1 (15 June 2016) and Seventh Report HC 71-v (2016–17), chapter 1 (6 July 2016).

8 Fingerprinting of asylum applicants and irregular migrants: the Eurodac system

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee
Document details	Proposal for a Regulation on the establishment of 'Eurodac' for the comparison of fingerprints (recast)
Legal base	Articles 78(2)(e), 79(2)(c), 87(2)(a) and 88(2)(a) TFEU, ordinary legislative procedure, QMV
Department	Home Office
Document Number	(37754), 8765/16, COM(16) 272

Summary and Committee's conclusions

8.1 The proposed Regulation on Eurodac is part of a wider package of measures to reform the EU's asylum system so that it is better equipped to manage sustained pressures at the EU's external borders and a high level of secondary movements within the Schengen free movement area. The changes proposed by the Commission are intended to make the Dublin system more effective and develop Eurodac into a broader migration management tool. Eurodac is an EU database containing the fingerprints of third country (non-EU) nationals who have applied for asylum within the EU or who have been apprehended in connection with an irregular border crossing.[24] Member States are able to search the database for evidence to help determine which one is responsible for examining an asylum application under the Dublin rules. Up until now, Eurodac has operated primarily as an asylum database and cannot be used for wider immigration purposes. Member States are unable to store and compare fingerprint data on illegally-staying third country nationals, making it difficult to track any secondary movements within the EU or identify where they first entered the EU. As a consequence, the Commission estimates that "thousands of migrants remain invisible in Europe, including thousands of unaccompanied minors".[25]

8.2 The expanded Eurodac database would store the facial images as well as fingerprints of third country nationals falling within any one of three categories: asylum, irregular entry to the EU, or illegal presence within a Member State. The ability to access this information would, the Commission suggests, help to establish when and where an irregular migrant entered the EU and facilitate the identification and re-documentation of individuals who should be returned to their countries of origin. National law enforcement authorities and Europol would have access to the more extensive range of biometric data held in the expanded Eurodac database in order to prevent, detect or investigate terrorism and other serious crimes.

24 Throughout this chapter, the reference to third country nationals also includes stateless persons.

25 See p.2 of the Commission's explanatory memorandum accompanying the proposed Regulation.

8.3 As well as expanding the type of personal data to be stored in Eurodac, the Commission also proposes lowering the age threshold for taking fingerprints and facial images from 14 years to six on the grounds that it will be easier to identify asylum-seeking and migrant children, especially those that are unaccompanied or have been separated from their families, and ensure that they are properly safeguarded. At the beginning of 2016, Europol estimated that more than 10,000 unaccompanied migrant children in Europe had gone missing within hours of being registered as new arrivals. The actual number is expected to be considerably higher.[26]

8.4 The UK participates fully in Eurodac and in the wider Dublin system of which it forms part. The proposed Regulation is subject to the UK's Title V (justice and home affairs) opt-in, meaning that the UK will only be bound by the changes proposed by the Commission if the Government decides to opt in. The Government has welcomed many of the changes, including the expansion of the categories of data to be stored in the Eurodac database, its development into a tool to assist Member States in dealing with illegal migration and returns, and increased data availability for law enforcement purposes. The Government also supports a reduction in the age threshold for taking the fingerprints and facial images of asylum-seeking and migrant children, noting that it is more in line with UK practice.

8.5 We considered the proposed Regulation in June and recommended that the Government's opt-in decision should be debated on the floor of the House before the three month deadline for opting in at the negotiating stage expired on 18 November. The debate took place in European Committee B on 15 November on a motion endorsing the Government's recommendation to opt into the proposed Regulation. We asked the Government to provide further information on the following matters ahead of the debate:

- an analysis of the feasibility of opting into the revised Eurodac Regulation but not the revised Dublin Regulation, given that the Eurodac proposal is inextricably linked to the Commission's wider reform of the Dublin system;
- the rationale for reducing the age threshold for taking the fingerprints and facial images of very young children and the adequacy of the safeguards contained in the proposed Regulation; and
- the enforceability of the safeguards to prevent the misuse of Eurodac data transferred to third countries.

8.6 We asked the Government to confirm that it had consulted the UK's Information Commissioner on the proposed changes to Eurodac and requested a summary of his views. We also made clear that we would welcome an early indication of the reactions of other Member States and progress reports on any negotiations that took place up until the scheduling of the opt-in debate.

8.7 In his first update, the Immigration Minister (Mr Robert Goodwill) formally notifies us of the Government's decision to opt into the proposed Regulation, adding:

> "If we do not opt in at this stage, the lack of access to EURODAC for asylum/migration and law enforcement purposes risks the UK becoming

26 The NGO, Missing Children Europe, reports that in 2015, almost 90,000 asylum seekers in the European Union were unaccompanied children under 18, about nine times more than the number arriving in the previous three years. This figure does not include unaccompanied children who did not apply for asylum.

> a 'blind spot' in terms of data-sharing capabilities, which would harm UK interests. The new EURODAC will strengthen the UK's ability to control immigration, by tackling illegal migration, promoting the first safe country principle and maximising returns."

8.8 He also provides a brief update on negotiations within the Council and a *limité* text setting out the basis for the Justice and Home Affairs Council to agree a "partial general approach" at its meeting on 8–9 December.[27]

8.9 **The Minister's letter post-dates the Justice and Home Affairs Council at which a partial general approach was agreed, establishing the mandate for the Council to enter into trilogue negotiations with the European Parliament once it has agreed its negotiating position.[28] While we are grateful for sight of the limité text supporting the Council's partial general approach, it is disappointing that it has taken the Minister six months to provide an initial update. It is clear that discussions within the Council have been proceeding apace. His update does not provide the information requested in our earlier Report, agreed in June, despite our making clear that it should be made available ahead of the opt-in debate (on 15 November). The Minister has not complied with the Government's own Code of Practice on parliamentary scrutiny of opt-in decisions in which the Government undertakes to inform the scrutiny committees in both Houses of a decision to opt into an EU legislative proposal "as soon as the Presidency has been notified".[29] We ask the Minister to explain the reasons for these delays and omissions.**

8.10 **In his Written Statement on the outcome of the December Justice and Home Affairs Council, the Minister for Policing and the Fire Service (Brandon Lewis) explained that the Council had only agreed a *partial* general approach as "it would need further amendments to reflect the outcome of negotiations on the Dublin IV and EU Asylum Agency proposals".[30] The UK has not opted in to these proposals which form part of the Commission's wider asylum reform package. Our earlier Report specifically asked the Government to comment on the feasibility of opting into the revised Eurodac Regulation but not opting into the revised Dublin Regulation (or the Commission's other asylum reform proposals). We reiterate our request for the Government to provide an analysis setting out the relevant legal (and any other) factors.**

8.11 **The Written Statement notes that "the UK has opted into the Eurodac proposal and it remains under parliamentary scrutiny". We ask the Minister to explain whether the Government endorsed, opposed, or abstained on the partial general approach agreed at the December Justice and Home Affairs Council. The Statement continues:**

> **"I also intervened with other Member States to object to the current text on law enforcement access and said that the UK would support further amendments to the text to make it easier to check Eurodac for law enforcement purposes."**

27 The *limité* text (Council document 14462/16) is provided on condition that "it cannot be published or reported on in any way which would bring detail contained in the document into the public domain".

28 See the press release issued by the Council on 9 December 2016.

29 See Annex S of Cabinet Office guidance on Parliamentary Scrutiny of EU Documents.

30 See the Minister's Written Ministerial Statement of 15 December 2016.

8.12 **We ask the Minister to set out the main changes which the partial general approach agreed by the Council would make to the Commission proposal and to explain the further changes the Government would like to see to "improve the scope and efficiency of law enforcement access".**

8.13 **We note that the rationale for opting into the proposed Regulation at the negotiating stage (rather than reviewing possible UK participation once the proposal has been formally adopted) is to mitigate the risk of the UK becoming "a 'blind spot' in terms of data-sharing capabilities, which would harm UK interests". As the Eurodac Regulation will, in any event, cease to apply to the UK once it leaves the EU, we ask the Minister to explain what steps the Government intends to take during exit negotiations to mitigate or eliminate the risk that UK law enforcement and immigration control authorities may lose access to important EU data-sharing instruments.**

8.14 **The proposed Regulation remains under scrutiny. We draw this chapter to the attention of the Home Affairs Committee.**

Full details of the document

Proposal for a Regulation on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person], for identifying an illegally staying third country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast): (37754), 8765/16, COM(16) 272.

Background

8.15 Eurodac was established in 2000. It consists of a central database and a communications infrastructure allowing each participating country to search the database for evidence to help determine the Member State responsible for examining an asylum application. Eurodac was amended in 2013 to allow law enforcement access under strictly defined conditions. The Commission has now proposed a "recast" Regulation which reproduces many of the provisions contained in the current Eurodac Regulation but incorporates a number of important changes. Our earlier Report listed at the end of this chapter provides a detailed overview of the changes proposed by the Commission and the Government's position.

The Minister's letter of 15 December 2016

8.16 The Minister notifies us of the Government's decision to opt into the proposed Regulation and says that the new Eurodac system proposed by the Commission will "continue to support the effective application of the Dublin Regulation, to determine responsibility for examining an application for international protection, to identify illegally staying third country nationals and to allow requests to EURODAC by national law enforcement authorities and Europol for law enforcement purposes".

8.17 He notes that the proposal will replace a 2013 Eurodac Regulation in which the UK currently participates and that the UK also participated fully in an earlier 2000 Eurodac Regulation. The Minister explains that the changes proposed by the Commission are intended to "enhance the EURODAC database so that it better supports Member States to tackle illegal migration and to facilitate returns" and says that they will extend the scope of the Eurodac database in the following ways:

- "Increasing the categories of fingerprint data stored in the database by storing data on persons found illegally present in a Member State (this data is currently transmitted on a discretionary basis to search against stored asylum data);
- "Increasing the scope of the data comparisons within the database so that each new transmission is compared against all other stored records (as opposed to the current arrangements where new asylum data transmissions are stored and searched against existing asylum data and data for those entering the EU illegally and data on persons found illegally present is searched against stored asylum data only);
- "Increasing the storage periods for data, e.g. from 18 months to five years for illegal entrant data to address secondary movements; and
- "Increasing the level of detail associated with each fingerprint record, including for the first time facial images, biographical information (name/aliases, nationality, place and date of birth) and information on any documents held by individuals to assist States with re-documenting for returns."

8.18 The Minister notes that the value of the database for law enforcement and counter terrorism agencies will increase as it will include more records and associated information. He continues:

> "If we do not opt in at this stage, the lack of access to EURODAC for asylum/migration and law enforcement purposes risks the UK becoming a 'blind spot' in terms of data-sharing capabilities, which would harm UK interests. The new EURODAC will strengthen the UK's ability to control immigration, by tackling illegal migration, promoting the first safe country principle and maximising returns."

8.19 The Minister provides a brief update on developments within the Council:

> "The Council has been discussing the proposal, including very recent amendments to law enforcement access. A revised text at '*limité*' classification has been circulated which includes proposals to make law enforcement access easier in order to support wider security and law enforcement objectives. For example, it will allow access to security services and provide that stored data on beneficiaries of international protection can be searched in the same way as data on applicants for international protection."

8.20 The Minister welcomes the changes proposed in the Presidency's revised *limité* text but adds that the Government is "pressing for further amendments to improve the scope and efficiency of law enforcement access". He says that the Presidency intends to seek a 'partial general approach' before the JHA Council on 8–9 December, but adds that "the UK has a scrutiny reservation on the text". He undertakes to update us on progress "in due course".

Previous Committee Reports

Sixth Report HC 71-iv (2016–17), chapter 2 (15 June 2016).

