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European Scrutiny Committee

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Documents considered by the Committee on 6 February 2019

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 looks at the significance of EU proposals and decides whether to clear the document from scrutiny or withhold clearance and ask questions of the Government. The Committee also has the power to recommend documents for debate.

Brexit-related issues

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

- The Northern Ireland Backstop is relevant to future UK climate policy as the Backstop will only be superseded by a future relationship guaranteeing a level playing field in environmental policy

Summary

Establishing a European Travel Information and Authorisation System

The European Commission has put forward proposals to establish a European Travel Information and Authorisation System (ETIAS) for the nationals of around 60 countries who do not need a visa to visit the Schengen area. They would be required to complete an online application form and obtain authorisation before they travel. ETIAS is not expected to be operational before 2021. The UK is not entitled to participate in ETIAS as it builds on parts of the Schengen rule book which do not apply to the UK. Our scrutiny of the proposals has focused on the implications for UK nationals travelling to an EU or Schengen country once the UK has left the EU and any post-exit transition period has ended and the possibility for UK law enforcement to access information held in the ETIAS Central System and the related Europol watchlist of criminal suspects. In her latest update, the Immigration Minister (Rt Hon Caroline Nokes MP) confirms that the ETIAS proposals have been adopted, that UK nationals will need to apply for a travel authorisation (at a cost of €7 per applicant) post-exit/transition, and that there are "appropriate safeguards" for individuals whose personal data are held in the ETIAS Central System. The European Scrutiny Committee asks the Minister to address a number of outstanding issues raised in earlier Reports, in particular the conditions for third country access to ETIAS data and the prospects for securing better access under a post-exit EU/UK internal security agreement.

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

Visa exemption for UK nationals travelling to the EU after Brexit

The European Commission has put forward a series of proposals to prepare for the UK's withdrawal from the EU. They include a proposed Regulation which would amend the EU Visa Regulation to include the UK in the list of third countries whose nationals do not require an entry visa for short stays within the Schengen area once the UK has left the

EU and any post-exit transition/implementation period has ended. In her latest update, the Immigration Minister (Rt Hon Caroline Nokes MP) reiterates the Government's intention to maintain reciprocal arrangements to enable citizens to travel freely between the EU and the UK, without a visa, for tourism and temporary business activity. The European Scrutiny Committee seeks an assurance that Parliament will be informed of, and consulted on, any proposal to change the visa status of EU citizens in the future, given the important implications this would have for the visa status of UK nationals travelling to the Schengen area under the EU's reciprocity rules. They also ask the Minister for her view on changes recently proposed by the European Parliament, as well as on reports that Spain has secured a new footnote reference to Gibraltar as "a colony of the British Crown" and that this is likely to be replicated in other Brexit-related EU legislation.

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

Climate change strategy

When the Committee first considered the Commission's new climate change strategy, it was most concerned to clarify the extent to which future EU climate policy would directly influence UK policy. The Minister accepts that there will need to be close cooperation and engagement between the UK and the EU, but she resists the idea that the inclusion of an environmental level playing field in the Northern Ireland Backstop effectively requires the future relationship to include such an objective. The Committee reminds the Minister that the future relationship will only supersede the Backstop if it achieves the same objectives. The Committee also urges the Government not to restrict future dialogue with the EU to formal engagement through international fora.

Cleared; drawn to the attention of the Business, Energy and Industrial Strategy Committee

Digital Single Market: Consumer Rights for online and offline sale of goods

The proposed Digital Content Directive (DCD) and the Sale of Goods Directives (SGD) are mainly aimed at breaking down barriers to cross-border online trade due to differing Member States' contract law on matters such as quality of goods, remedies for defective goods and guarantees. The proposal being considered, the SGD, now covers both online and offline sales of goods whereas a previous 2015 initiative was limited to online or distance sales. The UK will not have to implement these proposals before EU exit on 29 March; there is a chance the UK may have to implement them in a "deal" situation and an extended transition/implementation period. We cleared the proposed DCD in our Report of 28 November 2018 as negotiations on that proposal were more advanced. We granted a scrutiny waiver for a General Approach on the proposed SGD at the same time. The Government's main concern has been that the SGD is a "maximum harmonisation" proposal where more stringent national requirements cannot be maintained. This has meant the potential loss of some existing consumer rights available in UK law under the Consumer Rights Act 2015, particularly the short-term right to reject faulty goods.

The Government now updates the Committee on the General Approach text agreed in December. Improvements in the text were secured by the UK on short term right to reject and liability periods but some concerns remain. Mindful of the basis on which the

Committee granted the scrutiny waiver, the Government still chose to abstain. Following trilogues we understand that agreement will be sought at the Committee of Permanent Representatives (COREPER) level on 6 February to a final text which would then need to be adopted in Council later. The Government requests a scrutiny waiver. As there are some concerns outstanding we do not clear this proposal. Instead, to give the Government some leeway to influence a more favourable outcome, we grant a scrutiny waiver in respect of the adoption of the text in Council. But only on the understanding that we would not expect the UK to support a proposal which materially undermines key UK consumer protections. The conclusions to the chapter also ask some questions about "no deal".

Not cleared from scrutiny; scrutiny waiver granted; further information requested; drawn to the attention of the Business, Energy and Industrial Strategy Committee.

Trade deals and data flow between the EU and third countries

Today we considered two documents relating to data exchange with the EU after Brexit. First, a Commission Communication which is highly relevant to EU-UK data sharing at either exit/end of transition. It is widely anticipated by commentators that future personal data-sharing arrangements will be by way of a data adequacy decision rather than an international data-sharing agreement (or Treaty) which initial Government position papers implied.

One of the issues discussed in the Communication is whether data flows could be addressed in EU-third country free trade agreements. Connected with this, the second document comprises cross-border data flow provisions drafted by the Commission for inclusion in EU-third country trade agreements. However, these appear to address potential data-related non-tariff barriers to trade, such as protectionist data localisation legislation or rules. They were tabled in the EU-Indonesia FTA negotiations but were deposited from scrutiny by the Government at the Committee's request.

As these two documents raised Brexit issues relevant to both "deal" and "no-deal" scenarios and the Science and Technology Committee had also expressed interest in a debate, the Committee recommended a debate on the floor of the House in its Report of 12 September. This was held in European Committee B on 23 October and the documents were cleared from scrutiny. As the debate was of an exceptionally short duration, the Committee wrote to the two DIT and DCMS Ministers concerned on 14 November to ask them to provide fuller answers to outstanding questions. They do now in a long annex to a letter of 24 January.

The conclusions simply draw the annex to the attention of the House and marshal some of the key responses into "deal" and "no deal" categories. Much of the information is already available from other public documents.

Cleared from scrutiny; drawn to the attention of the Digital, Culture, Media and Sport Committee, the International Trade Committee, the Science and Technology Committee, the Business, Energy and Industrial Strategy Committee and the Exiting the EU Committee

Commission Brexit preparedness: Biocidal products

The Commission's proposal would amend Regulation (EU) No 1062/2004 (the Biocidal Products Review Regulation) in light of the UK's withdrawal from the EU. In terms of its content, the Commission's proposal is not controversial and relates solely to the Union's internal preparations for the UK's withdrawal from the EU. The Commission is proposing to transfer each active substance/product-type for which the HSE is currently the evaluating authority to competent authorities in EU Member States and EEA/EFTA members. Additional changes are also suggested to set new deadlines by which evaluations must be completed. Provision would also be made to allow competent authorities to charge fees for these evaluations. As set out in the Annex II to the Review Regulation, the HSE is currently responsible for the evaluation of 57 substances/product types (this equates to roughly 1/8th of the EU total).

The Union's internal preparations provide an opportunity to assess the Commission's and the Government's plans for how the authorisation and approval of biocidal active substances and products would function in the event of a no-deal Brexit (where the draft Withdrawal Agreement is not ratified by either the UK or the EU).

Not cleared from scrutiny; 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: EU climate change strategy [Commission Communication (C)]; Digital Single Market: Consumer contract rights for the sale of goods [Proposed Directive (NC; scrutiny waiver granted)]; Trade deals and data flows between the EU and third countries [(a) Communication; (b) EU proposed provisions on cross-border data flows and protection of personal data and privacy (C)]; Commission Brexit preparedness: Biocidal products [Delegated Regulation (NC)]

Digital, Culture, Media and Sport Committee: Trade deals and data flows between the EU and third countries [(a) Communication; (b) EU proposed provisions on cross-border data flows and protection of personal data and privacy (C)]

Environment, Food and Rural Affairs Committee: European Maritime and Fisheries Fund [Proposed Regulation (C)]

Exiting the EU Committee: Establishing a European Travel Information and Authorisation System [Proposed Regulations (NC)]; Visa exemption for UK nationals travelling to the EU after Brexit [Proposed Regulation (NC)]; Trade deals and data flows between the EU and third countries [(a) Communication; (b) EU proposed provisions on cross-border data flows and protection of personal data and privacy (C)]

Foreign Affairs Committee: Visa exemption for UK nationals travelling to the EU after Brexit [Proposed Regulation (NC)]

Home Affairs Committee: Establishing a European Travel Information and Authorisation System [Proposed Regulations (NC)]; Visa exemption for UK nationals travelling to the EU after Brexit [Proposed Regulation (NC)]; Third country participation in the EU's asylum database: Eurodac [Proposed Decisions (NC)]

International Trade Committee: Trade deals and data flows between the EU and third countries [(a) Communication; (b) EU proposed provisions on cross-border data flows and protection of personal data and privacy (C)]

Justice Committee: Visa exemption for UK nationals travelling to the EU after Brexit [Proposed Regulation (NC)]

Science and Technology Committee: Trade deals and data flows between the EU and third countries [(a) Communication; (b) EU proposed provisions on cross-border data flows and protection of personal data and privacy (C)]

1 Digital Single Market: Consumer contract rights for the sale of goods

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; scrutiny waiver granted; further information requested; drawn to the attention of the Business, Energy and Industrial Strategy Committee
Document details	Amended proposal for a Directive on certain aspects concerning contracts for the sale of goods amending Regulation (EC) 2006/2004 and Directive 2009/22/EC and repealing Directive 1999/44/EC
Legal base	Article 114 TFEU; ordinary legislative procedure; QMV
Department	Business, Energy and Industrial Strategy
Document Number	(39194), 13927/17 + ADD 1, COM (17) 637

Summary and Committee's conclusions

1.1 In December 2015 the Commission published two proposals aimed at boosting the EU digital economy by reducing contract-law related barriers to trade and making it easier for consumers to shop online across the single market. It envisaged a uniform set of rules on business-to-consumer contracts across the EU, which would support the EU's Digital Market Strategy.

1.2 The two proposed Directives addressed aspects of:

- contracts for the supply of digital content (the Digital Content proposal),[1] for example downloading a film from an online platform like Netflix (document (a)); and
- contracts for the sale of goods online or by other distance selling[2] (the Tangible Goods proposal)[3] for example the sale of a coffee machine from Amazon or clothes from the mail order catalogue or over the phone.

1.3 We have completed our scrutiny of the Digital Content proposal and cleared it from scrutiny in our Report of 28 November.

1.4 A new Sale of Goods proposal was published on 31 October 2017 to replace the Tangible Goods proposal. As a result, negotiations on this proposal lagged behind those on the Digital Content proposal.

1 2015/287, COM (2015) 634: Proposal for a Directive of the Council and the European Parliament on certain aspects concerning the supply of Digital Content.

2 Distance selling is where the two contracting parties are not in the same place at the same time (i.e. sales that are not face-to-face).

3 2015/0288, COM (2015) 635: Proposal for a Directive of the Council and the European Parliament on certain aspects concerning contracts for the online and other distance sales of goods.

1.5 The Sale of Goods proposal extends to offline sales of goods as well as the online and distances sales covered by the Tangible Goods proposal. The new proposal reflected the concerns of the UK and other Member States about the possibility of different contractual rules for online and offline sales. The Government has told us that the extension in scope is significant, covering over 90% more sales transactions across the EU than the Tangible Goods proposal. It would capture many businesses who do not sell online or at a distance and who may not enjoy single market benefits.

1.6 The Government has also highlighted points of divergence between the "maximum harmonisation" proposal (where more or less stringent national requirements cannot be maintained) and current UK law, mainly the Consumer Rights Act 2015. The potential loss of the UK consumer's short term right to reject and the possible need to introduce liability periods[4] are key concerns of the Government. A detailed account of the proposal and the Government's view are provided in our previous Reports listed at the end of this Report chapter.

1.7 In our last Report of 28 November, we granted a scrutiny waiver to allow the Government the freedom to negotiate a General Approach text in keeping with the UK's negotiating objectives. This was on the basis that we were reassured by the Governments' commitment to marshalling support amongst Member States for:

- a minimum harmonisation approach to the proposed Directive which would preserve established UK consumer protections, principally the short term right to reject faulty goods; and
- clarification that the very specific legal concept of a liability period does not have to be introduced in national law.