9 A uniform residence permit for third country nationals

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee
Document details	Proposal for a Regulation amending Council Regulation (EC) No 1030/2002 laying down a uniform format for residence permits for third country nationals
Legal base	Article 79(2)(a) TFEU, ordinary legislative procedure, QMV
Department	Home Office
Document Number	(37915), 10904/16 + ADD 1, COM(16) 434

Summary and Committee's conclusions

9.1 A residence permit is a document issued to third country (non-EU) nationals authorising them to stay legally on the territory of a Member State. Since 1997, Member States have issued residence permits in a uniform format. The technical specifications and security features have been strengthened in recent years to reduce the risk of forgery and prevent illegal immigration and residence. The Commission nevertheless considers that the current format has been compromised as a result of "serious incidents of counterfeiting and fraud". The proposed Regulation is intended to strengthen the security features and technical specifications of residence permits to make them more fraud-proof.

9.2 The UK participates in the existing EU Regulations establishing a uniform format for residence permits. These Regulations allow Member States to include their own additional national security features. Whilst the Immigration Minister (Robert Goodwill) considers that evidence of abuse of the UK's biometric residence permit is "quite sporadic and largely anecdotal", he told us that the UK had played an active part in discussions to improve the security features of the uniform residence permit for other Member States.

9.3 The proposed amending Regulation is subject to the UK's Title V (justice and home affairs) opt-in. The three-month deadline for deciding whether or not to opt in at negotiating stage expired on 5 October. When we considered the proposal at our meeting on 7 September, we asked the Minister to:

- set out the factors which the Government would take into account in deciding whether or not to opt into the proposed amending Regulation;
- explain why the proposal was considered to be a Schengen-building measure for some countries but not for the UK and which Protocol—the UK's Title V opt-in Protocol or Schengen opt-out Protocol—applied; and
- provide a more detailed assessment of the implications of the Government's opt-in decision both during the period that the UK remains a member of the EU and following the UK's withdrawal from the EU.

9.4 In his first letter dated 12 October, the Minister sets out the factors informing the Government's opt-in decision, explains the reasons why the UK's Title V opt-in rather than Schengen opt-out Protocol applies, and explores the implications of the Government's opt-in decision in light of the UK's decision to leave the EU. Although his letter was sent after 5 October—the date on which the three month deadline for opting into the proposed Regulation expired—the Minister did not indicate whether or not the Government had decided to opt in. He did, however, leave open the possibility of future UK participation in the Regulation at a later stage, "depending upon our future relationship with the EU" and the UK's "wider post-Brexit objectives". His second letter dated 16 December informs us that the Government has decided *not* to opt into the proposed Regulation. The Government intends to continue issuing the current (unamended) format of the residence permit until the UK leaves the EU and is "considering the options following exit".

9.5 **A delay of more than two months in informing this Committee and the House of the Government's decision not to opt into the proposed Regulation is unacceptable and the Minister's apology inadequate. The Government's own Code of Practice on scrutiny of opt-in decisions provides:**

> **"If the Government decides not to opt in, the Minister will write to inform the Committees of its decision as soon as it has been reached."**[31]

9.6 **The Minister provides no explanation for the delay. We ask him to do so as a matter of urgency. The Government repeatedly tells us that it is "business as usual" until the UK leaves the EU. This must mean that it is also "scrutiny as usual". We seek an immediate and categorical assurance that his Department is adequately resourced to manage both its Brexit business and its scrutiny business and that Home Office Ministers will abide by the Code of Conduct and by the commitments made by the previous Coalition Government in January 2011 which are intended to strengthen significantly Parliament's oversight of EU justice and home affairs matters and to ensure greater Government accountability for the decisions it makes in the EU.**[32]

9.7 **The Minister's earlier letter of 12 October appears to leave open the possibility of future UK participation in the proposed Regulation "at a later occasion", with any decision being taken "in the context of our wider post-Brexit objectives". Can the Minister indicate how soon he expects the proposed Regulation to be adopted and whether a post-adoption opt-in remains a possibility?**

9.8 **Pending further information, the proposed Regulation remains under scrutiny. In light of our concern about the Home Office's scrutiny performance, we draw this chapter to the attention of the Home Affairs Committee.**

Full details of the documents

Proposal for a Regulation amending Council Regulation (EC) No. 1030/2002 laying down a uniform format for residence permits for third country nationals: (37915), 10904/16 + ADD 1, COM(16) 434.

31 See Annex S of Cabinet Office Scrutiny Guidance.

32 See the Written Ministerial Statement of 20 January 2011 made by the former Minister for Europe (Mr David Lidington).

Background

9.9 Further details on the content of the proposed Regulation and the Government's position are contained in our Tenth Report which was agreed at our meeting on 7 September.

The Minister's letter of 12 October 2016

9.10 The Minister explains that "the Government is committed to taking all opt-in decisions on a case-by-case basis, putting the national interest at the heart of the decision making process", and identifies the factors informing the Government's opt-in decision:

- whether the UK can continue to use the existing residence permit based on an earlier Regulation[33] if the Government decides not to opt in to the proposed amending Regulation;
- the cost and time needed to develop a new residence permit if the UK does not opt in to the proposed amending Regulation and is unable to continue to use the existing EU residence permit; and
- whether it is appropriate to commit to developing and using a new residence permit in light of the UK's decision to leave the EU and the fact that the terms of the UK's exit will be subject to negotiation.

9.11 We asked the Minister why the recitals to the proposed amending Regulation indicate that it is a Schengen-building measure for Denmark and for countries associated with Schengen (Iceland, Norway, Switzerland and Liechtenstein) but not for the UK. The Minister explains that the recitals are consistent with those in the earlier 2002 Regulation which the proposal will amend. The 2002 Regulation replaced an earlier Joint Action (adopted in 1996)[34] concerning a uniform format for residence permits which does not form part of the Schengen rules applicable to the UK but which does form part of the rules applicable to countries associated with Schengen under the terms of their association agreements.[35] It follows that measures building on the Joint Action are not part of the Schengen rule book for the UK, even though they are for Denmark and for third countries associated with Schengen.

9.12 We noted that the proposed amending Regulation was likely to be adopted before the UK's withdrawal from the EU takes effect and invited the Minister to provide a more detailed assessment of the Brexit implications of the Government's opt-in decision. He comments:

> "While the UK remains a member of the EU it is entitled to participate in the Regulation on the uniform format of the residence permit. If the Government chooses to participate in the amended Regulation, on the

33 Council Regulation (EC) No 1030/2002.
34 Joint Action 97/11/JHA.
35 The Joint Action is not included in the 2000 Council Decision identifying those elements of the Schengen rule book that apply to the UK. It is included in the agreements associating various non-EU countries with the implementation, application and development of the Schengen rule book. See, for example, the association agreement with Iceland and Norway.

> basis of the current wording, we will need to introduce the new design of the uniform format on the residence permit within twelve months of the necessary technical specifications being agreed by the Commission."

9.13 The Minister confirms that if the Government were to decide not to opt in to the proposed amending Regulation, the UK would remain bound by the existing EU rules establishing a uniform format for residence permits until its withdrawal from the EU takes effect. Invited to comment on the Commission's view that the current uniform format for residence permits has been compromised by "serious incidents of counterfeiting and fraud" and that it might therefore be advisable to incorporate more advanced security features into the UK's biometric residence permit before the UK leaves the EU, he observes:

> "We are aware of [a] number of incidents of counterfeiting and fraud reported to us by the police and through our engagement with employer groups. However, we have seen no evidence to indicate that the current design of the card has been significantly compromised. We will consider the risks of the current card being abused as part of our decision on whether we participate in the amended Regulation."

9.14 He also comments:

> "Although the EU is upgrading the current design of [the] residence permit to prevent fraud, it remains a very secure document. However, depending upon our future relationship with the EU we may be able to participate in the Regulation at a later occasion. My officials are examining the UK's position in context of our wider post-Brexit objectives and I will provide a further update in due course."

9.15 We asked the Minister whether he anticipated that the Government would wish to replicate the standards envisaged in the proposed Regulation in national law or seek to legislate in a different manner following the UK's withdrawal from the EU. We also requested an assessment of the potential practical consequences for third country nationals and for UK immigration control of divergent national and EU laws on the format of residence permits. The Minister responds:

> "It should not be necessary for the UK to legislate on the design of the evidence of leave [to reside in the UK] if it issues biometric cards to replace either the current or the revised uniform format for residence permits. We have domestic legislation in place, the UK Borders Act 2007, as amended, which provides the Secretary of State with regulation making powers in respect of the issuance of biometric immigration documents. To ensure the integrity of any replacement document, we would expect it to contain comparable security features as those set out in the proposed amendment to the Regulation for the uniform format for residence permits.
>
> "My officials are currently exploring the implications and consequences of having divergent national and EU laws on the format of residence permits. However, we consider any legislative impact is likely to be minimal as we currently do not specify the format of immigration documents in our legislation."

9.16 Finally, we noted that, post-Brexit, UK nationals would be third country nationals for the purposes of EU law and may (depending on the outcome of Brexit negotiations) be required to obtain a residence permit to authorise a stay of more than three months in an EU Member State. We sought reassurance that the changes proposed in the Regulation were intended solely to enhance the security of residence permits issued by EU Member States and would not introduce any additional impediment to the acquisition of a residence permit. The Minister confirms that the changes are concerned only with the format of the residence permit.

The Minister's letter of 16 December 2016

9.17 The Minister reiterates the factors which informed the Government's opt-in decision and apologises for the delay in notifying us of its decision *not* to opt into the proposed Regulation. He adds:

> "Whilst the Government welcomes measures that will strengthen immigration and border control, we have taken account of the cost of developing a document that the UK may never use. The UK will continue issuing the current format of the residence permit until we leave the EU and are considering the options following exit."[36]

Previous Committee Reports

Tenth Report HC 71-viii (2016–17), chapter 6 (7 September 2016).

36 See also the Minister's Written Ministerial Statement made on 16 December 2016, HCWS 372.

10 EU asylum reform

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information awaited/ requested; drawn to the attention of the Home Affairs Committee
Document details	(a) Proposal for a Regulation on standards for determining who qualifies for international protection, a uniform status for refugees or individuals eligible for subsidiary protection, and the content of the protection granted (b) Proposal for a Regulation establishing a common procedure for international protection in the European Union and repealing Directive 2013/32/EU (c) Proposal for a Directive laying down standards for the reception of applicants for international protection (recast)
Legal base	(a) Articles 78(2)(a) and (b) and 79(2) TFEU, ordinary legislative procedure, QMV (b) Article 78(2)(d) TFEU, ordinary legislative procedure, QMV (c) Article 78(2)(f) TFEU, ordinary legislative procedure, QMV
Department	Home Office
Document Numbers	(a) (37967), 11316/16 + ADD 1, COM(16) 466 (b) (37968), 11317/16 + ADDs 1–2, COM(16) 467 (c) (37969), 11318/16, COM(16) 465

Summary and Committee's conclusions

10.1 These documents form part of a wider package of EU asylum reforms which are intended to establish "an effective and protective" asylum system "based on harmonised rules and mutual trust between Member States". Document (a)—the proposed Qualification Regulation—concerns the criteria applied by Member States to determine whether a third country (non-EU) national qualifies for international protection. The Commission believes that "applicants for international protection must have the same chance of obtaining the same form of protection, or having their claim rejected, irrespective of where they apply for asylum in the Union".[37] Its aim is to produce greater convergence in asylum recognition rates across the EU, harmonise the rights accorded to beneficiaries of international protection, introduce more frequent "status reviews", and apply stricter rules to discourage secondary movements between Member States.[38]

37 See the Commission's fact sheet on its latest asylum reform proposals.
38 See the Commission's infographic on the changes proposed.

10.2 Document (b)—the proposed Asylum Procedures Regulation—would harmonise asylum procedures throughout the EU in an attempt to reduce the "pull factors" which may draw individuals to Member States with the most favourable asylum recognition rates and reception conditions and result in an uneven distribution of asylum seekers and sharing of responsibility amongst Member States.

10.3 Document (c)—the proposed Reception Conditions Directive—has a two-fold purpose: to ensure that all Member States provide "sufficient and decent reception conditions" while an application for international protection is being examined, and to reduce "wide divergences" in the reception conditions currently provided by Member States. The proposal takes the form of a Directive rather than a Regulation as the Commission recognises that full harmonisation is neither feasible nor desirable given the "significant differences in Member States' social and economic conditions".[39]

10.4 All three proposals are subject to the UK's Title V (Justice and Home Affairs) opt-in, meaning that they will only bind the UK if the Government decides to opt in. We recommended in September that the Government's opt-in decisions on these important proposals should be debated, adding that the opt-in debate should consider the merits of the Commission's asylum reform package, the legal, practical and political feasibility of opting into some, but not all, of the reform proposals, and the wider implications for the UK once it has left the EU. The debate took place in European Committee B on 19 December, *after* the three-month period for opting into the proposals at the negotiating stage had expired (on 1 December for the proposed Qualification Regulation, 8 December for the proposed Asylum Procedures Regulation and 11 December for the proposed Reception Conditions Directive). The notion endorsed the Government's decision not to opt-in and noted the possibility of post adoption opt-in.

10.5 On 16 December, the Immigration Minister (Mr Robert Goodwill) formally notifies us of the Government's decision *not* to opt into the proposals. Although indicating that the Government welcomes the "overarching aim" of the proposals to discourage "abuse and unwarranted secondary movements" and that the proposals "have some merit", he observes:

> "We have long been of the view that decisions on asylum systems are best taken at national level. The proposals, in particular where replacing the use of a Directive with a Regulation, would further limit the Government's ability to take decisions on the UK asylum system at national level and in the UK national interest."

10.6 **As we anticipated when we wrote to the Minister in November, delays and omissions by the Government resulted in the opt-in debate we requested in September being scheduled on 19 December, after the three month opt-in deadline for each proposal had expired.[40] The House therefore had no opportunity to influence and inform the Government's opt-in decisions. The Government's cavalier approach to scrutiny of these important proposals is at odds with the undertaking made to Parliament by the previous Coalition Government to "extend scrutiny of opt-in decisions" in order to ensure "full transparency and accountability of opt-in decisions". In his Written**

39 See p.6 of the Commission's explanatory memorandum accompanying the proposed recast Directive.

40 See the letter of 23 November 2016 from the Chair of the European Scrutiny Committee to the Immigration Minister (Mr Robert Goodwill.

Ministerial Statement of 20 January 2011, the then Minister for Europe (Mr David Lidington) envisaged that opt-in debates would not only "reduce the democratic deficit over EU matters" but also "significantly strengthen Parliament's oversight of EU justice and home affairs matters and make the Government more accountable for the decisions it makes in the EU".[41] The Government's own Code of Practice on parliamentary scrutiny of opt-in decisions makes clear that opt-in debates should take place *within* the three month opt-in period to ensure that the Government is accountable to the House *before*, not after, it has reached a decision.[42]

10.7 **As we have made clear in our comments on another proposal forming part of the Commission's asylum reform package, a proposed Regulation establishing an EU framework for resettlement, Parliament's role in scrutinising opt-in decisions is even more important in light of the UK's decision to leave the EU and the uncertain timescale for completing exit negotiations. Opt-in decisions taken during this period are likely to take on an additional significance, signalling areas in which the Government may be expected to seek closer or looser ties with EU partners once the UK leaves the EU. We ask the Minister to explain why he has failed to abide by the letter and the spirit of the undertakings given by the previous Coalition Government in 2011 and in the Government's own Code of Practice on parliamentary scrutiny of opt-in decisions. We seek an unequivocal assurance that he intends to do so in future and a description of the systems he is putting in place to prevent the recurrence of similar lapses.**

10.8 **We remind the Minister that his letter does not address the questions which are outstanding on these proposals from our earlier Reports. We expect him to do so at the earliest opportunity. We would also welcome an update on the progress being made in negotiations. Meanwhile, the proposals remain under scrutiny. We draw this chapter to the attention of the Home Affairs Committee.**

Full details of the documents

(a) Proposal for a Regulation on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents: (37967), 11316/16 + ADD 1, COM (16) 466. (b) Proposal for a Regulation establishing a common procedure for international protection in the European Union and repealing Directive 2013/32/EU: (37968), 11317/16 + ADDs 1–2, COM(16) 467. (c) Proposal for a Directive laying down standards for the reception of applicants for international protection (recast): (37969), 11318/16, COM(16) 465.

Background

10.9 Our earlier Reports listed at the end of this chapter provide a detailed overview of the proposals and the Government's position. We wrote separately to the Minister in November expressing our disappointment at the Government's apparent reluctance to

41 See the Written Ministerial Statement made by the then Minister for Europe (Mr David Lidington) on 20 January 2011.

42 See the Government's Code of Practice on Scrutiny of Opt-In and Schengen Opt-Out Decisions which forms part of the Cabinet Office's Guidance on parliamentary scrutiny of EU documents (Annex S).

engage with the concerns we have raised during our scrutiny of these proposals, as well as those raised by external stakeholders, notably the International Rescue Committee. We noted:

> "The Government persists in reminding us that the UK remains a full member of the European Union until exit negotiations are concluded and that all the rights and obligations of EU membership remain in force. Despite this, the handling of the EU asylum reform package indicates to us that the Government has become complacent in fulfilling its scrutiny obligations, at a time when effective scrutiny and accountability to Parliament on EU matters is more important than ever. The scrutiny function of this Committee remains unaltered until such time as the UK leaves the EU. We expect the Government to ensure that we are able to fulfil our role in a meaningful way through the provision of prompt and accurate information."

10.10 We sought an immediate assurance that the Home Office is "fully committed to fulfilling its scrutiny obligations and is adequately resourced to do so."[43]

The Minister's letter of 16 December 2016

10.11 The Minister's letter (received on 19 December, the date of the opt-in debate on the proposals) notifies us of the Government's decision *not* to opt into the Commission's proposals for a new Qualification Regulation, a new Asylum Procedures Regulation and a recast Reception Conditions Directive. He sets out the broader context for the Government's decision:

> "The new proposals on qualification, asylum procedures and reception conditions reform the package of asylum Directives adopted between 2011 and 2013 as part of the second phase of the CEAS [Common European Asylum System]. The UK chose not to participate in the corresponding second phase instruments as it was considered that they would result in unacceptable interference with the UK's national system, particularly in respect of the scope to restrict access to the labour market and the use of detention within the asylum system. As a result the UK remains bound by the Directives adopted as part of the first phase of the CEAS: the Reception Conditions Directive 2003/9/EC; the Qualification Directive 2004/83/EC; and the Asylum Procedures Directive 2005/85/EC. These Directives established minimum standards and allowed Member States a large degree of flexibility in implementation.
>
> "Taking each proposal in turn, the new Qualification Regulation seeks to ensure a more harmonised approach to the criteria for applicants to qualify for asylum and subsidiary protection and to the rights for persons who benefit from such status. It seeks to address the variations in the duration of residence permits and access to rights and the lack of systematic use of the

43 See the letter of 23 November 2016 from the Chair of the European Scrutiny Committee to the Immigration Minister (Mr Robert Goodwill).

> provisions on cessation of status. Such differences could create an incentive to claim asylum in a Member State where those rights and recognition levels are perceived to be more favourable.
>
> "The new Asylum Procedures Regulation seeks to establish a fully harmonised common EU procedure for seeking international protection (asylum and subsidiary protection). The aim is a faster and more efficient treatment of claims for protection by establishing common rules on the procedure to be followed to register a claim, common deadlines, procedural guarantees and clear obligations for applicants.
>
> "The recast Reception Conditions Directive aims to further harmonise reception conditions in the EU, to reduce incentives for secondary movements and to increase applicants' self-reliance and integration prospects. The Commission believes that the migration crisis has exposed the need to ensure consistency in reception conditions across the EU and for Member States to be better prepared to deal with more migrants."

10.12 The Minister welcomes "some elements of the approach in the proposals", highlighting in particular "the overarching aim of the proposals of discouraging abuse and unwarranted secondary movements". He continues:

> "The migration crisis has highlighted the challenges presented by large scale secondary movements. As noted above the UK did not participate in the Directives of 2011 and 2013 owing to concerns over the limits they would place on our national system. I note that the Qualification and Asylum Procedures proposals reflect a shift by the Commission from setting standards and criteria in a Directive, which permits Member States some flexibility in transposing the provisions into national law, to a Regulation, which limits Member States' ability to set their own national rules in accordance with national interests.
>
> "Whilst the proposals have some merit we have long been of the view that decisions on asylum systems are best taken at national level. The proposals, in particular where replacing the use of a Directive with a Regulation, would further limit the Government's ability to take decisions on the UK asylum system at national level and in the UK national interest.
>
> "I see no reason to change our approach from that taken with regard to the second phase measures. Therefore, the UK will not opt in to the proposals."

Previous Committee Reports

Twelfth Report HC 71-x (2016–17), chapter 1, chapter 2 and chapter 3 (14 September 2016) and Twentieth Report HC 71-xviii (2016–17), chapter 1, chapter 2 and chapter 3 (23 November 2016).

11 Enhancing security in a world of mobility

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee and the Committee on Exiting the European Union
Document details	Commission Communication: *Enhancing security in a world of mobility: improved information exchange in the fight against terrorism and stronger external borders*
Legal base	—
Department	Home Office
Document Number	(38088), 12307/16, COM(16) 602

Summary and Committee's conclusions

11.1 This Communication seeks to identify "key work streams" to implement the policy initiatives set out in the Commission's earlier *European Agenda on Migration* and *European Agenda on Security* published in 2015. The Commission places "strong borders" and "smart intelligence" at the heart of its efforts to maintain security within an open Europe. It calls for rapid progress in establishing the European Border and Coast Guard, the introduction of a new EU Entry/Exit System by 2020, the setting up of a European Travel Information and Authorisation System (ETIAS) to pre-screen visa-free travellers to the Schengen area, stronger measures on document security and an enhanced role for Europol in tackling terrorism.

11.2 The Government's Explanatory Memorandum on the Communication had little to say about the UK's future relationship with EU partners in these two important policy areas—migration and security—following its withdrawal from the EU. We suggested that it was reasonable to expect the Government to put more flesh on the bones as the timetable for commencing exit negotiations with the EU drew nearer.

11.3 The Government has informed us of its intention to opt into the new Europol Regulation before it takes effect next May but has been reluctant to explain how it envisages maintaining cooperation with Europol once the UK has left the EU on the grounds that "it would be wrong to set out unilateral positions on specific areas of cooperation at this time".[44] Given that one of the Government's objectives for the withdrawal negotiations is to "keep our justice and security arrangements at least a strong as they are", we asked which of the existing models of third country cooperation with Europol the Government would prefer—a strategic or an operational agreement—and how the intensity of the UK's relationship with Europol would be affected by the UK's withdrawal from the EU. We also asked the Government to confirm that neither type of agreement would allow direct access

44 See the letter of 2 November 2016 from the Security Minister (Mr Ben Wallace) to the Chair of the European Scrutiny Committee.

to Europol's data files and to explain what assessment it has made of the implications of indirect access for the ability of UK law enforcement authorities to respond quickly to cross-border security threats.