1.8 We also asked that the Government report fully on the outcome of the meeting, supplying us with a copy of the agreed text. We expected to be told of any significant changes to the texts affecting when the proposals might have to be implemented and which could particularly affect future EU-UK cooperation on consumer protection.

1.9 The Minister for Small Business, Consumers and Corporate Responsibility (Kelly Tolhurst MP) in her letter of 17 January writes now with an account, enclosing a copy of the General Approach text which was agreed on 7 December. She confirms that although there were improvements in the text meaning that the UK can maintain for the most part the short-term right to reject goods and not have to introduce liability periods,[5] the UK was unable to support it since there were several areas which undermine the current levels of consumer protection in the UK. As this is an important proposal in terms of existing UK legal protections, we set out a summary of the Minister's account of those improvements and shortcomings in more detail in paragraphs 0.17–0.26 below.

1.10 In terms of the next steps in the legislative process the Minister says that:

- The overall position of the EP suggests that it is unlikely the text will move significantly further towards the UK position because it favours a maximum harmonisation approach.

4 A liability period is a time limit for a defect to arise for the consumer to be entitled to a remedy, as opposed to limitation periods (which exist in UK law) providing a time limit for pursuing legal action.

5 A liability period is a time limit for a defect to arise for the consumer to be entitled to a remedy, as opposed to limitation periods (which exist in UK law) providing a time limit for pursuing legal action.

- If the final text continues to fail to meet UK objectives of maintaining existing UK standards of consumer protection in all affected areas, the Government will again not vote in favour of it.
- However, should the text develop in favour of the UK's negotiating objectives, maintaining existing UK standards of consumer protection in all affected areas, the UK might consider voting in favour.

1.11 Bearing that in mind, she requests that we waive the proposal from scrutiny ahead of final adoption due to take place in early February at the Committee of Permanent Representatives (COREPER). Our staff now understand from the Minister's officials that the agreed text of the proposal following trilogues is to be put to COREPER for agreement on 6 February. Formal adoption by the Council will follow in due course.

Our conclusions

1.12 **We thank the Minister for her letter which also enclosed a limité copy of General Approach text. We welcome her robust approach to defending key UK consumer protections and for not supporting a General Approach text which did not fully do so. We are glad that improvements were achieved which for the most part preserve the UK short-term right to reject goods and the freedom not to introduce liability periods. However, we note from the Minister's letter that concerns remain about other aspects of the proposal affecting existing UK consumer law (as outlined in paragraphs 0.21 and 0.23 of this Report chapter).**

1.13 **We understand that the next expected step in the EU legislative process for this proposal is agreement at the level of EU ambassadors in COREPER on Wednesday 6 February prior to final adoption in the Council of Ministers. Technically agreement in COREPER is not subject to our Scrutiny Reserve. But we are grateful to the Government for giving us advance notice of that agreement as often the substantive agreement takes place in COREPER with the Council simply rubberstamping that decision later.**

1.14 **We are prepared to grant a scrutiny waiver for that final adoption in the Council. This is to give the Government some negotiating flexibility to attempt to resolve those outstanding areas of concern and garner support from other Member States. But should the final text to be adopted fail to resolve those concerns with the result that key UK consumer protections have been materially undermined, then we would expect the Government to vote against the proposal in any case. We see that the Minister has already committed to this approach in her letter (as outlined in paragraph 0.10 above).**

1.15 **Since our last Report on both this proposal and the proposed Digital Content Directive, attention has become more focussed on the prospect of a "no deal" exit. We are aware that the Government published its "no deal"** guidance **"Consumer rights if there's no Brexit Deal" on 12 October. We are also aware that the Government has laid EU exit Statutory Instruments relating to consumer protection, in particular the** Consumer Protection (Amendment etc) (EU Exit) Regulations 2018 **and the** Consumer Protection (Enforcement) (Amendment etc) (EU Exit) Regulations 2018**. We do not comment further here, other than to ask the Minister whether the UK consumer is**

likely to be assisted in a "no deal" situation by the increased harmonisation of the remaining 27 Member States consumer protection laws envisaged by this proposal. We remind the Minister of what her own "no deal" guidance says:

> **As the UK will no longer be a Member State, there may be an impact on the extent to which UK consumers are protected when buying goods and services in the remaining Member States. The laws of those states are similar but may differ in some areas to UK law both as respective laws evolve over time as well as due to differing levels of harmonisation between Member States in some areas.**

To mitigate the potential confusion for the UK consumer of those differences (and vice versa for EU citizens whom the Government would no doubt wish to continue to buy goods from businesses based in the UK):

- **would the UK Government in a "no deal" situation consider aligning "retained EU law" and other domestic law in the field of consumer protection with both this proposed Directive (once adopted) and the Digital Content Directive. By this we mean alignment to the extent that it would not undermine key UK consumer protections; and**
- **could alignment be an interim measure until it becomes clear what the detailed future EU-UK relationship on consumer laws might be?**

1.16 **Until the Minister has informed us of the outcome of Coreper and Council meetings and responded to our other questions, we feel unable to clear this document from scrutiny. In the meantime, we draw this document and chapter to the attention of the Business, Energy and Industrial Strategy Committee.**

Full details of the document

Amended proposal for a Directive on certain aspects concerning contracts for the sale of goods amending Regulation (EC) 2006/2004 and Directive 2009/22/EC and repealing Directive 1999/44/EC: (39194), 13927/17+ ADD 1, COM (17) 637.

More detailed account from the Government of improvements and shortcomings in the General Approach text

1.17 In addition to providing an account of the progress of the text (see paragraphs 1.9–1.11), in her letter the Minister explains the improvements in the text which favour the UK's negotiating position. She also addresses the timetable for the next steps in the legislative process.

Short-term right to reject goods

1.18 The Minister explains the UK presented a drafting proposal that set the regime for consumer remedies at minimum harmonisation. This would have:

- allowed Member States to retain or adopt more stringent provisions on consumer remedies than those in the proposed Directive; and

- avoided the UK having to abolish consumers' short-term right to reject faulty goods.

1.19 However, instead the Presidency added a specific provision that would allow Member States to maintain or adopt this short-term right. This was a major success for the UK with the only restriction on the current right being that UK consumers could not pause the 30-day "right to reject" period if they wanted to try a repair instead.

Time limits for a remedy

1.20 The Minister then outlines the other key improvement which allows Member States to maintain only a limitation period (time limit for pursuing legal action) without having to introduce a liability period (time limit for a defect to arise for the consumer to be entitled to a remedy). This is important as UK consumer legislation does not provide for liability periods.

1.21 However, there are still outstanding concerns in relation to the application of the time limit provisions to goods with digital elements ("smart goods"). She gives the example of the current drafting in the text on trader liability. This indicates that for contracts requiring a continuous supply of digital content or digital services for goods over time, any limitation period shall not be shorter than the length of the continuous supply period under the contract. She then explains why this is problematic:

- The UK's current limitation periods (five years in Scotland and six years in England and Wales) would be too short where digital content or services are being continuously supplied for longer than these periods.

- It could lead to inconsistent outcomes, where liability can be limited to two years in some circumstances but be almost indefinite where digital content is supplied continuously.

1.22 She adds that the Government is working closely with like-minded Member States and MEPs to clarify the position and to agree drafting that would allow Member States to maintain their existing limitation periods, if they have them.

Areas where improvements are still necessary

1.23 The Minister identifies the following areas where, without adequate changes to the text the UK's current level of consumer protection would be weakened. Specifically, the text:

- fails to impose a limit of one attempt by traders to repair or replace goods before consumers can seek a refund or price reduction, which is the case in UK law—instead it requires that, if a first attempt at a repair or replacement fails, it should be objectively ascertained what is a reasonable step to take given the full circumstances of the case, such as the value of the goods and the nature of the defect;[6]

6 The Minister comments further that while this approach allows the system to respond flexibly to the sheer complexity and diversity of the goods market, it is unclear how "the next step" could be objectively ascertained without the involvement of a court or dispute resolution body.

- also prohibits consumers from seeking a refund if a defect is "minor", whereas in UK law there is no such restriction; and
- is unclear as the extent to which the UK could retain non-statutory (i.e. common law and equitable) remedies, which, although not consumer-specific, are a source of UK consumer protections and remedies in addition to the statutory regime.

1.24 The Minister says that it is disappointing that the UK has not been successful in securing these concessions by way of a minimum harmonisation clause for consumer remedies. She says that the UK is working with other Member States and MEPs to try to achieve this in trilogues.

Treatment of goods with embedded digital elements (smart goods)

1.25 The Minister reminds us that in June 2018 the Justice Council agreed that goods with digital elements should be within the scope of the Sales of Goods Directive rather than the Digital Content Directive. The UK supported this as it would give consumers greatest clarity.

1.26 Working groups have continued to work on how to ensure that embedded digital content within smart goods is updated sufficiently to preserve the conformity of the overall good with the contract. The result has been to specify that a software update is listed as a requirement for conformity alongside more traditional requirements such as being fit for purpose. EU retailers are concerned about the practicality of this requirement, such as how they would maintain relationships with consumers to provide an update. Government officials have been working with EU partners during trilogues on this to achieve both a clear and practicable solution.

Timetable for implementing the text

1.27 The Minister confirms that a two-year deadline still applies to implementation, although this may be extended by six months to allow greater time for adaptation. This deadline is likely to fall after the end of any implementation period following the UK's withdrawal (based on an end date of 31 December 2020).

Previous Committee Reports

Forty-sixth Report HC 301–xlv (2017–19), chapter 1 (28 November 2018); Fifth Report HC 301–v (2017–19), chapter 1 (13 December 2017); Second Report HC 301–ii (2017–19), chapter 3 (22 November 2017); Eighteenth Report HC 71–xvi (2016–17), chapter 3 (16 November 2016); Sixth Report HC 71–iv (2016–17), chapter 3 (15 June 2016); Twenty-third Report HC 342–xxii (2015–16), chapter 5 (10 February 2016).

2 Online platforms

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; scrutiny waiver granted; further information requested
Document details	Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services
Legal base	Article 114; Ordinary Legislative Procedure; QMV
Department	Business, Energy and Industrial Strategy
Document Number	(39665), 8413/18 + ADDs 1–3, COM(18) 238 final

Summary and Committee's conclusions

2.1 The Parliamentary Under-Secretary of State at the Department for Business, Energy and Industrial Strategy (Lord Henley) wrote to the Committee on 4 February 2018 to inform it that the Romanian Presidency of the Council has designated the Commission's proposal for a Platform-to-Business Regulation file as a priority and is seeking to bring it to completion quickly.[7] Although trilogues are ongoing and there remain substantial differences between the Parliament and Council texts, meaning that the shape of the final text remains to be determined on a number of points, the Regulation is provisionally scheduled for adoption at the Competitiveness Council on 18 February, following a final trilogue on 12 February.

2.2 The main features of the proposal, which seeks to promote fairness and transparency for business users of online intermediation services by establishing a range of regulatory requirements applicable to multi-sided e-commerce marketplaces, app stores, social media, and search engines, are set out in the Committee's first report on the subject,[8] which it considered at its meeting on 18 July 2018.

2.3 The Committee considered the Government's Explanatory Memorandum[9] to be exceptionally brief and non-committal, with the Minister (Lord Henley) merely observing that the Government was committed to maintaining "the right environment to ensure both platforms and the businesses that use them can thrive", without specifying whether the proposal represented the right environment or not. The Committee accepted the rationale for targeting these categories of intermediary on the basis of the features of the markets they operated in, which are characterised by strong network effects, which can lead to high levels of market concentration and successful platforms becoming almost unavoidable trading partners for businesses seeking to reach consumers. A key consequence of these

7 Letter from the Minister to the Chair of the European Scrutiny Committee of 4 February 2018 (incorrectly dated 31 January). The letter will be made available in due course on the following web-page of the Department for Exiting the European Union's European Memoranda portal: https://goo.gl/XXN2vp.

8 Thirty-sixth Report HC 301–xxxv (2017—2019), chapter 2 (18 July 2018).

9 Explanatory memorandum submitted by the Department for Business, Energy and Industrial Strategy (5 June 2018).

market dynamics is that platforms can possess very high levels of bargaining power in negotiations with the smaller businesses that depend on them to reach the market, which can lead to the imposition of unfair terms and conditions on dependent businesses.

2.4 The Committee considered that the level of intervention proposed was, for the most part, light-touch, with the focus being on improving transparency in these markets, but also recognised the need identified by the Government to balance the need to promote innovation with the need to ensure fairness to reliant businesses.

2.5 In its second report on 14 November 2018,[10] the Committee granted the Government a waiver to support the text at the Competitiveness Council on 29/30 November 2018. The Minister informed the Committee that the compromise text was balanced and that it included a number of minor changes: terms and conditions that did not comply with the transparency requirements set out in the Regulation would be rendered "non-binding" rather than "null and void"; explanations of suspension or termination would be communicated to the business users via a "durable medium"; and search engines would not have to disclose the reasons for the relative importance of ranking criteria.

2.6 In the Minister's most recent letter, approved and sent to the Committee on 4 February 2019 (despite being dated 31 January),[11] the Minister indicates that two trilogues have taken place, with a third scheduled for 12 February. However, the Minister states that progress has been limited and that there continue to be a number of disagreements between the positions of the Council and the European Parliament. The Minister judges that the European Parliament's text goes significantly beyond the UK Government's intention of creating a proportionate Regulation, on three points:

- expansion of the scope of the Regulation to include operating systems;
- introduction of a notice period for platforms to suspend business users; and
- tighter rules on differentiated treatment for search engines as well as a ban on differentiated treatment for online platforms that compete with their business users.

2.7 On the proposed expansion of the scope of the Regulation to include operating systems, the Minister states that, although the Government recognises the intention behind the text to future-proof the regulation by expanding the scope in this way, it is "particularly concerned regarding the unintended consequences this may have and the unnecessary burdens this may place on businesses". The Minister states that there is currently insufficient evidence to warrant the inclusion of operating systems or the introduction of a non-circumvention clause. He also states that operating systems fulfil "primarily a technical function" and therefore expanding the scope of the Regulation "might have unintended consequences such as compromising device security and exposing systems to fraud or manipulation".

2.8 On the subject of suspension and termination, the Minister states that the Government supports some of the Parliament's suggested text, including allowing platforms to waive any notice period when there is a legal obligation on the platform to protect customers. He states that the Government does not, however, support the inclusion of a 15-day

10 Forty-fourth Report HC 301–xliii (2017—2019), chapter 1 (14 November 2018).
11 See footnote 1.

notice period before the suspension of platform services to a business, as this would take away a platform's ability to protect itself, other businesses and its customers through the immediate suspension of its services to a business which is breaching its terms and conditions. The Minister concludes on this point that the Council text has established the right balance by allowing for immediate suspension (with appropriate notification), while introducing a 30-day notice period before the business relationship can be finally terminated.

2.9 The Minister states that differentiated treatment is one of the Government's biggest concerns. He states that the Government's position is that "platforms must be transparent about any differentiated treatment they offer between their own business activities and those of their business customers", and that the proposed text "significantly widens the scope of this to cover search engines as well as platforms". He also states that the Government has concerns about the European Parliament's proposal to prevent platforms from discriminating against goods or services listed on the platform by other businesses versus themselves, on the basis that this would "endanger existing and legitimate business models of many online platforms and severely limit the innovation capacity of the platform economy". The Minister states that the Government's position remains that "instead of banning this differentiated treatment, the Regulation should require platforms to be transparent about it."

2.10 While noting its concerns about these aspects of the European Parliament's text, the Minister states that the Government recognises the importance of this Regulation and wants to support a proportionate and balanced approach. He states that, to do so (and for the Government to be willing to vote in favour of the Regulation), he considers it essential that the final text:

- avoids a further widening of the scope of the Regulation, specifically with regard to a suggested inclusion of operating systems;
- enables platforms to protect themselves, other businesses and customers by suspending business users immediately;
- avoids the introduction of a ban on differentiated treatment.

2.11 Given that the final trilogue will take place on 12 February 2019, with the proposal being adopted on 18 February, it was clearly not feasible for the Minister to write to the Committee following the final trilogue in sufficient time for the Committee to consider the Minister's letter and grant clearance/a waiver, in advance of the adoption of the Regulation in Council. In order to avoid an override of the scrutiny reserve, the Minister therefore requests that the Committee either clear the document from scrutiny or grant the Government a scrutiny waiver so that it can participate at Council, on the basis of the information provided.

2.12 **We have taken note of the Minister's update in advance of the forthcoming Competitiveness Council on 18 February 2019 at which it is anticipated that the final text of the proposed Regulation will be adopted. Given that there remain considerable differences between the European Parliament and Council texts, and that it is unclear how they will be resolved, we are not yet willing to clear the proposal from scrutiny.**

2.13 **We have taken note of the Government's red lines, which will determine whether it can support the final text or not: the Government seeks to avoid a further widening of the scope of the Regulation to include operating systems; wishes to ensure that platforms are able to protect themselves, other businesses and customers by suspending business users immediately where necessary (with a 30-day notice period before the business relationship can be finally terminated); and wishes to avoid the introduction of an absolute ban on differentiated treatment, while supporting the requirement that platforms be transparent about differentiated treatment where it is occurring.**

2.14 **While we note the principles and positions the Government has identified which will enable it to determine whether it will be able to support the Regulation in its final form, we are not entirely persuaded by the Government's argument that operating systems should be excluded from the measure. Our assessment is that operating systems are also multisided platforms, may act as intermediaries between business users and consumers, may have effects on the operation of many of the other platforms within the scope of the Regulation, and that many similar concerns which the Regulation seeks to address could therefore in principle arise in relation to them. We therefore encourage the Government to critically reflect on any evidence that is brought forward, and whether (if there is) there is scope for a compromise which would enable both the Council and the Parliament to address their concerns on this point in a manner that is not disproportionate.**

2.15 **Subject to this point, we grant the Government a scrutiny waiver to participate at Council. We request an update in due course regarding the final text that is adopted, and a summary of the final changes to the Regulation, as it represents a significant and long-contested strand of the Digital Single Market Strategy. We particularly ask for a summary of any obligations placed upon operating systems by the Regulation (in the event that they are included in its scope). In the meantime, we retain this document under scrutiny.**

Full details of the documents

Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services: (39665), 8413/18 + ADDs 1–3, COM(18) 238 final

Previous Committee Reports

Forty-fourth Report HC 301–xliii (2017—2019), chapter 1 (14 November 2018); Thirty-sixth Report HC 301–xxxv (2017—2019), chapter 2 (18 July 2018).

3 European System of Financial Supervision

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; but scrutiny waiver granted for the ECOFIN Council of 12 February 2019
Document details	(a) Proposal for a Regulation on the European Supervisory Authorities; (b) Proposal for a Directive amending Directive 2014/65/EU on markets in financial instruments (MiFID II) and Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II); (c) Amendment of the proposal for a Regulation as regards the authorisation of CCPs
Legal base	(a)—(c): Article 114 TFEU, ordinary legislative procedure; QMV
Department	Treasury
Document Numbers	(a) (39052), 12420/17 + ADD1–2, COM(17) 536; (b) (39053), 12422/17, COM(17) 537; (c) (39056), 12431/17, COM(17) 539

Background and Committee's conclusions

3.1 After the financial crisis, the EU Member States made major changes to the regulation and supervision of their financial markets on a pan-European basis. Notably, they established the European System of Financial Supervision (ESFS) which involved the creation of three "European Supervisory Authorities" (or ESAs): the European Banking Authority (EBA),[12] the European Insurance & Occupational Pensions Authority (EIOPA) and the European Securities & Markets Authority (ESMA). They have sector—and firm-specific—responsibilities covering the banking, insurance and securities markets respectively, and help oversee the uniform implementation of the EU's post-crisis regulation of the financial services industry.

3.2 The ESAs have far fewer direct supervisory responsibilities than national regulators like the Bank of England. Instead, they focus on assisting the European Commission in drafting technical regulations.[13] Although the Authorities can—as a last resort—exercise powers to override a national regulator if they believe it is not properly applying EU

12 The EBA has been based in London since its establishment, but will move to Paris from 29 March 2019 due to the UK's withdrawal from the EU.

13 The ESAs have four broad sets of powers under EU law: drafting Technical Standards to give full effect to EU financial regulation; issuing non-binding guidelines, recommendations and opinions to both financial services providers and domestic regulators; fostering regulatory and supervisory convergence throughout the EU; and exercising direct supervisory powers, notably authorisation and ongoing supervision of specific types of financial firms.

financial legislation, this power has never been used: a decision to invoke such a 'breach of Union law' procedure must be taken by the Board of Supervisors of an ESA, where only the EU's national regulators have voting rights.[14]

Review of the European System of Financial Supervision

3.3 The European Commission carried out a comprehensive evaluation of the ESFS from 2014. This highlighted concerns about the governance and effectiveness of the ESAs in using their existing powers to foster regulatory convergence, given their functioning is effectively controlled by the national regulators whom they are meant to monitor and, if necessary, override. It also concluded that other political developments necessitated a rethink of the Supervisory Authorities' remit and powers to ensure uniform implementation of EU financial services law in all Member States.

3.4 Principal among these developments was the UK's decision to withdraw from the EU. Given the UK's status as Europe's largest financial centre, the Commission reasoned Brexit was likely to result in a substantial proportion of financial services within the EU being provided from a 'third country' that is not subject to EU law.[15] Under existing European legislation, UK financial firms could continue to service EU-based customers under a variety of mechanisms to reduce the impact on market access resulting from the UK's withdrawal from the Single Market, including:

- equivalence, where a non-EU country's regulatory regime for specific financial products or services is can be formally declared equivalent to the EU's by the European Commission, making it easier for those firms to access the EU market;
- outsourcing and delegation, where an EU-based firm—possibly a subsidiary of a UK firm—effectively contracts a UK entity to provide the actual services; and
- the establishment of branches in specific EU countries where they want to provide services, under the national legislation of those countries.

3.5 In the light of these developments, the Commission in September 2017 tabled a package of proposals to amend the 2010 Regulations that established the Supervisory Authorities.[16] In summary, these proposals would:[17]

14 The decision-making powers of each ESA—for example to issue draft technical standards or declare a national regulator in breach of EU law—rest with its respective Board of Supervisors (BoS), on which only the Member States' national competent authorities have a vote (with qualified majority voting rules for the most important decisions). Although day-to-day management of the ESAs is handled by Management Boards, they are also dominated by a sub-set of national supervisors, and they have few direct responsibilities.

15 The Commission also cited other developments, including the increased cross-border flows of capital as part of the Capital Markets Union, and the further integration of the European banking sector as part of the Banking Union.

16 In parallel, the Commission also proposed changes to the functioning of the European Systemic Risk Board. We cleared this proposal from scrutiny on 21 February 2018.

17 We described the substance of the Commission's ESFS proposals in some detail in our previous Reports of 13 December 2017, 28 February 2018 and 9 January 2019.

- reinforce the role of the Supervisory Authorities in the 'equivalence' process, requiring them to advise the Commission when determining whether a specific 'third country' was equivalent, and help it monitor that country's regulatory regime on an on-going basis to ensure equivalence is maintained thereafter;[18]

- give each ESA new powers to obtain data from national regulators about their supervision of 'third country' firms that effectively operate within the EU by means of outsourcing or delegation of activities by EU-based firms, to give the European Commission a clearer picture of the extent to which the provision of financial services are carried out subject to effective supervision under EU law;

- expand the powers of the European Securities & Markets Authority (ESMA),[19] making it the responsible regulator for certain investor prospectuses, financial benchmarks and investment funds, stripping those supervisory powers from the Member States' national regulators;[20]

- alter the ESA's governance structures to make them more assertive vis-à-vis the Member States' national financial regulators, notably by transferring the power to censure those regulators for mis-applying EU law—for example in relation to services provided by non-EU firms—to a new Executive Board (which would be made up wholly of independent members);[21] and

- reform of the ESAs concerned the way in which they are funded. The Commission had suggested the Supervisory Authorities should charge a levy on firms within their remit to cover 60 per cent of their ESA's running costs (which are currently met by annual contributions by the Member States' national regulators), with the remainder being drawn from the EU budget.[22]

3.6 In September 2018, the Commission added a further proposal to the ESFS review, with the aim of expanding the powers of the European Banking Authority to tackle money laundering (AML) following the various banking scandals involving European financial institutions. We cleared this from scrutiny in January 2019.[23]

State of play in the legislative process

3.7 The Council adopted its position on the supplementary proposal related to anti-money laundering powers for the EBA on 22 January 2019. At that same meeting, the Finance Ministers of a "number of Member States" argued that they should agree on

18 In particular, the ESAs would submit a confidential report on their findings about continued equivalence of non-EU countries with EU financial services law to the Commission on an annual basis, which would use this information to decide whether to maintain, modify or withdraw equivalence.

19 ESMA is the Paris-based EU Supervisory Authority that oversees EU legislation that affects capital markets, notably the second Markets in Financial Instruments Directive; the Benchmarks Regulation; the Prospectus Regulation; and the European Market Infrastructure Regulation (EMIR).

20 The original Commission proposal would make ESMA the regulator responsible for European Venture Capital Funds (EuVECA),54 Social Entrepreneurship Funds (EuSEF) and Long-term Investment Funds (ELTIF), which are all specific types of investment funds whose legal framework is set out in EU Regulations.

21 At present, all important decisions taken by the ESAs are made by their Boards of Supervisors (BOS), which are made up of representatives of the Member States' national regulators.

22 The ESAs get 60 per cent of their budget from National Competent Authorities' (NCA) contributions and 40 per cent from the EU budget. National contributions are proportionate to each country's share of votes under the Council qualified majority rule as it applied until October 2014. As a result, the UK contributes approximately 8 per cent of the NCA contributions each year (amounting to €4.4 million in 2016).