11.4 Turning to another EU Agency, the European Border and Coast Guard Agency, we asked whether the "model status agreement" being developed by the Commission to govern relations with third countries would provide a suitable basis for UK cooperation with the Agency after Brexit.

11.5 The Government has underlined the importance of data-sharing arrangements in responding to "mobile threats". The UK participates in EU data protection rules which provide a general framework for sharing information in the field of criminal law. This framework will no longer apply once the UK leaves the EU, raising questions about the UK's ability to continue to participate in EU data-sharing instruments likely to be of significant interest for law enforcement purposes. We asked how much priority the Government attaches to maintaining the following data-sharing arrangements and how this could be achieved once the UK leaves the EU:

- the so-called "Prüm" measures which provide for the automated exchange of DNA profiles, fingerprints and vehicle registration data;
- the Schengen Information System—SIS II—which expressly provides that law enforcement data processed in SIS II shall not be transferred or made available to third countries;[45] and
- the European Criminal Records Information System—ECRIS—which makes no provision for the sharing of criminal record information with third countries.[46]

11.6 **The Government has provided a disappointing and elliptical response which takes us no further in understanding how the Government intends to secure its objective of "keep[ing] our justice and security arrangements at least as strong as they are" and seeking "as far as possible, to replicate what we already have".[47] Our EU negotiating partners will be well aware of the existing structures for cooperation on security matters. The Government's reluctance to flesh out its objectives in the vital area of justice and home affairs cooperation contrasts with the information provided to Parliament ahead of sensitive negotiations in 2014 on the police and criminal justice measures the UK intended to rejoin, following the Coalition Government's decision to opt out of all such measures adopted before the Lisbon Treaty took effect on 1 December 2009. The then Government published two Command Papers, the first (in July 2013) containing an analysis of the 130-odd measures subject to the UK's block opt-out and a list of 35 measures which the Government considered it would be in the UK's national interest to rejoin, the second (in July 2014) setting out the evidence base for UK participation in an amended list of 35 measures based on comprehensive impact assessments analysing the likely costs and benefits.[48] The publication of these Command Papers did not jeopardise the outcome of negotiations on the 35 measures**

45 See Article 54 of Council Decision 2007/533/JHA.

46 See Framework Decision 2009/315/JHA on the organisation and content of the exchange of information extracted from the criminal record between Member States and Council Decision 2009/316/JHA.

47 See the Statement on Next Steps in Leaving the European Union made by the Secretary of State for Exiting the European Union (Mr David Davis), Hansard, 10 October 2016, col.55 as well as his response to an oral question on preparations for triggering Article 50, Hansard, 1 December 2016, col.1650.

48 See Command Paper 8671 (July 2013) and Command Paper 8897 (July 2014).

which the UK successfully rejoined in December 2014. We ask the Minister to spell out why he considers that it would pre-empt or prejudice the outcome of negotiations to provide a similar level of transparency in:

- **identifying the EU security cooperation and information-sharing instruments which are likely to be a priority for the UK in exit negotiations; and**
- **the Government's assessment of the costs and benefits of securing a similar level of cooperation or participation post-Brexit.**

11.7 **As regards Europol, the Minister helpfully confirms that neither of the two types of agreement Europol has concluded with third (non-EU) countries—strategic or operational agreements—allows for direct access to Europol's extensive information systems. We assume, therefore, that a bespoke agreement would be necessary to enable the UK to replicate, "as far as possible", the UK's existing relationship with Europol. Can the Minister confirm whether this is the case and whether maintaining access to Europol's databases, analytical resources and secure means for exchanging information will be a priority during exit negotiations?**

11.8 **The UK will no longer be bound by general EU data protection rules which govern the sharing of information in the field of criminal law once it leaves the EU, or by more specific data protection rules contained in various EU information-sharing criminal law instruments. What assessment has the Government made of the implications for the UK's ability to continue to share sensitive law enforcement information with EU Member States post-Brexit? Does the Minister accept that the UK's domestic data protection laws will need broadly to replicate EU laws if information-sharing is to continue to the same or similar extent post-Brexit?**

11.9 **Pending further information, the Communication remains under scrutiny. We draw it to the attention of the Home Affairs Committee and the Committee on Exiting the European Union.**

Full details of the documents

Commission Communication: *Enhancing security in a world of mobility: improved information exchange in the fight against terrorism and stronger external borders*: (38088), 12307/16, COM(16) 602.

Background

11.10 The Communication builds on earlier policy frameworks put forward by the Commission in 2015, notably the *European Agenda on Migration* and the *European Agenda on Security*, which are described in detail in the Reports listed at the end of this chapter.

The Minister's letter of 12 December 2016

11.11 The Minister for Policing and the Fire Service (Brandon Lewis) says that there are two types of third country agreements with Europol: strategic agreements, such as those concluded with Turkey and Russia, which are limited to the exchange of strategic and technical data and do not include the exchange of personal data; and operational

agreements, such as those concluded with the US and Norway, which "include the possibility for those countries to request personal data, such as data relating to an identified or identifiable individual". The Minister continues:

> "Neither of these agreements allows for direct access to Europol data systems. However, it is worth noting that each country has a different type of relationship with Europol under the broad category it participates in. For example, the US has an operational arrangement but has more liaison officers than any other third country and works more closely together in specific areas of interest and expertise, such as online child sexual abuse."

11.12 The Minister does not indicate which type of agreement would be a suitable model for the UK once it leaves the EU, noting:

> "We are a valued partner within Europe and have played a leading role in the development of a number of the EU security measures, including Europol. The UK is in a unique starting position and we are exploring options for cooperation arrangements once the UK has left the EU. As part of that work we are looking at the risks and opportunities presented by each."

11.13 He does not say whether the Government has made an assessment of the implications for UK law enforcement authorities of having only indirect access to Europol's data files, but comments:

> "The level of access we have to Europol systems will be agreed as part of our exit negotiations so it is not possible to give an assessment of the likely impact ahead of negotiations."

11.14 Turning to the "model status agreement" being developed by the Commission to govern relations between the new European Border and Coast Guard Agency and third countries, he explains:

> "Under Article 54(5) of the new Regulation, this would be an agreement between the Agency and a third country to which teams are deployed. The teams would be carrying out activities on the territory of that third country. The status agreement will not be used when a third country is simply cooperating with the Agency under Article 54(1). We are currently considering our position in preparation for the UK's withdrawal from the EU and remain committed to ensuring effective cooperation with the new Agency."[49]

11.15 Finally, the Minister provides no indication of the priority which the Government attaches to maintaining UK participation in the Prüm measures, SIS II and ECRIS or the possible mechanisms for doing so, merely observing:

> "The question of how the UK shares information with the EU will of course be a key consideration as part of the process of leaving the EU and establishing a new relationship. But again, it would be wrong to pre-empt the impact on these measures ahead of exit negotiations."

49 See Regulation (EU) 2016/1624 on the European Border and Coast Guard.

Previous Committee Reports

Nineteenth Report HC 71-xvii (2016–17), chapter 9 (23 November 2016) and Thirteenth Report HC 71-xi (2016–17), chapter 9 (12 October 2016). Our Reports on earlier Commission Communications, *The European Agenda on Migration* and *The European Agenda on Security* are also relevant: First Report HC 342-i (2015–16), chapter 6 (21 July 2015), Second Report HC 342-ii (2015–16), chapter 1 (21 July 2015), Seventh Report HC 342-vii (2015–16), chapter 4 (28 October 2015), Twenty-third Report HC 342-xxii (2015–16), chapter 2 (10 February 2016).

12 Establishing a European Travel Information and Authorisation System

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee and the Committee on Exiting the European Union
Document details	Proposal for a Regulation establishing a European Travel Information and Authorisation System (ETIAS)
Legal base	Articles 77(2)(b) and (d), 87(2)(a) and 88(2)(a) TFEU, ordinary legislative procedure, QMV
Department	Home Office
Document Number	(38261), 14082/16 + ADD 1, COM(16) 731

Summary and Committee's conclusions

12.1 A spate of terrorist attacks in Europe and unprecedented pressures at the EU's external borders have heightened concerns about security and cast doubt on the sustainability of open borders and mobility within the Schengen free movement area. The Commission's proposal for an automated European Travel Information and Authorisation System ("ETIAS") is one of a number of policy initiatives foreshadowed in its recent Communication, *Enhancing security in a world of mobility*. Its purpose is to strengthen security, reduce the risk of irregular migration and protect public health by requiring nationals of around 60 countries who do not need a visa to visit the Schengen area to complete an online application form and obtain authorisation before they travel.[50] Launching the proposal, the Commission's First Vice-President (Frans Timmermans) commented:

> "Securing our borders and protecting our citizens is our first priority. ETIAS will close an information gap by cross-checking visa exempt applicants' information against all our other systems."[51]

12.2 The Commission says that the application process will be "simple, cheap and fast", costing €5 (£4.51) for each adult applicant (free for children) and taking no more than 10 minutes to fill in. 95% of applicants can expect to receive their travel authorisation "within minutes".[52] Unlike visa applicants, individuals applying for a travel authorisation would not need to provide fingerprints or other biometric data. Personal information contained in the application would be screened against a set of risk indicators and checked against a variety of migration and law enforcement databases, as well as an ETIAS "watch list" of criminal suspects established by Europol. The travel authorisation would be valid for five years (unless the applicant's passport expires earlier) and for multiple journeys. It would not guarantee entry to the Schengen area—this would remain the responsibility of

50 See the European Commission's factsheet on the ETIAS.
51 See the Commission's press release issued on 16 November 2016.
52 See p.4 of the Commission's explanatory memorandum accompanying the proposed Regulation.

national border control authorities—but possession of a travel authorisation would give travellers "confidence that they would be able to cross the borders smoothly" and reduce the number turned away at the external border.[53] Individuals refused a travel authorisation would not be entitled to enter the Schengen area but would have a right of appeal. The Commission expects the ETIAS to be operational from 2020.[54]

12.3 As the proposed Regulation establishing the ETIAS builds on parts of the Schengen rule book concerning external border controls which do not apply to the UK, the UK is not entitled to participate in it. Nor will UK law enforcement authorities be able to access directly information held in the ETIAS if the system is up and running before the UK leaves the EU.[55] Moreover, the proposed Regulation makes clear that personal data stored centrally in the ETIAS cannot be made available to third (non-EU) countries, limiting the possibility for the UK to obtain access to ETIAS data once it leaves the EU.