23 See the Committee's Report of 9 January 2019.

their common position on the entire ESFS review before negotiations with the European Parliament were undertaken (instead of opening such negotiations solely on the AML—related provisions, as had been the original plan). Another group of national Governments also expressed the view that the Council "was very close to reaching a compromise on the whole dossier at the end [2018]" and would have supported a General Approach at the ECOFIN Council on 22 January 2019 if one had been on the agenda.

3.8 Given these political pressures, by letter dated 30 January 2019 the Economic Secretary to the Treasury (John Glen MP) therefore informed us that the Council had converged on a common position on the ESFS package as a whole. He expects this to be formally endorsed by EU Finance Ministers when they meet in Brussels on 12 February 2019.[24] This was apparently despite a push by the UK for more time to be taken to discuss the proposals.

3.9 Under the draft 'General Approach' that will be put to Finance Ministers on 12 February, a majority of Member States want to make significant changes to the original Commission proposals in a number of areas, including:

- Eliminating most of the proposed transfers of direct supervisory responsibilities from Member States to ESMA, except for critical benchmarks (which would leave the current domestic discretion on recognition of non-EU financial benchmarks intact), and financial markets' data reporting service providers;
- Removing the proposed power for the EBA, ESMA and EIOPA to "approve or challenge" individual EU-based firms plans for outsourcing, delegation and risk transfer arrangements to firms based in non-EU countries;[25]
- Accept the principle of a larger role for the Supervisory Authorities in monitoring continued compliance with the conditions for equivalence by 'third countries' with EU financial services legislation, focussed on "implications for financial stability; market integrity; investor and consumer protection; the functioning of the internal market; relevant regulatory and supervisory developments and practices; and market developments relevant to a risk-based equivalence assessment";[26]
- Scrap most of the suggested governance reforms for the ESAs, in particular the creation of new Executive Boards (which would have had substantial powers and be independent from the Member States' national regulators). Instead, the

24 On 30 January 2019, the Minister said that a "number of Member States" argued earlier that month that a General Approach should be sought on the whole file before negotiations with the European Parliament were undertaken (which, at that stage, would have focussed on the AML elements only). Another group of Member States also expressed the view that the Council "was very close to reaching a compromise on the whole dossier at the end [2018]", and would have supported a General Approach at the ECOFIN Council on 22 January 2019.

25 Under the Commission proposals, the ESAs would not have been able to block any such arrangements except via a breach of Union law procedure (which, as noted, has never been used).

26 However, under amendments being considered by the Council, the ESAs would only produce one overarching annual report to cover their monitoring of all equivalence decisions within their remit, rather than on a country-by-country basis. Moreover, the requirement for national authorities to share their draft administrative arrangements with non-EU supervisory authorities would be removed; instead the ESAs would develop model administrative arrangements that national regulators "will be encouraged, but not required, to follow".

Council is looking to add some external and independent members with clearly defined policy and managerial tasks to the Authorities' existing Management Boards (whose powers are limited);[27] and

- Remove the proposed industry levy to fund the activities of the ESAs, retaining the current system of national and EU contributions. However, there is no agreement yet on whether the contribution from the EU budget should remain at 60 per cent, as is currently the case.

3.10 The Parliament's Economic & Monetary Affairs Committee adopted its position on the ESFS reform proposals on 10 January 2019.[28] The Minister's letter does not indicate to what extent these changes to the Commission proposals, if endorsed by Finance Ministers, are also likely to be acceptable to the Parliament.

Next steps in the legislative process

3.11 The ESA reform proposals are subject to the EU's ordinary legislative procedure, meaning they must be agreed jointly between the Parliament and the Council to take effect. As we have noted, there are significant differences of opinion between the two institutions, some of which are highlighted in the Minister's latest letter.

3.12 If the EU Finance Ministers adopt their 'General Approach' later this month, the Romanian Presidency of the Council would begin so-called trilogue negotiations with MEPs on the final substance of the new legislation. How long those discussions will take is unclear at this stage. Both institutions are aiming for adoption of the legislation before the European elections in May 2019, although the Treasury has previously told us that the UK wants to "delay the main [ESFS] proposal from being agreed" before the European Parliament is dissolved in April, delaying its eventual entry into force.[29]

3.13 One of the key areas of focus for the Government in the forthcoming trilogues is the European Parliament's demand that ESMA should be given "direct supervision of third country Central Security Depositaries and Trading Venues" under the EU's CSD Regulation.[30] This governs the market infrastructure that allows for the settlement of securities transactions in the EU; many of the firms that provide such services are British, meaning the UK post-Brexit would be disproportionately affected by a change in how their access to the European market is regulated. The Minister has informed us that it is a "priority" for the Treasury to "water […] down" the Parliament's proposals in this area.

27 The ESA's Management Boards are responsible for their day-to-day management. Like the Boards of Supervisors, they are also dominated by (a sub-set of) Member States' national financial regulators, and they have few direct responsibilities. Under the Council's general approach, the Board of Supervisors of the ESAs would have to discuss decisions relating to 'breach of Union law' procedures when two members object to use of a written procedure. The procedure for actually declaring a breach would remain unchanged.

28 European Parliament document A8–0013/2019.

29 The Minister also informed the Committee in his letter of 9 January 2019 that the Treasury had "belatedly" identified 'Justice and Home Affairs' content in the ESFS proposal, relating to exchange of information between financial regulators and law enforcement authorities. The Government maintains triggers the UK's opt-in protocol for such measures even where the draft EU legislation has an 'internal market' legal base, and the Minister says the UK has therefore purported to opt-out of this particular element of the proposals. The Committee's long-standing position is that the JHA protocol is not engaged unless draft EU legislation as a legal base in Title V of the Treaty.

30 The original Commission proposal does not foresee extending ESMA's powers under the CSD Regulation. The Parliament's reasoning for its proposed change is set out in amendment 325 of document PE627.677

3.14 The outcome of the legislative process may still have a significant impact on the British financial services industry and regulators, irrespective of the political timetable and despite the UK's scheduled withdrawal from the EU on 29 March 2019. We have reiterated our assessment on this point in our conclusions below.

Our conclusions

3.15 **We thank the Minister for the information on the negotiations for the reform of the EU's financial Supervisory Authorities, and the areas of special concern to the UK.**

3.16 **As we have noted in various previous Reports we remain concerned about the implications of the ESFS review for the UK despite its scheduled withdrawal from the European Union in March this year.**

3.17 **If the Withdrawal Agreement is ratified,[31] the UK would enter a post-Brexit transitional during which it would stay in the Single Market until at least 31 December 2020.[32] During that time, EU law would continue to apply and EU bodies—including the financial Supervisory Authorities—would retain their powers in relation to the UK as if it were still a Member State. The key difference is that the Government would no longer have representation or voting rights at EU-level (meaning, for example, that the Bank of England and FCA would cease to be part of the ESA's Boards of Supervisors). Any new powers the ESAs gain in the coming years—for example the transfer of supervisory responsibility for benchmarks or prospectuses from Member States to ESMA—would extend to the UK financial services industry while the transition is still in effect.**

3.18 **The powers of the ESAs are also highly relevant for the UK even after it leaves the Single Market (for example at the end of any post-Brexit transitional period, or in the eventuality of a 'no deal' scenario on 29 March 2019).**

3.19 **Firstly, Government has accepted that any preferential access for UK financial services firms to the EU market will be based on the 'equivalence' mechanism. As discussed, this would allow the European Commission to declare the UK's regulatory approach in a specific financial sector as equivalent to the EU's, in some cases providing enhanced market access rights. As the ESFS review is likely to result in a greater role for the ESAs in preparing and monitoring equivalence decisions, both the Treasury and the industry itself will be following the negotiations with interest. We note in this regard that the Government is pushing for more "transparency" in the process of granting, modifying or withdrawal of equivalence decisions by the EU. The Political Declaration does not oblige the Commission to grant the UK equivalence where it is available under EU law: that decision lies with the Commission on a case-by-case, subject to a qualified majority vote among Member States.**

3.20 **Secondly, the legislative reform of the ESAs is included in the scope of the Government's Financial Services (Implementation of Legislation) Bill currently before Parliament. This Bill gives the Treasury the power to implement a number of pending**

31 Ratification of the Withdrawal Agreement remains highly uncertain in light of the vote in the House of Commons on 29 January 2019 instructing the Prime Minister to re-open negotiations with the EU.

32 Under Article 135 of the Withdrawal Agreement, the transition could be extended until 31 December 2022.

EU legislative proposals in the field of financial services into UK law, in the event that the Withdrawal Agreement is not ratified (and EU law ceases to apply in the UK in March 2019).

3.21 **The Bill, if enacted, would enable the Treasury to make regulations to implement the ESA reforms domestically after they are formally adopted by the Council and the European Parliament. The inclusion of the ESFS review in the scope of the Bill seems counterintuitive, given that the proposals relate to the powers of EU bodies that, by definition, would have no jurisdiction over the UK in a 'no deal' eventuality. However, the Bill would enable the Treasury to implement the legislation "with any adjustments [it] considers appropriate". We understand the Government has included the ESFS review in the Bill so that it can implement changes to allow financial markets to continue functioning as smoothly as possible. For example, it could make regulations allowing the Financial Conduct Authority to share information with the ESAs in return for EU investment firms 'delegating' their activities to UK-based entities after Brexit, rather than needing to pass primary legislation.**

3.22 **For the reasons given above, the ESFS review is directly relevant to the UK financial services industry both before and after the UK leaves the Single Market. Given the potential implications of the proposals for the UK, we welcome the Minister's indications that the Member States at least want to significantly alter some of the more far-reaching elements of the original Commission proposal (including mostly removing the proposed transfer of direct supervisory responsibilities from national regulators to ESMA).**

3.23 **We ask the Minister to keep us informed of further developments in the legislative process, but are content to now grant the Government a scrutiny waiver enabling the Treasury to support a general approach on the proposals at the ECOFIN Council on 12 February 2019.**

Full details of the documents

(a) Proposal for a Regulation on the European Supervisory Authorities: (39052), 12420/17 + ADD 1–2, COM(17) 536; (b) Proposal for a Directive amending Directive 2014/65/EU on markets in financial instruments (MiFID II) and Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II): (39053), 12422/17, COM(17) 537; (c) Amendment of the proposal for a Regulation as regards the authorisation of CCPs: (39056), 12431/17, COM(17) 539.

Previous Committee Reports

See (39052), 12420/17 + ADD 1–2, COM(17) 536: Fifth Report HC 301–v (2017–19), chapter 9 (13 December 2017); Fourteenth Report HC 301–xiv (2017–19), chapter 7 (21 February 2018) and Fifty-First Report HC 301–l (2017–19), chapter 5 (16 January 2019).

4 Establishing a European Travel Information and Authorisation System

Committee's assessment	Legally and politically important
Committee's decision	(a) and (b) Not cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee and the Exiting the European Union Committee
Document details	(a) Proposal for a Regulation establishing a European Travel Information and Authorisation System (ETIAS) (b) Proposal for a Regulation establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulation (EU) 2016/794
Legal base	(a) Articles 77(2)(b) and (d), 87(2)(a) and 88(2)(a) TFEU, ordinary legislative procedure, QMV (b) Article 88(2)(a) TFEU, ordinary legislative procedure, QMV
Department	Home Office
Document Numbers	(a) (38261), 14082/16 + ADD 1, COM(16) 731; (b) (38815), 9763/17 + ADD 1

Summary and Committee's conclusions

4.1 These documents would establish a European Travel Information and Authorisation System—"ETIAS"—for the nationals of around 60 countries who do not need a visa to travel to the Schengen area for short stays of up to 90 days in any six-month period. The proposed ETIAS Regulation—document (a)—would require these visa-free third country nationals to complete an online application form and obtain authorisation before they travel.[33] The information provided would be screened against a set of risk indicators and checked against a variety of EU migration and law enforcement databases, as well as an ETIAS "watchlist" of individuals suspected of taking part in or planning to commit terrorist or other serious criminal offences. The UK is not entitled to participate in (and vote on) the proposed ETIAS Regulation, as it builds on parts of the Schengen rule book which do not apply to the UK. By contrast, the UK is entitled to participate in the second proposed Regulation—document (b)—which would amend Europol's founding Regulation to enable Europol to manage and provide information on criminal suspects to the ETIAS watchlist. The UK participates fully in the current Europol Regulation (applicable since 1 May 2017).

4.2 The Justice and Home Affairs Council agreed a General Approach on both proposed Regulations in June 2017. The Government decided *not* to opt into the proposed Europol amending Regulation as it "had concerns about the number of unknowns that there still are with regard to how the watchlist will be hosted by Europol and how it will function"

33 See the European Commission's fact sheet on the ETIAS, April 2018.

and because it was unclear "what obligations opting-in might place on the UK".[34] When we last considered the proposed Regulations in November 2017, we noted that the decision not to opt in meant that the Government would be unable to vote on any changes agreed during negotiations which might reduce "the number of unknowns" about the functioning of the watchlist and the obligations it might create for Member States. We noted also that the UK would be bound by the Europol Regulation but not by this subsequent amending proposal. This raised the possibility, under Article 4a of the UK's Title V (Justice and Home Affairs) opt-in Protocol, that the Commission and other Member States might seek to eject the UK from the Europol Regulation if they considered that the UK's decision not to participate in the ETIAS watchlist would make it "inoperable".

4.3 We recalled that the Government had chosen not to make any interventions on Article 55 of the proposed ETIAS Regulation which set out highly restrictive conditions for the sharing of ETIAS data with third countries. We asked whether the Government intended to seek law enforcement access to ETIAS data as part of a post-exit internal security agreement with the EU and whether the provisions of such an agreement would take precedence over incompatible provisions in EU secondary legislation, such as the proposed Regulation.

4.4 We highlighted the possibility that the personal data of a large number of British nationals might be stored in the ETIAS Central System following the UK's exit from the EU and be checked against other EU databases and the ETIAS watchlist. We sought an assurance that the Government would press for extremely robust safeguards and effective enforcement mechanisms and requested regular progress reports on this and other aspects of the negotiations.

4.5 A Council press release published on 25 April 2018 stated that the Council and European Parliament had concluded negotiations and reached a final agreement on both the proposed Regulations. A Statement issued by the European Commission on the same day announced that ETIAS should be fully operational by 2021 and would:

> [……] carry out pre-travel screening for security and migration risks of travellers benefiting from visa-free access to the Schengen area. By cross-checking visa-exempt travellers against our information systems for borders, security and migration, the ETIAS will help us identify anyone who may pose a security or migration risk before he or she even reaches the EU border. The process for travellers to obtain an authorisation will be affordable, simple and fast and will always be carried out in full respect of fundamental rights and EU data protection rules. The ETIAS will also help us to strengthen and safeguard mobility for visa-free travellers who do not pose risks, while identifying those who do.

4.6 The final version of the ETIAS Regulation and the Europol amending Regulation were published in the EU's Official Journal in September 2018.[35] The ETIAS travel authorisation will cost €7 but this fee will be waived for children and elderly people who are under the age of 18 or over 70 when they apply. It will be valid for three years (or the date on which the applicant's passport expires, if sooner) and for multiple journeys.[36] The

34 See the letter of 6 September 2017 from the then Immigration Minister (Rt Hon Brandon Lewis MP) to the Chair of the European Scrutiny Committee.

35 Regulation (EU) 2018/1240 and Regulation (EU) 2018/1241.

36 The European Commission's original proposal recommended a €5 fee and a five-year period of validity.

travel authorisation will need to be produced before boarding a ferry or airplane bound for a Schengen country—this requirement will be extended to international coach travel three years after the ETIAS has become operational. The travel authorisation will not guarantee entry to Schengen territory. The final decision on admission will continue to rest with national border control authorities applying the rules set out in the Schengen Borders Code.

4.7 In her letter of 22 January 2019, the Immigration Minister (Rt Hon Caroline Nokes MP) apologises for the delay in responding to the questions we raised more than a year ago. She confirms that the Regulations have been adopted and entered into force on 9 October 2018. She highlights two changes to the Europol amending Regulation made after we first examined the proposal in November 2017:

> The first amendment reflects additional duties relating to management of the ETIAS watchlist and data entry. The second amendment provides additional detail on the agencies that will have indirect access to the ETIAS information stored by Europol.

4.8 The Minister draws our attention to the EU's Notice on travelling between the EU and the UK following withdrawal of the UK from the EU (published on 13 November 2018) which makes clear that the UK will become a third country on leaving the EU and UK nationals will cease to be treated as EU citizens. She notes that the European Commission's proposal to grant UK nationals visa-free access to the EU for short visits post-exit also makes clear that they will need to obtain a travel authorisation in accordance with the ETIAS Regulation before travelling to the EU once EU law on the free movement of EU citizens ceases to apply to the UK.[37]

4.9 The Minister explains that the UK's exclusion from the ETIAS Regulation (a Schengen measure) has limited the opportunity to influence the final text but adds:

> The European Commission has confirmed in its published fact sheet that its proposal fully complies with the EU's Charter of Fundamental Rights and contains all appropriate safeguards, ensuring that ETIAS is developed in line with high data protection standards; in particular regarding data access, which is strictly limited. Processing of personal data must meet EU data protection law, and this is consistent with data protection applicable in the UK.

4.10 Finally, the Minister notes that the Government's White Paper, *The UK's future skills-based immigration system* (published in December 2018) sets out the intention to introduce an Electronic Travel Authorisation (ETA) for visa-free travellers to the UK. She continues:

> It is our intention to require EU citizens to obtain an ETA, but we intend to discuss this further with the EU in the next phase of negotiations.

Our Conclusions

4.11 **As we have stated in our earlier Reports, a requirement to obtain a travel authorisation before travelling to an EU or non-EU Schengen associated country (Iceland, Norway, Switzerland and Liechtenstein) will mark a significant change**

37 See our Forty-eighth Report HC 301–xlvii (2017–19), chapter 6 (12 December 2018).

in practice for the many UK nationals who have become accustomed to moving freely within the Schengen area. It is disappointing that we have had to prompt the Government to provide an update on the progress and outcome of negotiations. We note the Minister's assurance that the ETIAS Regulation and Europol amending Regulation contain "all appropriate safeguards" to protect the personal information submitted as part of the ETIAS application. We nonetheless remain concerned that it will be difficult in practice to appeal against a refusal of a travel authorisation or to rectify inaccurate information stored in the ETIAS Central System, given that the applicant will have to grapple with the laws and procedures in place in the country responsible for the application.

4.12 **We note that the provisions on third country access to personal data stored in or obtained from the ETIAS Central System are now set out in Article 65 of the ETIAS Regulation. Whilst there is a general prohibition on this information being made available to a third (non-EU) country, Article 65 includes possible derogations, for example where there is an imminent risk of terrorism or danger to life. We would welcome the Minister's assessment of these changes and their implications for the UK once it becomes a third country following the UK's exit from the EU and the end of any post-exit transition/implementation period. We also ask her to address the questions raised in our** earlier Report **(agreed on 13 November 2017) which asked:**

- **whether the Government intends to seek law enforcement access to ETIAS data as part of a post-exit agreement with the EU on internal security;**
- **whether the terms of such an agreement concerning cross-border data sharing and transfers for law enforcement purposes would take precedence over incompatible provisions in EU secondary legislation, such as the ETIAS Regulation; and**
- **if they would not, whether the Government is content with the restrictive conditions on access to ETIAS data set out in Article 65 of the ETIAS Regulation.**

4.13 **The Minister has not told us whether the Government's decision *not* to opt into the Europol amending Regulation places the UK at risk of being ejected from Europol, as contemplated in Article 4a of the UK's Title V (Justice and Home Affairs) opt-in Protocol. We again ask her:**

- **whether the Government has sought assurances from the Commission that it will not activate the Article 4a procedure;**
- **what assessment the Minister has made of the risk of UK ejection from Europol;**
- **whether there is any legal precedent for the UK being bound by part, but not all, of a Title V (justice and home affairs) instrument as would be the case under the amended 2016 Europol Regulation; and**
- **whether the Government is contemplating a post-adoption opt-in.**

4.14 **We will consider releasing the ETIAS Regulation and Europol amending Regulation from scrutiny once the Minister has addressed our outstanding questions. 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 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.

(b) Proposal for a Regulation establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulation (EU) 2016/794: (38815), 9763/17 + ADD 1.

Background

4.15 The earlier Reports listed at the end of this chapter provide a detailed overview of the proposed ETIAS Regulation—document (a)—and Europol amending Regulation—document (b)—and the Government's position.

Previous Committee Reports

First Report HC 301–i (2017–19), chapter 23 (13 November 2017). For document (a), see our Fortieth Report HC 71–xxxvii (2016–17), chapter 18 (25 April 2017), Thirty-fifth Report HC 71–xxxiii (2016–17), chapter 7 (15 March 2017); Thirty-first Report HC 71–xxix (2016–17), chapter 12 (8 February 2017) and Twenty-fifth Report HC 71–xxiii (2016–17), chapter 12 (11 January 2017).

5 Visa exemption for UK nationals travelling to the EU after Brexit

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Exiting the European Union Committee, the Foreign Affairs Committee, the Home Affairs Committee and the Justice Committee
Document details	Proposal for a Regulation amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, as regards the withdrawal of the United Kingdom from the EU
Legal base	Article 77(2)(a) TFEU, ordinary legislative procedure, QMV
Department	Home Office
Document Number	(40192), 14329/18, COM(18) 745

Summary and Committee's conclusions

5.1 The proposed Regulation is one in a series of measures put forward by the European Commission to prepare for the UK's withdrawal from the EU. It would amend the 2001 EU Visa Regulation to include the UK in the list of third countries whose nationals do not need to obtain an entry visa for short-stays (visits which do not exceed 90 days in any 180-day period) within the Schengen area.[38] The Regulation would enter into force on 30 March 2019—exit day—but only take effect when EU law ceases to apply to the UK. This could be any date between 30 March 2019 (if the UK leaves without an exit deal) and 1 January 2023 (if the draft EU/UK Withdrawal Agreement is ratified). The European Commission makes clear that the visa exemption for UK nationals is conditional on the UK allowing reciprocal visa-free entry post-exit for the nationals of the remaining 27 EU Member States.

5.2 The 2001 EU Visa Regulation forms part of the Schengen rule book which does not apply to the UK. The UK is not therefore entitled to take part in, or vote on the adoption of, any changes to the EU Visa Regulation. In her Explanatory Memorandum of 30 November 2018, the Immigration Minister (Rt Hon Caroline Nokes MP) referred us to the Government's July 2018 White Paper, *The Future Relationship Between the United Kingdom and the European Union*, which envisages reciprocal arrangements to enable citizens to travel freely between the EU and the UK, without a visa, for tourism and temporary business activity. She noted that the Political Declaration on the Framework for the Future Relationship accompanying the draft EU/UK Withdrawal Agreement also commits the EU and the UK to "aim to provide, through their domestic laws, for visa-free travel" for short-term visits. The proposed Regulation is consistent with this objective.

38 Regulation (EC) No 539/2001. The Regulation has been frequently amended. The link is to the latest consolidated text of the Regulation.

5.3 Whilst welcoming the proposed Regulation, we reminded the Minister that the European Commission has made its progress through the legislative process dependent on the Government "formalising" its commitment to grant EU citizens reciprocal visa-free access for short stays in the UK, once free movement ends. We asked her whether this would necessitate a change to the UK's Immigration Rules and to indicate when she expected to announce and give effect to this change.

5.4 In her letter of 22 January 2019, the Minister explains that the current rules on free movement set out in the EU Free Movement Directive are implemented in the UK by the Immigration (European Economic Area) Regulations 2016.[39] These rules are "frozen" by the European Union (Withdrawal) Act 2018 and will remain in force until they are repealed by the Immigration and Social Security Coordination (EU Withdrawal) Bill once it receives Royal Assent. The purpose of the Bill is to end the free movement rights of EU citizens within the UK by revoking the domestic rules which give effect to them. Unlike the EU Visa Regulation, the UK's Immigration Rules only list the countries whose nationals are required to obtain a visa to enter the UK. They do not list the countries whose nationals enjoy visa-free entry to the UK. As a consequence, the Minister confirms that "there is no requirement to make any changes to the Immigration Rules to formalise our commitment to grant EU nationals visa-free access to the UK".

Recent developments

5.5 The European Parliament's Committee on Civil Liberties, Justice and Home Affairs agreed its report on the proposed Regulation on 29 January 2019. It proposes to include a new recital which further underlines the expectation that the UK will grant full visa-free entry to the nationals of all EU Member States, without any differentiation, and calls on the European Commission to "monitor the respect of the principle of reciprocity on a continuous basis".

5.6 A Council press release issued on 1 February 2019 states that COREPER (the body on which Member States' ambassadors to the EU are represented) has agreed a mandate to open negotiations with the European Parliament. It makes clear that "visa exemption is granted on condition of reciprocity", adding:

> In the event that the United Kingdom introduces a visa requirement for nationals of at least one Member State in the future, the existing reciprocity mechanism would apply and the three institutions [European Commission, Council and European Parliament] would commit to act without delay in applying the mechanism.