12.4 Although the UK will not participate in the proposed Regulation, the Immigration Minister (Mr Robert Goodwill) recognises the importance of increased border security in the wake of recent terrorist attacks and says that further strengthening of the external Schengen border is "of direct benefit to the UK".[56] He notes that while the UK remains a member of the EU, British nationals will *not* be required to obtain an ETIAS travel authorisation before travelling to the Schengen area, but adds:

> "It is too early to say how these proposals would impact on the UK once we have left the EU. This will be considered as part of wider negotiations."[57]

12.5 He makes clear that the Government intends to keep a close eye on negotiations on the proposed Regulation.

12.6 **The proposed European Travel Information and Authorisation System is unlikely to be fully operational before 2020, and so would take effect after the expected date for the UK's withdrawal from the EU. The immigration status of UK nationals wishing to travel to the Schengen area post-Brexit is one of the issues to be resolved during Article 50 negotiations on the terms of the UK's withdrawal. There appear to be three possibilities:**

- **UK nationals would be required to apply for a Schengen visa;**
- **UK nationals would enjoy visa-free access to the Schengen area but would be required to obtain a travel authorisation under the ETIAS scheme; or**
- **UK nationals would be exempt from the requirement to obtain a Schengen visa or an ETIAS travel authorisation.**

12.7 **For the many UK nationals who do business, visit family or go on holiday to countries within the Schengen area, a new requirement to obtain a visa or travel authorisation before they depart is likely to be one of the more immediately-felt consequences of Brexit. We think it is reasonable to expect the Government to indicate**

53 See p.3 of the Commission's explanatory memorandum accompanying the proposed Regulation.
54 See p.22 of the Commission's explanatory memorandum accompanying the proposed Regulation.
55 See p.23 of the Commission's explanatory memorandum accompanying the proposed Regulation.
56 See para 22 of the Minister's Explanatory Memorandum.
57 See para 24 of the Minister's Explanatory Memorandum.

what outcome it is seeking to achieve in Article 50 negotiations, not least because this will inform its approach to the proposed ETIAS Regulation and also help to reduce uncertainty for individuals and carriers. We therefore ask the Minister to explain:

- **the main differences between the ETIAS model proposed by the Commission for visa-free entry to the Schengen area and a full Schengen visa regime;**
- **whether the Government intends to seek visa-free access to the Schengen area for UK nationals post-Brexit;**
- **whether the Government also intends to press for an exemption from the ETIAS travel authorisation for UK nationals post-Brexit, or to seek instead to minimise the cost and complexity of the application process; and**
- **if the Government is unable to secure an exemption, whether it would wish to introduce a reciprocal travel authorisation system for EU nationals travelling to the UK post-Brexit.**

12.8 **The proposed Regulation would prohibit direct third country access to personal data held in the ETIAS Central Unit as well as indirect access through a Member State to personal data obtained from the ETIAS Central Unit for law enforcement purposes. As the UK will be a third country following its withdrawal from the EU, what assessment has the Government made of the impact of these provisions on the UK's ability to access quickly information which may strengthen security within the UK or be of significant benefit for law enforcement purposes post-Brexit? Does he consider that the Commission's goal of achieving maximum interoperability between EU information systems would make it more or less difficult for the UK to negotiate access to one or more EU databases post-Brexit?**

12.9 **Turning to the content of the proposed Regulation, we ask the Minister if he can clarify the Commission's reasons for including "level and field of education" and "current occupation" in the list of personal information to be submitted in the ETIAS application form. How is this information likely to be relevant in establishing the extent of any security, irregular migration or public health risk? We also ask the Minister to elaborate on the concerns he identifies in his Explanatory Memorandum in relation to "hits" against an "alert" contained in the Schengen Information System (SIS II). In particular, does he consider that changes will be needed to the 2007 Council Decision on the establishment, operation and use of the SIS II to ensure that alerts entered in SIS II can be used for the purposes envisaged in the proposed ETIAS Regulation?[58] What are the factors requiring "careful consideration" in determining whether a "hit" against an alert entered in SIS II should be stored centrally in SIS II?**

12.10 **Pending further information, the proposed Regulation remains under scrutiny. Given the possibility that it may apply to UK nationals wishing to travel to the Schengen area following the UK's withdrawal from the EU, we draw it to the attention of the Home Affairs Committee and the Committee on Exiting the European Union.**

58 See Council Decision 2007/533/JHA.

Full details of the documents

Proposal for a Regulation establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 515/2014, (EU) 2016/399, (EU) 2016/794 and (EU) 2016/1624: (38261), 14082/16 + ADD 1, COM(16) 731.

Background

12.11 Some 200 million non-EU citizens cross the external Schengen border each year. Depending where they come from, many will need to obtain a visa before they travel. However an increasing number—the Commission estimates around 1.4 billion individuals from around 60 countries—are entitled to enter the Schengen area without a visa for short stays (not exceeding 90 days in any 180-day period). The Commission anticipates that the number of visa-exempt third country nationals crossing the external Schengen border each year will increase from 30 million in 2014 to 39 million in 2020.[59] Visa-free access makes it easier to do business in the EU, encourages tourism and is an important means of developing cooperation with third countries on return and readmission. As visa-free travel generally operates on a reciprocal basis, it also enables EU citizens to travel abroad more easily. Currently, there are no prior checks on visa-free third country nationals before they arrive at the Schengen external border. The ETIAS is intended to establish a "light touch" means of gathering and processing information and checking for any potential security, immigration or public health risk *before* they travel to the Schengen area. Similar systems operate in Canada, the US and Australia.

12.12 The ETIAS is intended to operate alongside the proposed EU Entry/Exit System (currently under negotiation) which would establish entry and exit records for all third country nationals crossing the external Schengen border. These records would enable national immigration authorities to identify more easily and remove "overstayers"—third country nationals who remain within the Schengen area beyond the period authorised for their stay—and contribute to wider law enforcement efforts to detect and combat the misuse of travel documents, identify fraud, and other forms of cross-border criminality. The Commission's goal is for the EU Entry/Exit System and ETIAS to be fully operational by the beginning of 2020.[60]

The proposed ETIAS Regulation

12.13 The ETIAS would consist of a Central Unit established within the European Border and Coast Guard Agency (formerly Frontex) and National Units located in each participating Member State. Once ETIAS is fully operational (unlikely to be before 2020), visa-free third country nationals planning to travel to the Schengen area would be required to apply for a travel authorisation by completing an online application form accessible through a public website or mobile app. The Commission expects the information generated to be of particular value in relation to individuals seeking to cross the external Schengen border over land (on foot, by car, bus, truck or train) as these forms of transport do not depend on the provision of advanced passenger information or passenger name records.[61]

59 See p.2 of the Commission's explanatory memorandum accompanying the proposed Regulation.

60 See our Third Report HC 71-ii (2016–17), chapter 14 (25 May 2016).

61 See p.4 of the Commission's explanatory memorandum accompanying the proposed Regulation.

Applying for a travel authorisation

12.14 The ETIAS would apply (with some limited exceptions) to all third country nationals who do not require a visa to enter the Schengen area, including third country national family members of EU citizens who do not have a residence card. Each applicant would be required to provide information confirming their identity, age, gender, nationality, details of their passport or other travel document, home address and contact details, level of education, current occupation and the first Member State through which they intend to enter the Schengen area. They would also have to answer a set of background questions which are intended to elicit information disclosing potential security risks (for example, time spent in conflict zones or a record of offending), risks to public health (contagious or infectious parasitic diseases) or a risk of irregular migration (such as a previous order to leave the territory of a Member State).[62] The Commission estimates that it should take no more than 10 minutes to complete the application form. All applicants aged 18 and over would have to pay a €5 (£4.51) fee.

The processing of ETIAS applications

12.15 All applications would be processed automatically by the ETIAS Central Unit which would cross-check the information contained in each application form against:

- data held in various EU information systems—the Schengen Information System (SIS II), the EU Entry/Exit System (once operational), the Visa Information System, Eurodac, and the European Criminal Records Information System;
- data held by Europol;
- data recorded in Interpol databases relating to travel documents;
- the ETIAS "watchlist" of known or suspected criminals; and
- a set of specific risk indicators (screening rules) designed to highlight any risk of irregular migration, threat to public health or security.

12.16 The ETIAS watchlist would be established by Europol, drawing on information on terrorism and other serious crime provided by Member States or obtained through international cooperation. An advisory ETIAS Screening Board consisting of representatives from each ETIAS National Unit and Europol would be consulted on the specific risk indicators and on the implementation of the watchlist.

12.17 The Commission anticipates that "the vast majority of applications"—at least 95%—would result in the automatic issuing of a travel authorisation "within minutes" of completing the application.[63] Some would require further verification by the ETIAS Central Unit to eliminate any "false hits". A small proportion (the Commission estimates 1–2% of ETIAS applications) may require additional manual analysis by an ETIAS National Unit where, for example, checks against EU, Europol or Interpol databases, the ETIAS watchlist or screening rules have produced a "hit".[64] The ETIAS National Unit may request additional information or documentation and, "in exceptional circumstances",

62 See Article 15 of the proposed Regulation.

63 See p.10 of the Commission's explanatory memorandum accompanying the proposed Regulation.

64 Manual processing of the ETIAS application would be carried out by the National Unit of the Member State through which the applicant first intended to enter the Schengen area.

arrange an interview with the applicant. Depending on the type of hit, the ETIAS National Unit may have to consult other Member States and/or Europol before deciding whether or not to issue a travel authorisation. The entire process should be completed within 72 hours of an applicant submitting their ETIAS application (or, where additional information has been requested, within 72 hours of providing it).

Issuing or refusing a travel authorisation

12.18 A travel authorisation would be valid for five years (unless the applicant's travel document expires earlier) and would cover the entire Schengen area but would not guarantee entry at the external border. Rather, it would provide "a reliable early indication of admissibility into the Schengen area" but the final decision on admission would continue to rest with national border control authorities applying the rules set out in the Schengen Border Code.[65] Exceptionally, an ETIAS National Unit may issue a travel authorisation on humanitarian grounds which would only be valid for its territory for up to a maximum of 15 days. A travel authorisation would have to be annulled or revoked if evidence emerged that the applicant did not meet, or no longer fulfilled, the conditions for issuing it.

12.19 A decision to refuse, annul or revoke a travel authorisation would be subject to appeal and must state the grounds on which the decision is based.

Obligations on carriers

12.20 All carriers by land, air and sea would be required to verify (via a secure carrier gateway) that visa-free third country nationals have a valid travel authorisation prior to boarding. Carriers would continue to bear the cost of returning third country nationals who are refused entry to their initial point of embarkation, but would not incur a fine for those who were in possession of a valid travel authorisation when they boarded.[66]

Law enforcement access to ETIAS data

12.21 The ETIAS is intended not only to help Member States identify individuals who present a security risk before they arrive at the Schengen external border, but also to provide an additional data source for national law enforcement authorities and Europol to enhance their ability to tackle terrorism and other serious crime. Designated national law enforcement authorities and Europol would be entitled to request access to specific data held in the ETIAS Central System provided they are able to demonstrate reasonable grounds for considering that the data would contribute substantially to the prevention, detection or investigation of terrorist or other serious criminal offences and could not be obtained from other information sources (for example, national law enforcement databases). Except in urgent cases, requests would be subject to prior independent verification to ensure that the conditions for access have been met.

65 See pp.5–6 of the Commission's explanatory memorandum and Article 61(e) of the proposed Regulation.

66 See p.13 of the Commission's explanatory memorandum accompanying the proposed Regulation.

Third (non-EU) country access to ETIAS data

12.22 Under the rules proposed by the Commission, personal data stored in the ETIAS Central System may not be transferred or otherwise made available to third countries, international organisations or private parties (with a limited exception for Interpol). A similar prohibition would apply to third country/party access to personal data obtained from the ETIAS Central System by individual Member States for law enforcement purposes.

Cost of establishing the ETIAS

12.23 The Commission expects the ETIAS to be "financially self-sustaining" as the annual costs of operating the system—estimated at around €85 million (£77 million)—would be covered by fee revenue. It says that the ETIAS and the EU's proposed Entry/Exit System should be developed together to ensure maximum interoperability and reduce costs. The Commission anticipates that the development costs of the ETIAS will be around €212.1 million (£191 million).

Legal base, subsidiarity and fundamental rights

12.24 The proposed Regulation establishing the ETIAS is based on two sets of Treaty provisions, the first dealing with external border management and border checks, the second with police cooperation.[67] The Commission considers that there is a clear justification for EU action as there is currently no provision for "automated, coordinated and homogenous prior screening of visa-exempt third country nationals" when they cross the external Schengen border. The absence of prior screening gives rise to "a clear cross-border problem as visa exempt third country nationals can freely choose the first point of entry in the Schengen area in order to avoid certain controls at certain border points".[68]

12.25 The Commission argues that any interference with fundamental rights is justified in terms of the "legitimate public interest in ensuring a high level of security". It says that the ETIAS will enhance Member States' ability to detect trafficking in human beings and cross-border criminality. It highlights a number of data protection safeguards, including strict conditions on law enforcement access to ETIAS data, as well as provisions ensuring that decisions on the issuing and refusal of a travel authorisation are taken on a non-discriminatory basis and are subject to appeal.

The Minister's Explanatory Memorandum of 30 November 2016

12.26 The Minister prefaces his comments on the proposed Regulation with the Government's standard line on its post-referendum approach to EU legislative proposals:

> "On 23 June, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all

67 Article 77(2)(b) and (d) TFEU authorise the EU to adopt measures on an integrated external border management system and on checks at the external border; Articles 87(2)(a) and 88(2)(a) authorise the collection, storage, processing, analysis and exchange of information for law enforcement purposes.

68 See p.18 of the Commission's explanatory memorandum accompanying the proposed Regulation.

> the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation."[69]

12.27 He recognises the importance of increased border security in the wake of recent terrorist attacks and says that the Commission proposal is "in line with developments in international border security", citing similar travel authorisation schemes already in place in Canada and the United States of America. He considers the proposed Regulation to be a proportionate response to the "continuing pressures at the external border of the EU" and says he will "follow the development of this proposal closely".[70] As the UK will not be participating, he expects the impact on UK law to be "minimal".[71]

12.28 The Minister notes that the scheme proposed by the Commission is intended to have "as minimal an impact on travellers as possible" and says that he will urge the Commission to "retain such a low impact approach" as negotiations progress.[72] He highlights the obligations on carriers to verify that all passengers who require it have a valid ETIAS travel authorisation before boarding and adds:

> "We believe that it is vital that the Commission works closely with carriers across all transport modes to ensure that their responsibilities are clear, and that the mechanism by which they are expected to check for a valid ETIAS travel authority is workable in the context of carriers' wider business processes."[73]

12.29 The Minister welcomes the emphasis placed on the interoperability of the ETIAS with other EU information systems and databases and the Commission's intention to use "as much hardware and software" from existing systems to increase efficiency and reduce costs. He agrees that a hit against Interpol's Stolen and Lost Travel Document database and against "refusal of entry" alerts in the Schengen Information System (SIS II) should be grounds for refusing an ETIAS travel authorisation. He also agrees that checks should be made against SIS II alerts relating to documents reported as lost, stolen or invalidated, but cautions:

> "We will need to seek more information about whether the Commission believes that refusing an ETIAS following a SIS II hit (whether for a lost, stolen or cancelled travel document or because the person is subject to a European Arrest Warrant or other extradition request) is compatible with the purpose limitation rules in the SIS II Council Decision."[74]

12.30 He adds:

> "We believe that all hits on SIS II alerts that take place as a result of checks made against an ETIAS applicant should be communicated to the Member State that issued the alert in question. We believe that any move to store these hits centrally on SIS II should be subject to careful consideration."[75]

69 See para 23 of the Minister's Explanatory Memorandum.
70 See para 22 of the Minister's Explanatory Memorandum.
71 See para 19(iv) of the Minister's Explanatory Memorandum.
72 See para 25 of the Minister's Explanatory Memorandum.
73 See para 26 of the Minister's Explanatory Memorandum.
74 See para 29 of the Minister's Explanatory Memorandum.
75 See para 30 of the Minister's Explanatory Memorandum.

12.31 The Minister notes that the ETIAS and other related "smart borders" proposals will be funded from the EU budget. As the UK will not participate in the ETIAS, he expects the UK to "receive a refund on any contributions relating to this proposal, in line with its financing share of the EU budget."[76] The Government does not intend to produce an impact assessment on the proposed Regulation.

Previous Committee Reports

None on this document, but our earlier Reports on the Commission Communication, *Enhancing security in a world of mobility: improved information exchange in the fight against terrorism and stronger border controls* are relevant: Nineteenth Report HC 71-xvii (2016–17), chapter 9 (23 November 2016) and Thirteenth Report HC 71-xi (2016–17), chapter 9 (12 October 2016).

76 See para 34 of the Minister's Explanatory Memorandum.

13 EU-US data transfer for law enforcement purposes under the Umbrella Agreement

Committee's assessment	Legally and politically important
Committee's decision	Cleared from scrutiny; further information requested
Document details	Proposed Council Decision on the conclusion, on behalf of the EU, of an Agreement between the US and EU on the protection of personal information relating to the prevention, investigation, detection and prosecution of criminal offences (the Umbrella Agreement)
Legal base	Articles 16 and 218(6)(a) TFEU; EP consent; QMV
Department	Culture, Media and Sport
Document Number	(37726), 8914/16 + ADD 1, COM (16) 237

Summary and Committee's conclusions

13.1 This Council Decision authorises the EU to conclude the Umbrella Agreement concerning transfers of EU citizens' data to the US for law enforcement purposes (the Conclusion Decision). Earlier in the year there was a scrutiny override on the related signature Decision, now cleared from scrutiny. The Minister of State for Digital and Culture (Matt Hancock) belatedly submitted a Written Ministerial Statement on 16 November on that override.

13.2 On 16 November we also granted a scrutiny waiver for the expected vote in Council on this document, the conclusion Decision. The waiver was conditional on the Minister providing clarification about the exclusive external competence that the EU is exercising in the Agreement (see paragraphs 13.9 and 13.10 of this chapter). This was to be preferably before any Council vote but certainly before 1 December.

13.3 Unconnected with the waiver, we also asked other questions about the relevance of the Investigatory Powers Bill and how data sharing with the EU for law enforcement purposes would continue post-Brexit.

13.4 The Minister wrote on 25 November to respond to those questions, but when we considered his response at our meeting of 7 December, we did not think that his answer on exercise of EU competence in the Agreement satisfied the conditions of the waiver (see paragraphs 13.12 and 13.13 of this chapter).

13.5 We have since learnt independently that the EP gave its consent to the proposed Council Decision on 1 December and the Council voted to adopt it on 2 December. The Minister now confirms that the UK Government voted in support of that proposal and accepts that a scrutiny override has occurred. This he considers was due to the timing of the Joint EU-US Ministerial Conference of 6 December and the need for the proposal to be adopted by then.

13.6 **Although we now clear this document from scrutiny, we ask the Minister to:**

a) **update us on any legal challenge to either of the two recently adopted EU documents relating to the transfer of EU citizens' data to the US: Privacy Shield[77] and the Umbrella Agreement (the subject of the current document). We are aware that a challenge to Privacy Shield has already been launched by "La Quadrature du Net and others".[78]**

b) **send us a copy of the Written Ministerial Statement to the House explaining the scrutiny override on this document when it is submitted.**

13.7 **In respect of (b) above, we ask the Minister to note that our view is that the override occurred less because of the timing of the Joint EU-US Ministerial Conference and more because his initial explanation on competences was unclear. However, as he has apologised for the lack of clarity, we do not labour that point.**

Full details of the documents

Proposed Council Decision on the conclusion, on behalf of the EU, of an Agreement between the US and EU on the protection of personal information relating to the prevention, investigation, detection and prosecution of criminal offences (the Umbrella Agreement): (37726), 8491/16 + ADD 1, COM (16) 237.

Minister's letter of 25 November 2016

13.8 The Minister responds promptly to our last Report of 16 November. Taking first his responses to questions unrelated to competence and therefore to the conditions of the waiver, he says:

- The question of what data-sharing arrangements the UK will have with EU after Brexit will be a key consideration for both withdrawal and future relationship negotiations but it is premature to speculate about them now.
- The importance of law enforcement agencies working together, across borders, to share information in order to protect the public has not changed. Effective data-sharing with international partners remains a global priority for the UK.
- The Investigatory Powers Bill sets out conditions for relevant material being disclosed to other countries. The Secretary of State must be satisfied that satisfactory and equivalent handling arrangements are in place before sharing data with an overseas authority. The existence of the Umbrella Agreement will be relevant to authorities when considering this question.

77 Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield (notified under document C (2016) 4176). See our Reports on this document: (37695), —, + ADDs 1–7; Eighth Report HC 71-vi (2016–17), chapter 7 (13 July 2016); Third Report HC 71-ii (2016–17), chapter 3 (25 May 2016).

78 T-738/16: La Quadrature du Net and Others v Commission

13.9 He then responds to our questions about inconsistent statements the Government has made about the EU's exclusive competence to sign and conclude the agreement. These were as follows:

- In its Explanatory Memorandum, the Government said in respect of the signature agreement, "we have been successful in securing the deletion of recital 5, which means that there is nothing in the measure indicating that the EU has exclusive external competence in this area"; and
- In the Minister's letter of the 1 November, he said: "As this is an EU-only agreement, this means that the Council has authorised the EU to exercise shared competence in relation to this agreement."

13.10 We therefore asked the Minister, as part of the conditions of the scrutiny waiver, to reconcile these statements and to take into account in his response:

- whether recital (5) "The EU has exclusive competence to the extent that the Agreement may affect common Union rules or alter their scope" had also been deleted from this Conclusion Decision;
- if so, what this deletion had achieved in the context of an "EU-only agreement"; and
- how the proposed Decisions reflect the Government's stated policy that where competence is shared between the EU and Member States it should normally be exercised by Member States.

13.11 The Minister now states, referring to those two statements:

> "The first statement sets out that the Commission was asserting external exclusive competence and both statements are consistent in setting out the UK Government view that this is not the case".

Our letter of 7 December 2016

13.12 In this letter, we thanked the Minister for his letter of 25 November and the Written Ministerial Statement. We asked for a more detailed answer to competence questions which we raised in our last Report. We commented:

> "Not only have you omitted to address the specific questions raised in paragraph 4.7 of the relevant chapter of the Report,[79] but the Committee has been left none the wiser as to why the Government wishes to support the proposal when it is opposed to the EU exercising exclusive competence in the EU-only agreement and when Government policy is that Member States should be exercising shared competence. When you write, we would be grateful if you could also update us formally on developments since the date of your last letter."

79 Eighteenth Report, HC-71xvi (2016–17), chapter 4 (16 November 2016)

13.13 We added:

> "As your response stands, the Committee considers that in terms of its substance it does not fulfil the conditions of the scrutiny waiver granted on 16 November. This means that if the Government has supported a Council vote on the document in the interim, it will have overridden scrutiny."

Minister's letter of 14 December 2016

13.14 The Minister thanks us for our letter of 7 December and apologises that his response to our specific questions set out in our Report of 16 November was not clearer in his letter of 25 November. He explains on the question of the exercise of EU competence in the Agreement that:

> "The Council Decision no longer makes reference to exclusive competence. While the proposed Council Decision (8491/16) dated 29 April included Recital 5, which outlined the EU's claim to exclusive competence, this recital did not appear in the final Council Decision (2016/920) dated 20 May. Therefore there is no implication in the text that the EU is exercising exclusive competence.
>
> "You also ask about the Government's decision to support the Umbrella Agreement. The UK is content for the EU to exercise shared competence in relation to the EU-US Umbrella Agreement. It sets in place a framework of data protection standards to underpin data transfers between the EU and US, in the area to which the agreement relates. The UK is supportive of a regime facilitating greater transfers."

13.15 He next informs us that the Council's Decision on Conclusion of the EU-US Umbrella Agreement has now been adopted. He adds:

> "The UK voted in favour of the Conclusion on the Umbrella Agreement.[80] Regrettably this triggered an override, which was induced by the deadline being brought forward to ensure the Conclusion was concluded in time for the EU-US Justice and Home Affairs ministerial meeting in Washington D.C. on December 6th. The EU has finalised its procedures, however we are waiting for final confirmation from the US authorities, who have assured us that these procedures will be completed before the new US Administration takes office on January 20th. We will update you when we have heard from them."