5.7 A report in the Financial Times, also published on 1 February 2019, states that Spain has pressed for and obtained an amendment to the text originally proposed by the European Commission so that it includes a footnote reference to Gibraltar as "a colony of the British Crown". If formally approved by the Council and European Parliament, the report suggests that a similar footnote would be included in all future EU legislation concerning the UK post-exit.[40]

39 See Directive 2004/38/EC.

40 See the Financial Times, 1 February 2019, Gibraltar to be designated 'Crown colony' in EU law for no-deal Brexit.

Our Conclusions

5.8 **We thank the Minister for clarifying the default position under the UK's Immigration Rules which is that EU citizens will not be required to obtain a visa for short stays in the UK post-exit/transition. Should the Government wish to introduce a visa requirement for EU citizens (or differentiate between them), a change to the Immigration Rules would be necessary. We ask the Minister for an assurance that Parliament would be informed of, and consulted on, any proposal to change the visa status of EU citizens in the future, given the important implications this would have for the visa status of UK nationals travelling to the Schengen area under the EU's reciprocity rules.**

5.9 **We would welcome the Government's view on the amendment proposed by the European Parliament's Civil Liberties Committee. We also ask the Minister to:**

- **provide a copy of the negotiating mandate agreed to by COREPER;**
- **comment on the significance of any changes made, particularly concerning references to the status of Gibraltar; and**
- **update us on the progress of trilogue negotiations with the European Parliament.**

5.10 **Meanwhile, the proposed Regulation remains under scrutiny. We draw this chapter to the attention of the Exiting the European Union Committee, the Foreign Affairs Committee, the Home Affairs Committee and the Justice Committee.**

Full details of the documents

Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, as regards the withdrawal of the United Kingdom from the EU: (40192), 14329/18, COM(18) 745.

Background

5.11 The inclusion of a third country in the visa-required or visa-exempt list annexed to the EU Visa Regulation must be based on a case-by-case assessment of various criteria, notably:

- the risk of illegal immigration;
- public policy and security;
- economic benefit from tourism and foreign trade;
- external relations considerations, such as respect for human rights and the implications for regional coherence; and
- reciprocity.

5.12 The Regulation contains a suspension mechanism enabling the EU to review and suspend visa-free travel in the event of a "substantial and sudden increase" in the number of illegal immigrants or asylum applicants from a visa-exempt third country. It also contains a reciprocity mechanism to ensure that the EU can respond swiftly if a visa-exempt third country imposes a visa requirement on the nationals of any EU Member State.

5.13 The changes proposed in the amending Regulation would include the UK in the list of visa-exempt third countries in recognition of the UK's geographical proximity to the EU, close trading links, high volume of travel and shared commitment to human rights, democracy and the rule of law.[41]

Previous Committee Reports

Forty-eighth Report HC 301–xlvii (2017–19), chapter 6 (12 December 2018).

41 See the European Commission's explanatory memorandum accompanying the proposed Regulation.

6 Third country participation in the EU's asylum database: Eurodac

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	(a) Proposal for a Council Decision on the signing, on behalf of the European Union, of a Protocol to the Agreement with Iceland and Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway regarding access to Eurodac for law enforcement purposes (b) Proposal for a Council Decision on the conclusion of a Protocol to the Agreement between the European Community and Iceland and Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway regarding access to Eurodac for law enforcement purposes (c) Proposal for a Council Decision on the signing, on behalf of the European Union, of a Protocol between the European Union, the Swiss Confederation and the Principality of Liechtenstein to the Agreement concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland regarding access to Eurodac for law enforcement purposes (d) Proposal for a Council Decision on the conclusion of a Protocol between the European Union, the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland regarding access to Eurodac for law enforcement purposes (e) Proposal for a Council Decision on the signing, on behalf of the European Union, of a Protocol to the Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention extending that agreement to law enforcement (f) Proposal for a Council Decision on the conclusion of a Protocol to the Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention extending that agreement to law enforcement

Legal base	(a), (c) and (e) Articles 87(2)(a), 88(2)(a) and 218(5) TFEU, QMV (b), (d) and (f) Articles 87(2)(a), 88(2)(a) and 218(6)(a) TFEU, QMV, EP consent
Department	Home Office
Document Numbers	(a) (40276), 15658/18, COM(18) 827; (b) (40277), 15653/18 + ADD 1, COM(18) 826; (c) (40278), 15638/18, COM(18) 831; (d) (40279), 15626/18 + ADD 1, COM(18) 828; (e) (40290), 15860/18, COM(18) 836; (f) (40291), 15676/18 + ADD 1, COM(18) 835

Summary and Committee's conclusions

6.1 Established in 2000, Eurodac forms an integral part of the "Dublin system", a set of EU rules for determining which Member State is responsible for examining an application for international protection made within the European Union. Eurodac consists of a central EU database containing the fingerprints of third country nationals who have made an application for asylum within the EU or who have been apprehended in connection with an irregular border crossing. Under the Dublin system, responsibility rests in most cases with the Member State considered to have played the greatest part in a third country national's irregular entry to the EU—often a small number of frontline Member States. The rules are intended to discourage "asylum shopping" and secondary movements within the EU by designating a single Member State responsible for an asylum application. Each of the four non-EU countries participating in the Schengen free movement area—Iceland, Norway, Switzerland and Liechtenstein—has concluded an international agreement with the EU enabling them to participate in the Dublin system.[42] Although an EU Member State, Denmark has a longstanding opt-out of EU asylum policy (dating back to 1999). Denmark has also concluded an international agreement with the EU so that it, too, can participate in the Dublin system, including Eurodac.[43]

6.2 Under the terms of the 2013 Eurodac Regulation, designated national law enforcement authorities and Europol are entitled to access the fingerprint data held in Eurodac where necessary to prevent, detect or investigate terrorism or other serious crimes.[44] These provisions on law enforcement access to Eurodac are beyond the scope of the existing agreements concluded with Iceland and Norway, Switzerland and Liechtenstein, and Denmark. As all five countries wish nonetheless to participate in the law enforcement elements of the 2013 Eurodac Regulation, the Council authorised the European Commission to enter into negotiations extending the scope of the existing agreements so that Denmark and the four non-EU Schengen-associated countries would be able to access the fingerprint data held in Eurodac for law enforcement as well as asylum purposes. The negotiations have now concluded and the European Commission has proposed six Council Decisions authorising the EU to sign and conclude a Protocol to the existing agreements with Iceland and Norway, Switzerland and Liechtenstein, and Denmark.

42 See the Agreement with Iceland and Norway, the Agreement with Switzerland and the Protocol extending the Agreement to Liechtenstein.

43 See the Agreement with Denmark.

44 Regulation (EU) No 603/2013 on the establishment of Eurodac.

6.3 All the proposed Council Decisions include a recital stating that the UK has opted in and will therefore be bound by the Protocols once concluded.

6.4 The Minister for Policing and the Fire Service (Rt Hon Nick Hurd MP) apologises for the delay in submitting an Explanatory Memorandum on the proposed Council Decisions, which he attributes to "a shift in responsibilities across policy teams", despite having requested an extension of time.[45] He underlines the UK's strong support for cross-border data sharing to help prevent terrorism and serious crime, subject to appropriate data protection safeguards, and considers that extending law enforcement access to Eurodac data to Denmark and the four non-EU Schengen associated countries "will enhance both their security and ours".

6.5 The Minister confirms that the UK's Title V (justice and home affairs) opt-in Protocol applies to the proposed Council Decisions and says that "no decision has yet been taken", despite the recitals indicating the contrary. He continues:

> 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. As indicated above, the Government will need to be fully assured that exchanges of personal data come with sufficient protections to ensure they are consistent with fundamental rights. The Government is generally supportive of the EU exchanging data with trusted third countries to maximise its potential in the fight against serious and organised crime.

6.6 The Minister adds that "the exact nature of the UK's future relationship with tools such as Eurodac is yet to be confirmed" and will be taken forward as part of the UK's wider exit negotiations.

Our Conclusions

6.7 **We ask the Minister whether the inclusion in each proposed Council Decision of a recital stating that the UK has opted in is an oversight on the part of the European Commission or reflects a different view on the application of the Title V opt-in Protocol to these proposals. We also ask him to tell us when the three-month deadline for opting in will expire.**

6.8 **Although the 2013 Eurodac Regulation does not provide for the participation of third (non-EU) countries in the Eurodac database and prohibits Member States or Europol from transferring personal data obtained from the Eurodac Central System outside the EU, an exception is made for third countries that apply the 2013 Dublin (III) Regulation. Third country participation in the Dublin Regulation has so far been limited to the four non-EU countries associated with the Schengen rule book on free movement and the removal of internal border controls.[46] We ask the Minister:**

45 See the Minister's letter of 29 January 2019 to the Chair of the European Scrutiny Committee.

46 See recital (25) of the current Dublin Regulation (Regulation (EU) 604/2013) which states: "The progressive creation of an area without internal frontiers in which free movement of persons is guaranteed in accordance with the TFEU and the establishment of Union policies regarding the conditions of entry and stay of third-country nationals, including common efforts towards the management of external borders, makes it necessary to strike a balance between responsibility criteria in a spirit of solidarity".

- **whether he considers full participation in the Schengen rule book to be a necessary pre-condition for participating in the Dublin system and Eurodac database as a third (non-EU) country; and**

- **as the Government has made clear that it has no intention of participating in the Schengen free movement area post-exit, whether there is a realistic prospect for the UK to secure an agreement on participation in Dublin and Eurodac.**

6.9 **We note, in this regard, that the Government's July 2018 White Paper on *The Future Relationship Between the United Kingdom and the European Union* envisaged a new security partnership with the EU post-exit which would include:**

> **a new legal framework to return illegal migrants and asylum-seekers to a country they have travelled through, or have a connection with, in order to have their protection claim considered, where necessary. People should be prevented from making claims in more than one country, and on multiple occasions. A clear legal structure, facilitated by access to Eurodac (the biometric and fingerprint database used for evidencing secondary asylum claims) or an equivalent system, will help achieve this.**[47]

By contrast, the November 2018 Political Declaration accompanying the proposed EU/UK Withdrawal Agreement is far less specific, referring only to cooperation in tackling illegal migration, whilst recognising the need to protect the most vulnerable.

6.10 **Given this difference in language and tone, we ask the Minister:**

- **whether the Government has broached the subject of continued UK participation in the Dublin and Eurodac Regulations post-exit/transition with the EU;**

- **how the EU has responded;**

- **if the EU were open to UK participation, whether the agreements with Iceland and Norway and with Switzerland and Liechtenstein would provide an appropriate model for the UK in terms of their substance, the governance arrangements and the formula for calculating their contribution to the administrative and operational costs of Eurodac; and**

- **in the absence of an EU-wide agreement, whether it would be open to the UK to enter into bilateral agreements on the return of irregular migrants or asylum applicants to individual EU Member States in which they have made a prior application for international protection.**

6.11 **Pending further information, the proposed Council Decisions remain under scrutiny. We draw this chapter to the attention of the Home Affairs Committee.**

47 See p.70 of the White Paper.

Full details of the documents

(a) Proposal for a Council Decision on the signing, on behalf of the European Union, of a Protocol between the European Union, the Republic of Iceland and the Kingdom of Norway to the Agreement between the European Community and Iceland and Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway regarding access to Eurodac for law enforcement purposes: (40276), 15658/18, COM(18) 827;

(b) Proposal for a Council Decision on the conclusion of a Protocol between the European Union, the Republic of Iceland and the Kingdom of Norway to the Agreement between the European Community and Iceland and Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway regarding access to Eurodac for law enforcement purposes: (40277), 15653/18 + ADD 1, COM(18) 826;

(c) Proposal for a Council Decision on the signing, on behalf of the European Union, of a Protocol between the European Union, the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland regarding access to Eurodac for law enforcement purposes: (40278), 15638/18, COM(18) 831;

(d) Proposal for a Council Decision on the conclusion of a Protocol between the European Union, the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland regarding access to Eurodac for law enforcement purposes: (40279), 15626/18 + ADD 1, COM(18) 828;

(e) Proposal for a Council Decision on the signing, on behalf of the European Union, of a Protocol to the Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention extending that agreement to law enforcement: (40290), 15680/18, COM(18) 836; and

(f) Proposal for a Council Decision on the conclusion of a Protocol to the Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention extending that agreement to law enforcement: (40291), 15676/18 + ADD 1, COM(18) 835.

Previous Committee Reports

None.

7 Commission Brexit preparedness: Biocidal products

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Business, Energy and Industrial Strategy Committee
Document details	Commission delegated Regulation (EU) .../... of 28.11.2018 amending delegated Regulation (EU) No 1062/2014 as regards certain active substances for which the competent authority of the United Kingdom has been designated as the evaluating competent authority
Legal base	Article 89(1) and 83 of Regulation (EU) No 528/2012 (the Biocidal Products Regulation);—
Department	Health and Safety Executive
Document Number	(40242), 14911/18 + ADD 1, COM(18) 7778

Summary and Committee's conclusions

7.1 The proposal under scrutiny concerns the amendment of Regulation (EU) No 1062/2004 (the Review Regulation). The Review Regulation gives effect to the Union's rolling programme of re-evaluation for biocidal active substances placed on the market before May 2000 (when the approval of active substances and the authorisation of biocidal products was governed by the EU's predecessor framework).[48]

7.2 The Commission is proposing to amend the Review Regulation in light of the UK's withdrawal from the EU. At present, the Health and Safety Executive—as the UK competent authority—is charged with evaluating a number of substances on behalf of the Union. In accordance with Union law, evaluation and, respectively, the approval and authorisation of active biocidal substances and products, can only be undertaken by an EU Member State, EEA member or Switzerland. These processes are governed by Regulation (EU) No 528/2012 (the Biocidal Products Regulation).

7.3 As an 'exiting' Member State, the Commission argues that such changes must be made irrespective of whether the proposed transition/implementation period under the draft Withdrawal Agreement goes ahead (and thus covers the possibility of a 'no-deal' or non-negotiated exit). This is in line with Article 128(6) of the draft Withdrawal Agreement which provides that "the United Kingdom shall not act as leading authority for risk assessments, examinations, approvals or authorisations at the level of the Union…". During the proposed transitionary period the UK would, however, be required—as per Article 127 of the draft Withdrawal Agreement—to recognise Union-issued approvals and authorisations. In accordance with the provisions of Chapter VII of the Biocidal Products Regulation (on mutual recognition procedures), the UK would also—subject

48 The background section of this chapter provides a brief explanation of what biocidal products/biocides are and how the evaluation and approval process for such substances/products operates.

to the grounds for derogation provided for in Article 37 of the Regulation—continue to be bound by the requirement to recognise an authorisation granted by the competent authority of (another) Member State.

7.4 In terms of the UK's role in EU approvals during the transitionary period, Article 127 of the draft Withdrawal Agreement states that the UK:

> [May] not act as a *leading authority* for… approvals or authorisations at the level of the Union or at the level of Member States *acting jointly* as referred to in the acts and provisions listed in Annex VII" (author's own emphasis added).[49]

7.5 It appears that the term 'leading authority' refers to the process of mutual recognition set under the Biocidal Products Regulation (the BPR) whereby a Member State acts as a 'reference' or lead Member State when an application is made for the approval of a biocidal product to more than one Member State at the same time (known under Article 34 of the BPR as 'mutual recognition in parallel'). This reference Member State is charged with tasks such as informing the applicant of any fees due, validating an applicant's submission and producing a draft assessment report.

7.6 It is unclear whether the phrase 'acting jointly'—as per Article 127—precludes a UK-issued approval from being used as the basis for an approval sought in (another) Member State (known as 'mutual recognition in sequence'). This question appears to turn on how the phrase 'acting jointly' is understood. It could be understood as: (1) referring to a situation whereby Member States collaborate on the initial process of national approval—through, for example, the exchange of expertise or information—with the lead Member State making a final decision or, alternatively; (2) implying a far looser relationship whereby Member States are said to be acting together when considering one another's decisions. Either way, it appears highly unlikely that the Commission would exclude one form of mutual recognition—that in parallel—and retain another when both provide for the same outcome via only slightly different routes.

7.7 With regards to the potential implications of the proposed transitionary period for business operators, according to the BPR (which will continue to apply in the UK in accordance with Article 127 of the draft Withdrawal Agreement), holders of product authorisations must be established in the EU (or EEA or Switzerland) and, for active substance or product suppliers included in the list referred to in Article 95 of the Regulation (the 'active substance list'), be established or have a representative established in the EU, EEA or Switzerland.

7.8 As, for the purposes of Union law, the UK would continue to be considered a Member State during transition (subject to the exemptions provided for in Article 127(6) of the draft Withdrawal Agreement), UK-based companies who hold an authorisation from an EU-27 Member State would not, in order to retain that authorisation, have to arrange for its transfer to a new holder established in either the EU, EEA or Switzerland. For active substances originally evaluated by the HSE and subsequently approved by another Member State or at Union-level, such approvals would remain valid irrespective of whether the draft Withdrawal Agreement is ratified; this is as validity is said to derive from the approving Member State or the Union not the original evaluating Member State.

49 The BPR is listed in Annex VII to the draft Withdrawal Agreement.

7.9 As approval holders for an active substance are not considered under Union law to be 'owners' or 'holders' of approvals (in the same way in which companies who hold authorisations are), they do not need to be established in the EU. For active substance or product suppliers included on the active substances list (as per Article 95 of the BPR), there would be no immediate requirement to re-establish or have a representative established in either the EU, EEA or Switzerland.

7.10 In the context of the UK's future relationship with the EU, the draft EU-UK political declaration contains the commitment that:

> The Parties [the UK and EU] will also explore the possibility of cooperation of United Kingdom authorities with Union agencies such as… the European Chemicals Agency (ECHA).

7.11 At present, there is little information available on what future cooperation with the ECHA could look like but it would almost certainly include, at minimum, access to the R4BP 3 database—used for biocide evaluations and applications—and the participation of UK experts in the Biocidal Products Committee. Deeper integration with the ECHA—such as associate membership—would likely entail continued alignment with EU rules. Given the current restrictions surrounding 'third country' (non-Member State) participation in biocide approvals and authorisations—which is significantly restricted—it is highly unlikely that anything other than an agreement on information exchange and some form of participation in expert committees could be achieved. This is not to say, however, that such participation would not be valuable (especially in light of the resource implications implicit in operating a domestic approvals and authorisations framework similar to that of the Unions).

7.12 In terms of its content, the Commission's proposal is not controversial and relates solely to the Union's internal preparations for the UK's withdrawal from the EU. The Commission is proposing to transfer each active substance/product-type for which the HSE is currently the evaluating authority to competent authorities in EU Member States and EEA/EFTA members. Additional changes are also suggested to set new deadlines by which evaluations must be completed. Provision would also be made to allow competent authorities to charge fees for these evaluations. As per Annex II to the Review Regulation, the HSE is currently responsible for the evaluation of 57 substances/product types (this equates to roughly 1/8th of the EU total).

7.13 The Union's internal preparations provide an opportunity to assess the Commission's and the Government's plans for how the authorisation and approval of biocidal active substances and products would function in the event of a no-deal Brexit (where the draft Withdrawal Agreement is not ratified by either the UK or the EU).

No-deal preparations

The Commission

7.14 The Commission's no-deal preparations centre around the status of approvals and authorisations granted prior to 29 March 2019 (as the UK cannot act as a 'lead authority' for approvals and authorisations during the transitionary period).[50]

50 As per Article 128(6) of the draft Withdrawal Agreement (and discussed above at subparagraph 3).

7.15 The Commission—in its no-deal notices—and the European Chemicals Agency have made a number of suggestions to UK-based holders and businesses in this regard. These follow-on, mainly, from the preceding discussions and include the advice that:

- Companies that are based in the UK and hold a product authorisation from an EU-27 Member State would have to re-establish in the Union; and
- Active substance or product suppliers based in the UK—and listed under Article 95 of the BPR (the active substance list)—would have to locate to or appoint a representative established in the EU/EEA or Switzerland.

7.16 The Commission has also warned businesses to carefully consider existing timelines for the evaluation and approval of biocides for which the UK is the evaluating or reference Member State and to closely monitor the progress of ongoing procedures.

7.17 As per Article 44 of the draft Withdrawal Agreement, the UK will have to transfer all files and documents relating to assessments, approvals and authorisations for which it is acting as the competent authority to that of another Member State before the date the agreement enters into force.

7.18 The Withdrawal Agreement is, however, not explicit as to whether this requirement relates to substances that the UK has been charged with re-evaluating under the Review Regulation or extends to cover authorisations that the HSE is processing in accordance with either of the mutual recognition process provided for under the Biocidal Products Regulation (those undertaken in parallel or in sequence). This is as Article 44 of the draft Withdrawal Agreement reads:

> The United Kingdom shall transfer without delay to the competent authority of a Member State designated in accordance with the procedures provided for in the applicable Union law all relevant files or documents…

7.19 Reference in Article 44 to 'designated' Member States and of transfers being made in accordance with 'applicable Union law' appears to cover the changes under scrutiny (i.e. those to the Review Regulation to reallocate substances by way of delegated act that the UK is currently charged with reviewing). It is not altogether certain as to whether the same can be said of the BPR; this is as, to date, proposals have not been forthcoming to allocate Member States with existing UK evaluations or approvals. Given that this process is more business-driven,[51] it could be that the Commission will come forwards with a technical—rather than legal—solution to such transfers and allow companies to choose any EU-27 competent authority or reference Member State to continue with their application (this would be in keeping with current ECHA advice).

HM Government

7.20 The Minister of State for Disabled People, Health and Work (Sarah Newton MP), wrote to the Committee on 19 December 2018 by way of explanatory memorandum. The Minister explains the background to the Commission's proposal and provides information on the Government's plans for regulating biocides in the event of a no-deal Brexit.

51 N.B. Member States are not designated for evaluation and approvals by Union law rather they are chosen by businesses based upon factors such as the market into which they wish to supply a product.

7.21 Regarding the future of the Review Regulation—and the roughly 500 active substances that the HSE will have to evaluate in the event of a no-deal Brexit—the Minister states that the Government would "put in place an alternative programme for reviewing remaining [active] substances…". The resource implications of operating such a programme are said to have been considered, however, the Minister does not provide the details for any such assessment.

7.22 Rather surprisingly, the Minister states that the Government will not "determine the scope of any [domestic] review programme" but will re-evaluate those substances earmarked for review by the ECHA when requested to do so by businesses. This marks a move away from what can be described as the 'systematic' approach of the Union to one that appears to be more 'ad-hoc' in nature.

7.23 The Minister also informs the Committee that a statutory instrument would be laid under the European (Withdrawal) Act 2018 (EUWA) to amend the Biological Products Regulation:

> [To] give the Secretary of State the power to make regulations… to extend the date for the systematic examination of existing active substances and specify matters in relation to carrying out a UK work programme.

It appears from the Minister's statement that the HSE would continue with the re-evaluation of the 57 active substances currently under its charge, however, this is not clear. The Minister's desire to extend the date by which examinations must be undertaken—in accordance with the Review Regulation—is also noteworthy. No further information is provided on specific dates.

7.24 On the Government's broader plans for the approval and authorisation of biocides in the event of a no-deal Brexit, it published a notice to stakeholders in December 2018. The Government's notice states that the UK would retain the EU's framework—as currently provided for in domestic legislation—with small changes made where necessary to ensure that it functions correctly (this would be achieved by way of statutory instrument made under the EUWA).

7.25 The HSE would take on all functions currently performed by the ECHA and, as a consequence, would be charged with all evaluations, technical equivalence assessments, approvals and authorisations etc. The Government states its desire for these processes to remain closely aligned to those in place under the current EU framework so as to minimise disruption to business. Plans are also said to be in place to launch a UK version of the EU's Article 95 active substances list and to create a database similar to the EU's R4BP 3 information portal.

7.26 In terms of the validity of UK-issued approvals, the Government's position is less maximalist than the EU's no-deal framework. Product authorisations would remain valid until their normal expiration date, however, subject to transitionary arrangements, authorisation holders would need to be established in the UK. The same location requirement would be introduced for active substance suppliers. The Government intends to 'copy-over' companies included on the EU's Article 95 list to a new UK equivalent (and would provide extra time—versus the Union's proposals—for companies to supply any additional information required).

7.27 The Government's no-deal preparations also cover the status of ongoing applications. Where possible, applications made directly to the HSE would be considered under the UK's new system. For those made as part of a wider EU process—such as via mutual recognition—a new application would have to be made. As is to be expected, the Government's no-deal notice does not outline whether the Union would, in such circumstances, make relevant information available to the UK.

7.28 **We thank the Minister for her Explanatory Memorandum of 19 December 2018. We would also like to thank officials at the Health & Safety Executive for the promptness with which they consulted the Committee on the need to deposit the proposal under scrutiny.**

7.29 **We retain the proposal under scrutiny pending satisfactory answers to the questions—and requests for further information—raised below. Given that the UK is scheduled to leave the EU in less the 9 weeks, we request a full response to our enquiries by 20 February 2019. In light of the Brexit-related implications the proposal raises, we draw it to the attention of the Business, Energy and Industrial Strategy Committee.**

7.30 **With regards to the substance of the proposal and, in particular, the Government's plans for the future operation of the Review Regulation, we seek clarification of whether the HSE will continue with the re-evaluation of the 57 active substances for which it is currently responsible.**

7.31 **The Committee understands that with the entry into force of the Review Regulation, the HSE was transferred funds by the ECHA for the re-evaluation of these 57 substances. If this is true, we request information on the amounts received by the HSE—per substance and in total—and whether these amounts will have to repaid and, if so, by when.**

7.32 **In her explanatory memorandum of 19 December 2018, the Minister of State for Disabled People, Health and Work (Sarah Newton MP), states that the "resources implications of operating a UK-specific review programme in the case of a no-deal exit have also been considered by the HSE". The Committee requests a full summary of the assessment on which this statement is made.**

7.33 **With regards to the approval and authorisation of biocidal substances and products during the proposed transitionary/implementation period, we seek the Government's understanding of:**

- **Article 127 of the draft Withdrawal Agreement (and whether it precludes a UK-issued approval from being used as the basis for an approval sought in (another) Member State (also known as 'mutual recognition in sequence') (this question is based upon the ambiguity of the phrase 'acting jointly' under Article 127)); and**
- **Article 44 of the draft Withdrawal Agreement (and whether it obligates the UK to transfer all files and documents relating to assessments, approvals and authorisations where it is acting as the lead or reference Member State in accordance with either of the mutual recognition process provided for under the Biocidal Products Regulation i.e. in parallel or in sequence).**

7.34 **The Committee would also like to hear about the Government's plans for articles treated with biocidal products after EU exit, in particular, whether articles treated with biocides will only be allowed into the UK if they contain active substances that have been approved by the HSE.**

7.35 **In terms of the UK's future relationship with the EU, we seek information on whether there would be any practical impediments to the participation of UK experts in the EU Biocidal Products Committee and involvement in the operation—and use of—the Union's R4BP 3 database (such impediments could include limitations imposed on third countries who are associate members of the ECHA).**

Full details of the documents

Commission delegated Regulation (EU) .../... of 28.11.2018 amending delegated Regulation (EU) No 1062/2014 as regards certain active substances for which the competent authority of the United Kingdom has been designated as the evaluating competent authority: (40242), 14911/18 +ADD 1, COM(18) 7778.