13.16 The Minister hopes that he has now answered any outstanding questions that we might have on the Agreement.

Previous Committee Reports

Eighteenth Report HC 71-xvi (2016–17), chapter 4 (16 November 2016); Fourth Report HC 71-iii (2016–17), chapter 2 (8 June 2016).

80 It is our understanding that this vote took place in Council on 2 December. The EP gave its consent on 1 December: see Commission Press Release of 2 December.

14 Political Dialogue and Cooperation Agreement with Cuba

Committee's assessment	Legally and politically important
Committee's decision	Cleared from scrutiny (decision reported on 07/12/2016)
Document details	(a) Joint Proposal for a Council Decision on the signing, on behalf of the European Union, and provisional application of the Political Dialogue and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Cuba, of the other part; (b) Joint Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Political Dialogue and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Cuba, of the other part
Legal base	(a) Article 37 TEU; Articles 207, 209, 218(5) and 218(8), TFEU; Unanimity (b) Article 37 TEU; Articles 207, 209, 218(6)(a) and 218(8) TFEU; EP Consent; Unanimity
Department	Foreign and Commonwealth Office
Document Numbers	(a) (38103), 12495/16 + ADD 1, JOIN(16) 42; (b) (38104), 12497/16 + ADD 1, JOIN(16) 43

Summary and Committee's conclusions

14.1 The Political Dialogue and Cooperation Agreement with Cuba (PDCA) is the first bilateral agreement between the EU and Cuba. It is intended to replace a Council Common Position of December 1996.

14.2 The objective of the Agreement is to create a stable framework for EU-Cuba relations instead of ad hoc dialogue and piecemeal cooperation that has characterised the relationship between the EU and Cuba to this point. The PDCA will serve as a platform for increased cooperation and dialogue on a very broad range of policy areas, across three main pillars: political, cooperation and trade.

14.3 Our scrutiny of the agreement has largely focused on the lack of clarity as to the extent to which the EU and the Member States are exercising competence. This issue has become important as the Commission is, generally, actively seeking to limit Member States' involvement in international agreements. Indeed in his latest letter the Minister (Sir Alan Duncan) indicates that the UK and other Member States had to push for this Agreement to be mixed.[81]

14.4 The Minister indicates that he agreed to adoption of both Decisions on 6 December before the Committee had cleared them from scrutiny on 7 December. Explaining why he considered it necessary to override scrutiny, he says that the UK would probably have

81 A mixed agreement is one entered into by the EU and the Member States separately in their own right.

been the only Member State to block agreement, which would have delayed adoption and signature on 12 December, and drew attention to the fact the Committee was not able to meet the week before.

14.5 **We asked the Minister to tell us what steps he had taken to clarify the extent to which UK was exercising competence in signing the PDCA. There has been no answer to this question in either this or the previous correspondence. It is possible that the Minister considers the language in the Decision[82] which makes it clear that provisional application does not prejudge the allocation of competences makes such steps unnecessary; if so, he could simply have said as much.[83]**

14.6 **We acknowledge that we were not able to consider the Minister's letter until after the Council had met, but note the scrutiny override was primarily caused by a combination of a failure to identify the need to ask for a waiver, acknowledged administrative oversight and an unsatisfactory response to our questions.**

14.7 **We note the Minister's assurance that the action by the EU in triggering provisional application of part of the PDCA does not cede any competence that it has not already exercised although we remain concerned that what he describes as "legal safeguarding language" is in fact the language of fudge.[84] We therefore re-iterate our earlier conclusion that this is another instance of the Government undermining, through lack of transparency, its own policy that the EU should only exercise its exclusive competence in respect of international agreements.**

14.8 **These documents have already been cleared from scrutiny. We require no further information.**

Full details of the documents

(a) Joint Proposal for a Council Decision on the signing, on behalf of the European Union, and provisional application of the Political Dialogue and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Cuba, of the other part: (38103), 12495/16 + ADD 1, JOIN(16) 42; (b) Joint Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Political Dialogue and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Cuba, of the other part. : (38104), 12497/16 + ADD 1, JOIN(16) 43.

Background

14.9 Details on the objectives and content of the Agreement were set out in our Report of 26 October.[85]

82 Decision 2016/2232.

83 However,signing is a distinct exercise of competence from triggering provisional application.

84 This language is "The provision application of parts of the Agreement does not prejudge the allocation of competences between the Union and its Member States in accordance with the Treaties."

85 Fifteenth Report HC 71–xiii (2016–17), chapter 3 (26 October 2016).

14.10 When we first considered the proposals, we noted that the Agreement was a mixed agreement[86] but that there was a familiar lack of clarity as to the extent to which the EU and the Member States were exercising competence. We granted a waiver from scrutiny for document (a) on the signing and provisional application of the document on condition that:

- the Minister indicated before signifying the agreement what steps he had taken or intended to take (by way of seeking amendment to the text or by laying a minute statement) to clarify that the UK was exercising competence to sign the Agreement in respect of all matters within its own competence or within shared competence; and[87]
- provisional application was limited to matters of exclusive EU competence.[88]

14.11 We also noted that the PDCA with Cuba raised questions about post-Brexit relations between the UK and Cuba.

14.12 In response, the Minister for Europe and the Americas, (Sir Alan Duncan), explained that the elements of the PDCA to be provisionally applied by the EU would be explicitly set out. The UK considered that the list did not cede any competence to the EU. New language had also been incorporated making it clear that provisional application did not "prejudge the allocation of competences between the Union and its Member States in accordance with the Treaties." On post-Brexit arrangements, the Minister assured the Committee that the UK "will work with both the EU and WTO to minimise disruption to our trading partners and secure positive outcomes for British businesses".

14.13 We concluded at our meeting of 7 December that the conditions for granting the scrutiny waiver had not been met. We drew the attention of the House to these documents as another instance of the Government glossing over the issue of the extent to which the EU is exercising competence and therefore undermining its own policy that the EU should normally only exercise its exclusive competence in respect of international agreements.

Minister's letter of 14 December 2016

14.14 The Minister begins by apologising for the administrative oversight which meant his letter of 8 November was not received until 28 November.

14.15 He explains the scrutiny override in the following terms:

> "The European External Action Service had given Member States a very ambitious deadline to work towards. They wanted the Agreement to be signed on 12 December at the Foreign Affairs Council, and had put adoption and approval of the Council Decisions on the agenda of the Economic and Financial Affairs Council on 6 December. The Committee clerks advised it was likely your Committee would not meet again until 7 December, at which point they would discuss my response. I therefore had to make the

86 A mixed agreement is entered into jointly by the EU and its Member States in their own right; the Member States exercise competence over matters for which only they have competence and, possibly, matters which are shared competence for which either the EU or the Member States can exercise competence

87 Shared competence can be exercised by either the EU or the Member States.

88 Exclusive EU competence must be exercised by the EU.

> difficult decision on whether to override scrutiny. If I had not, there was a very real possibility that the UK would be the only Member State not to have lifted their scrutiny reserve, which would have delayed adoption and signature. I therefore agreed to the adoption of these Council Decisions before your Committee had given final clearance."

14.16 On the Committee's request for clarification that the UK is exercising competence to sign the Agreement in respect of all matters within its own competence or within shared competence, the Minister says:

> "From the negotiating mandate stage of the Agreement to the signature, provisional application, and conclusion stages, we and other Member States pushed for the Agreement to be mixed, which we successfully achieved. Both Council Decisions underline the fact that the Member States are parties to the Agreement. As such, the UK is party to the Agreement and can exercise Member State competence as well as shared competence."

14.17 Whilst this approach confirms that the Agreement covers matters of shared competence some of which, at least, is being exercised by the Member States, it gives no indication what that shared competence is and whether, or the extent to which, the EU is exercising any shared competence.

14.18 As regards the question whether provisional application only applies to matters of exclusive EU competence, the Minister comments:

> "I am content that the Agreement does not cede any competence to the EU that it has not already exercised. This is in line with Government policy. The Council Decision on signature and provisional application restricts the EU to act in areas for which it has previously exercised the competence conferred on it by the Treaties, specified in the list of articles to be provisionally applied, and then only within the limits of that competence, as per the legal safeguarding language. The EU is not being given power to act in any areas in which it had not acted before, nor is it exercising previously unexercised shared competence."

14.19 As indicated above the Decision does not apply so as to restrict the EU to act, in relation to signature of the Agreement, in areas for which it has previously exercised the competence conferred on it by the Treaties. The technique of listing matters to be provisionally applied, as here, can have that effect, but only in respect of provisional application, which is an exercise of competence which is distinct from signature.

14.20 The Minister then refers to the Committee clearing an EU-Cuba Strategic Partnership Agreement (which we infer to be a reference to the EU-Canada Strategic Partnership Agreement), when it had expressed similar concerns around competence creep and provisional application. We look at that Agreement in chapter 4 of this Report. For present purposes we note that a comparison of recital (5) of Decision 2016/2232 relating to the Cuba PDCA with a similar recital (5) to Decision 2016/2118 illustrates the distinction between signature and provisional application mentioned in the previous paragraph.

14.21 The Minister concludes:

> "I am acutely aware of the importance your Committee places on Third Country Agreements and matters of competence, and as far as possible, I want to ensure your Committee has sufficient time to scrutinise the documents. However, I hope you and your Committee understand my reasons for taking this approach on this occasion."

Previous Committee Reports

Twenty-second Report HC 71-xx (2016–17), chapter 15 (7 December 2016), Fifteenth Report HC 71-xiii (2016–17), chapter 3 (26 October 2016).

15 Investments for jobs and growth

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny, further information requested
Document details	Proposed Regulation concerning the European Fund for Strategic Investments
Legal base	Articles 172, 173, third paragraph of 175 and 182(1) TFEU; ordinary legislative procedure; QMV
Department	HM Treasury
Document Number	(38074), 12201/16 + ADDs 1–3, COM(16) 597

Summary and Committee's conclusions

15.1 In September 2016 the Commission presented a proposed Regulation to extend the European Fund for Strategic Investments to 2020 and to increase the investment target to €500 billion (£424 billion).

15.2 In November 2016 we granted the Government a waiver of the scrutiny reserve resolution for use at the ECOFIN Council on 6 December 2016, on condition that a text proposed for agreement be informed by evaluations stipulated in the present governing Regulation. We asked for a report about exercise of the waiver by December 9 2016, before the matter was discussed at the European Council of 15 December 2016.

15.3 In a letter of 14 December 2016 the Government tells us that a General Approach was agreed at the ECOFIN Council, that the Government was satisfied that the text agreed was sufficiently informed by the evaluations and that it was to be discussed at the European Council before being negotiated with the European Parliament.

15.4 **We note the satisfactory outcome of Council consideration of this proposed Regulation and clear the document from scrutiny.**

15.5 **However, we wish to hear from the Chief Secretary to the Treasury (Mr David Gauke), the Minister concerned, why the Government failed to meet our requirement as to reporting promptly the use of the scrutiny waiver we had granted.**

Full details of the document

Proposed Regulation amending Regulations (EU) No. 1316/2013 and (EU) 2015/1017 as regards the extension of the duration of the European Fund for Strategic Investments as well as the introduction of technical enhancements for that Fund and the European Investment Advisory Hub: (38074), 12201/16 + ADDs 1–3, COM(16) 597.

Background

15.6 In response to a European Council request, in September 2016 the Commission presented a proposed Regulation to extend the European Fund for Strategic Investments (EFSI) to 2020 and to increase the investment target to €500 billion (£424 billion). When

we considered this proposal, in October 2016, the Government said that in principle it supported an extension of the EFSI, which should, however, be informed by evaluations stipulated in the present governing Regulation. We retained the proposed Regulation under scrutiny pending information from the Government about Council consideration of it and, in the context of Brexit, about the possible financial consequences for the UK.

15.7 In November 2016 we heard from the Government its view that there are no adverse implications before Brexit for the UK of financing the proposal through contributions to the EU Budget and for EFSI backed financing of UK projects. Its confidence is based on a statement of 29 June 2016 by the Heads of State and Government of the other 27 Member States that the UK will continue to have all the rights, obligations and benefits that membership brings, up until the point it leaves the EU. But the Government added that the post-Brexit position is a matter for the Article 50 TEU negotiations.

15.8 The Government also told us that the most recent compromise text of the proposed Regulation was generally in line with UK objectives and that it expected a COREPER agreed General Approach to be presented for consideration at the 6 December 2016 ECOFIN Council and for discussion at the European Council on 15 December 2016. It asked us to clear the document from scrutiny in advance of the ECOFIN Council meeting.

15.9 We noted what the Government said about this proposed Regulation in relation to Brexit. As for its request that we clear the document from scrutiny, the Government, while telling us that "the most recent compromise text…is generally in line with UK objectives", did not address the question as to whether the proposal met the Government's condition that it be informed by the evaluations stipulated in the present governing Regulation. So we did not feel able at that stage to clear the document from scrutiny. However, if that requirement was met we granted the Government a conditional waiver, on the exercise of which we would want a report by 9 December 2016, before the then forthcoming European Council.

The Minister's letter of 14 December 2016

15.10 The Chief Secretary to the Treasury (Mr David Gauke) tells us that:

- the present governing Regulation required three evaluations to be carried out—a Commission evaluation, a European Investment Board (EIB) evaluation and an independent external evaluation;
- all three of these evaluations had been completed and were published in time to inform the legislative process;
- during negotiations the Presidency took steps to ensure that the recommendations of the evaluations, in particular the independent evaluation, were reflected in the final compromise text that went to COREPER; and
- the independent evaluation findings can be grouped into four key areas—geographical coverage, additionality of EFSI investments, cooperation with National Promotional Banks (NPBs)/other sources of EU funding and the functioning of the EU guarantee.

15.11 The Minister then elaborates on the findings, saying first, on geographical coverage, that:

- the evaluation found that there has been significant geographical imbalances in the receipt of EFSI funds;
- it noted that around 90% has gone to the EU 15 and 60% alone to Italy, Spain and the UK;
- to address this the proposed Regulation now includes specific references to ensuring a wider geographical coverage of EFSI and motorways in cohesion countries have been made eligible for EFSI support;
- the proposals to enhance the European Investment Advisory Hub (EIAH) commit to using it as a tool to improve geographic diversification of EFSI; and
- to better develop project pipelines in cohesion states, a commitment to establish a local EIAH presence in countries that have difficulty in developing projects was included in the proposals.

15.12 Next, on the additionality of EFSI investments, the Minister says that:

- the evaluation found that stakeholders identified the need for the EIB to undertake higher risk operations and that decisions made by the EFSI Investment Committee should be made public; and
- to address this the proposed Regulation will ensure all Investment Committee decisions are published and that the EIB will undertake higher risk operations including subordinated debt and higher risk counterparts.

15.13 Turning to cooperation with NPBs and other sources of EU funding, the Minister says that:

- the evaluation found that the EIB may have often been competing with NPBs and that EFSI may have been in competition with other sources of EU funding; and
- to address this the proposed Regulation includes amendments to ensure that EFSI better complements other EU funding instruments and a proposal to commit the EIAH to making at least one cooperation agreement with an NPB for each Member State.

15.14 Finally, on the functioning of the EU guarantee, the Minister says that:

- the evaluation found that the present requirement for the guarantee fund to be provisioned up to 50% of the total guarantee was estimated to be higher than the required amount needed to cover the risk;
- the provisioning rate estimated to be necessary was 33.4%; and
- as a result the proposed Regulation requires the guarantee fund to be provisioned at a rate of 35%.

15.15 The Minister comments that, overall, the Government was satisfied that the proposal was sufficiently informed by the evaluation and is generally in line with UK objectives.

15.16 The Minister then reports that:

- the Presidency sought agreement on a General Approach on this proposed Regulation at the 6 December 2016 ECOFIN Council;
- the Presidency made it clear that financing of the package was conditional on wider agreement of the Mid-term Review of the Multiannual Financial Framework;
- the agreed General Approach was to be discussed at the 15 December 2016 European Council; and
- the proposal would then go forward to be negotiated with the European Parliament.

Previous Committee Reports

Nineteenth Report, HC 71-xvii (2016–17), chapter 8 (23 November 2016) and Fifteenth Report, HC 71-xiii (2016–17), chapter 5 (26 October 2016).

16 Documents not raising questions of sufficient legal or political importance to warrant a substantive report to the House

Department for Business, Energy and Industrial Strategy

(38319)
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Court of Auditors Special Report 31/2016 Spending at least one euro in every five from the EU budget on climate action: ambitious work underway, but at serious risk of falling short.

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Department for Environment, Food and Rural Affairs

(38333)
—
Communication from the Commission to the Council on reaching an agreement conferring special status on the European Union within the International Organisation of Vine and Wine (OIV).

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(38335)
15121/16
+ ADD 1
COM(16) 750
Proposal for a Regulation of the European Parliament and of the Council on the definition, presentation and labelling of spirit drinks, the use of the names of spirit drinks in the presentation and labelling of other foodstuffs and the protection of geographical indications for spirit drinks.

(38336)
15142/16
COM(16) 748
Report from the Commission on availability of training for service personnel regarding the safe handling of climate-friendly technologies replacing or reducing the use of fluorinated greenhouse gases.

(38359)
15292/16
COM(16) 771
Proposal for a Council Decision on the conclusion of the Agreement between the European Union and the Republic of Chile on trade in organic products

(38369)
15359/16
COM(16) 701
Report from the Commission to the European Parliament and the Council on statistics compiled pursuant to Regulation (EC) No. 2150/2002 on waste statistics and their quality.

(38372)
15372/16
COM(16) 776
Report from the Commission to the European Parliament and the Council on the implementation of the measures concerning the apiculture sector of Regulation (EU) No. 1308/2013 of the European Parliament and of the Council establishing a common organisation of the markets in agricultural products.

Department for International Trade

(38285)
14687/16
COM(16) 718

Report from the Commission to the European Parliament and the Council Annual Report on negotiations undertaken by the Commission in the field of export credits, in the sense of Regulation (EU) No 1233/2011.

(38028)
11772/16
COM(16) 521

Report from the Commission to the European Parliament and the Council on the implementation of Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.

Department for Transport

(38296)
14644/16
SWD(16) 255

Commission Staff Working Document on the evaluation of cross- border exchange of information on road traffic offences.

(38297)
15047/16
+ ADD 1
SWD(16) 256

Commission Staff Working Document on the evaluation of cross- border exchange of information on road traffic offences Executive summary.

(38353)
15203/16
COM(16) 766

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European strategy on Cooperative Intelligent Transport Systems, a milestone towards cooperative, connected and automated mobility.

(38354)
15197/16
COM(16) 745

Proposal for a Regulation of the European Parliament and of the Council Repealing Council Regulation (EEC) No. 1101/89, Regulations (EC) No. 2888/2000 and (EC) No. 685/2001.

HM Treasury

(38086)
12302/16
COM (16) 601

Communication from the Commission to the Parliament, the Council, the European Central Bank, the European and Social Committee and the Committee of the Regions Capital Markets Union - Accelerating Reform.

(38113)
12773/16
COM(16) 626

Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assignedor subrogated claim over the right of another person.

(38314) 14828/16 COM(16) 857	Report from the Commission to the European Parliament and the Council under Article 85(1) of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.
(38329) 15073/16 COM(16) 764	Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions Investment Plan for Europe: evaluations give evidence to support its reinforcement.

Home Office

(38265) 14617/16 COM(16)732	Communication from the Commission to the European Parliament, the European Council and the Council, Second Progress report towards an effective and genuine Security Union.

Formal Minutes

Wednesday 11 January 2017

Members present:

Sir William Cash, in the Chair

Alan Brown	Michael Tomlinson
Richard Drax	Mr Andrew Turner
Kate Green	Mike Wood

Draft Report, proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 16 read and agreed to.

Resolved, That the Report be the Twenty-fifth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

[Adjourned till Wednesday 18 January at 1.45pm.

Standing Order and membership

The European Scrutiny Committee is appointed under Standing Order No. 143 to examine European Union documents and—

a) to report its opinion on the legal and political importance of each such document and, where it considers appropriate, to report also on the reasons for its opinion and on any matters of principle, policy or law which may be affected;

b) to make recommendations for the further consideration of any such document pursuant to Standing Order No. 119 (European Committees); and

c) to consider any issue arising upon any such document or group of documents, or related matters.

The expression "European Union document" covers—

i) any proposal under the Community Treaties for legislation by the Council or the Council acting jointly with the European Parliament;

ii) any document which is published for submission to the European Council, the Council or the European Central Bank;

iii) any proposal for a common strategy, a joint action or a common position under Title V of the Treaty on European Union which is prepared for submission to the Council or to the European Council;

iv) any proposal for a common position, framework decision, decision or a convention under Title VI of the Treaty on European Union which is prepared for submission to the Council;

v) any document (not falling within (ii), (iii) or (iv) above) which is published by one Union institution for or with a view to submission to another Union institution and which does not relate exclusively to consideration of any proposal for legislation;

vi) any other document relating to European Union matters deposited in the House by a Minister of the Crown.

The Committee's powers are set out in Standing Order No. 143.

The scrutiny reserve resolution, passed by the House, provides that Ministers should not give agreement to EU proposals which have not been cleared by the European Scrutiny Committee, or on which, when they have been recommended by the Committee for debate, the House has not yet agreed a resolution. The scrutiny reserve resolution is printed with the House's Standing Orders, which are available at www.parliament.uk.

Current membership

Sir William Cash MP (*Conservative, Stone*) (Chair)

Alan Brown MP (*Scottish National Party, Kilmarnock and Loudoun*)

Geraint Davies MP (*Labour (Co-op), Swansea West*)

Steve Double MP (*Conservative, St Austell and Newquay*)

Richard Drax MP (*Conservative, South Dorset*)

Kate Green MP (*Labour, Stretford and Urmston*)

Kate Hoey MP (*Labour, Vauxhall*)

Stephen Kinnock MP (*Labour, Aberavon*)

Craig Mackinlay MP (*Conservative, South Thanet*)

Mr Jacob Rees-Mogg MP (*Conservative, North East Somerset*)

Dr Paul Monaghan MP (*Scottish National Party, Caithness, Sutherland and Easter Ross*)

Graham Stringer MP (*Labour, Blackley and Broughton*)

Michael Tomlinson MP (*Conservative, Mid Dorset and North Poole*)

Mr Andrew Turner MP (*Conservative, Isle of Wight*)

David Warburton MP (*Conservative, Somerton and Frome*)

Mike Wood MP (*Conservative, Dudley South*)

The following members were also members of the Committee during the parliament:

Peter Grant MP (*Scottish National Party, Glenrothes*), Nia Griffith MP (*Labour, Llanelli*), Rt Hon Damian Green MP (*Conservative, Ashford*), Kelvin Hopkins MP (*Labour, Luton North*), Calum Kerr MP (*Scottish National Party, Berwickshire, Roxburgh and Selkirk*), Alec Shelbrooke MP (*Conservative, Elmet and Rothwell*), Kelly Tolhurst MP (*Conservative, Rochester and Strood*), Heather Wheeler MP (*Conservative, South Derbyshire*)