Background

Biocidal products/biocides

7.36 Biocidal products—or biocides—are chemical substances or microorganisms that are intended to destroy, deter, render harmless or exert a controlling effect over any harmful organism by chemical or biological means (the non-active element of a biocidal product is usually a co-formulant designed to regulate considerations such as pH, viscosity, colour or odour).

7.37 The terms 'biocides' and 'pesticides' are often used interchangeably. Whereas pesticides include both biocides and plant protection products (designed to protect crops or desirable or useful plants), biocides are commonly used in isolation for non-food and feed purposes. In industry, biocidal products are employed to control organisms such as viruses, bacteria, fungi and vermin. Similar uses are made of biocidal products by members of the general public.

Biocidal Products Regulation/Review Regulation

7.38 At EU-level, the Biocidal Products Regulation (Regulation (EU) No 528/2012) governs the evaluation and approval of biocidal products—and biocidal active substances—before they can be placed on the market (sold). There are, however, certain exemptions to this framework. As an example, some biocidal products containing active substances covered by the Union's 'review programme' can be made available on the market and used—subject to national laws—pending a final decision on approval (and for up to 3 years afterwards).

7.39 The BPR also sets rules for articles treated with—or intentionally incorporating—biocidal products. In accordance with the Regulation, articles can only be treated with biocidal products containing active substances that have been approved in the EU. In practice, this prevents the importation of articles from third countries that have been

treated with active substances that are not recognised by the ECHA (e.g. soft furnishings from the USA that have been coated with Dimethylformamide (DMF) (a solvent used in the production of textiles)).

7.40 The Union's review programme is given effect to by Regulation (EU) No 1062/2014 (the Review Regulation). The Review Regulation provides for the re-evaluation of all active substances used in biocidal products placed on the market before May 2000 (the point at which national legislation ceased to govern the evaluation and approval of biocidal products). Annex II to the Regulation sets the UK as the evaluating state responsible for a number of substances on behalf of the Union. These substances include, for example, Calcium oxide, three different lime compounds and Ammonium sulphate.

The EU evaluation and approval process

7.41 All biocidal products—and the active substances they contain—require authorisation before they can be placed on the market (for active substances, this process is known as approval). Under the Biological Products Regulation (the BPR), active substances must be approved before a product containing such a substance can be authorised (and cleared to be placed on the market). A decision on approval is adopted by the Commission based upon an opinion prepared by the Biocidal Products Committee (working under the auspices of the European Chemicals Agency (ECHA)).

7.42 There are two main routes to product authorisation. First, if a product is to be placed only on the market of a single Member State, national authorisation from the relevant competent authority is sufficient (in the UK, the Health and Safety Executive (HSE) is the competent authority for product authorisations). If a company wishes to extend a national authorisation to other markets, it can apply for mutual recognition. This can be done either in sequence (to one Member State after another) or in parallel (to more than one competent authority at a time). Second, the BPR introduced the possibility for certain biocidal products to be authorised at EU-level; allowing companies to place products on markets throughout the Union without the need to obtain separate national authorisations and/or decisions on recognition.

7.43 Under the Regulation, certain conditions on approvals and authorisations—linked to the location of the company seeking recognition—must be met. Holders of product authorisations must be established in the EU (or the EEA or Switzerland). For active substances, substance or product suppliers included in the list referred to in Article 95 of the Regulation—the 'active substance list'—must be established or have a representative established in the EU, the EEA or Switzerland.

7.44 Another important part of the Regulation is the common obligation for existing data owners and prospective applicants for approvals and authorisations to share certain data from tests and studies. By doing this, applicants can reduce costs and the need to conduction tests involving vertebrate animals. This process—as with that for substance approvals and Union-wide product authorisations—is administered through R4BP 3 (the Union's central hub through which all biocide applications are made). As a Member State, UK officials participate in technical seminars designed to identify necessary changes to R4BP 3 (UK experts are also involved in the activities of the Biocidal Products Committee).

7.45 The ECHA levies fees for the approval of active substances and the issuance of Union-wide authorisations. These range from €120,000 for a first product-type approval of an active substance to between €1,500–€20,000 for renewals (fees for Union-wide authorisations are similar). Although not directly comparable, the HSE estimates a charge of roughly £10,000 for authorising a new biocidal product. Under the Union's review programme, funds have been transferred to competent authorities for the evaluation of active substances—for which they hold responsibility—placed on the market before May 2000.

Previous Committee Reports

None.

8 EU climate change strategy

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny (decision reported on 09/01/2019); drawn to the attention of the Business, Energy and Industrial Strategy Committee
Document details	Commission Communication—A Clean Planet for all. A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy
Legal base	—
Department	Business, Energy and Industrial Strategy
Document Number	(40225), 15011/18, COM(18) 773

Summary and Committee's conclusions

8.1 Late last year, the Commission set out a suggested EU strategic approach to greenhouse gas (GHG) emissions reductions, including pathways to reaching "net zero"[52] emissions by 2050. We observed at our meeting of 9 January[53] that the Commission's document had considerable implications for post-Brexit UK climate policy.

8.2 The Minister of State (Rt Hon Claire Perry MP) has responded[54] to our Report of 9 January. She draws attention to the UK's own framework for reducing emissions, which—she says—will be unaffected by Brexit. This includes the Climate Change Act 2008, which set a long-term target to reduce emissions by at least 80% by 2050, relative to 1990 levels. In addition, it established carbon budgets, which cap emissions from the UK over successive five-year periods.

8.3 Regarding the Commission's Communication, the Minister notes that the contents of the Communication, including the proposed EU 2050 net zero emissions target, are subject to debate within the EU, and that the proposals within it may change as a result. In addition, the document deals with EU-level policy and does not prescribe measures or targets for individual Member States.

8.4 Turning to the arrangements for Brexit, the Minister observes that the Political Declaration setting out the framework for the future UK-EU relationship sets a clear vision for continuing cooperation on global challenges like climate change. However, the details of the future UK-EU relationship on climate change, such as commitments on a level playing field for open and fair competition, are still to be negotiated. The Declaration states that such provisions should build upon the arrangements in the Withdrawal Agreement but also states the UK and the EU should have regard to the scope and depth of the future relationship when considering the precise nature of commitments in relevant areas.

52 'Net zero' means that total emissions are equal to or less than the emissions removed from the environment. This can be achieved by a combination of emission reduction and removal by offsetting. Emissions can be removed or absorbed by natural processes such as tree planting or by using technologies like carbon capture.

53 Fiftieth Report HC 301–xlix (2017–19), chapter 6 (9 January 2019).

54 Letter from The Rt Hon Claire Perry MP to Sir William Cash MP dated 24 January 2019.

8.5 Crucially, the Minister emphasises the importance of noting that the level playing field arrangements in the Withdrawal Agreement's Protocol on Ireland/Northern Ireland (the "Backstop") only come into effect in the event that the UK and the EU have not concluded a future relationship agreement by the end of the Implementation Period.

8.6 The Minister goes on to observe that, on 21 January, the Prime Minister announced the Government's support for the proposed amendment to the Meaningful Vote put forward by John Mann MP, stating that the UK would maintain standards in relation to workers' rights and environmental protections post-EU exit. The Government will now work closely with MPs, business and Trade Unions to develop proposals that give effect to the amendment, including looking at legislation where necessary.

8.7 Concerning the letter[55] from 11 Member States on net-zero greenhouse gas emissions in the EU by 2050, the Minister explains that the UK did not co-sign the letter because the Government awaits the advice of the Commission on Climate Change on the implications of the Paris Agreement on the UK's long-term goals, including setting a date for reaching net zero emissions.

8.8 While the UK is not currently able to endorse a specific timeframe for reaching net zero emissions, the Minister recognises and welcomes the Commission's strategy as a serious response to the urgency of the challenge faced in tackling climate change. She describes it as "a positive vision for real-world action to deliver the Paris Agreement that highlights the economic and social benefits of climate action" as well as providing an importance evidence base. The Government looks forward to engaging on it in the coming weeks and months.

8.9 On future UK engagement, the Minister notes that the UK will participate in the discussions on the long-term strategy on climate at the Environment Council in March. Following Brexit, continuing to work with the EU and Member States on climate policy will remain vital to the UK's international climate objectives, and so the UK will continue to work with European partners and the wider international community to drive ambitious climate action in order to meet the goals of the Paris Agreement. It is the intention of the UK and the EU to cooperate in international fora, such as the G7 and G20, in areas of mutual economic, environmental, and social interest, including climate change.

8.10 **We welcome the Minister's response, which represents a strong commitment to robust climate change policy.**

8.11 **On the arrangements for the UK's withdrawal from the EU, the Minister states that the level playing field arrangements in the Withdrawal Agreement's Protocol on Ireland/Northern Ireland ("the Backstop") only come into effect in the event that the UK and the EU have not concluded a future relationship agreement by the end of the Implementation Period. This must be qualified by recognising that the arrangements under the Backstop will only be superseded by a future relationship which delivers the same underlying objectives as the Backstop. It seems to us that ensuring a level playing field in environmental policy is one such objective. Such an objective could, of course, be met in a variety of ways and may potentially be to the UK's advantage should it wish to pursue a more ambitious climate policy than the EU.**

55 Joint letter to Commissioner Miguel Arias Cañete on the Climate ambition of the future EU long-term strategy, 14 November 2018.

8.12 **Regarding future UK engagement on EU climate policy, the avenues of engagement identified by the Minister are limited to specific international fora. We consider it highly unlikely—and indeed undesirable—that such fora will represent the limits of such engagement. We anticipate that there will be substantial informal engagement between the UK and the EU institutions and this may also be an area for more formal discussion within the Joint Committee established under the Withdrawal Agreement.**

8.13 **Finally, the Minister welcomes the Communication but, equally, notes that the policy suggestions within it are subject to debate within the EU, and that they may change as a result. As with all strategic EU documents, that is indeed the case. Nevertheless, EU policy is often formed at this strategic stage, which is why it is reassuring that the UK is engaging and intends to continue to do so.**

8.14 **The document has already been cleared from scrutiny and we have no outstanding questions for the Minister. We draw this chapter to the attention of the Business, Energy and Industrial Strategy Committee.**

Full details of the documents

Commission Communication—A Clean Planet for all. A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy: (40225), 15011/18, COM(18) 773.

Previous Committee Reports

Fiftieth Report HC 301–xlix (2017–19), chapter 6 (9 January 2019).

9 Trade deals and data flows between the EU and third countries

Committee's assessment	Legally and politically important
Committee's decision	Cleared from scrutiny (debate in European Committee B on 23/10/2018); drawn to the attention of the Digital, Culture, Media and Sport Committee, the International Trade Committee, the Science and Technology Committee, the Business, Energy and Industrial Strategy Committee and the Exiting the EU Committee
Document details	(a) Communication from the Commission to the European Parliament and the Council on Exchanging and Protecting Personal Data in a Globalised World; (b) EU proposal for provisions on cross-border data flows and protection of personal data and privacy
Legal base	—
Department	Digital, Culture, Media and Sport and International Trade
Document Numbers	(a) (38493), 5191/17, COM(17) 7; (b) (40020),—

Summary and Committee's conclusions

9.1 Document (a), a Commission Communication, is significant in highlighting the future approach of the EU to the exchange of personal data with third countries in a way which adequately protects EU citizens. It is highly relevant to the UK's position either at a negotiated or non-negotiated exit.[56] The background to the Communication and a detailed summary of its content are set out in our Report of 8 March 2017.

9.2 The Communication points to adequacy decisions as the best option for a third country to share data with the EU, though it also refers to international data-sharing agreements in certain contexts (e.g. data-sharing in some JHA areas). A data adequacy decision[57] takes the form of a Commission implementing decision, as specified by the General Data Protection Regulation (GDPR).[58] Although subject to comitology procedure, meaning that the Commission is assisted by a committee of national experts when refining the measure before adoption,[59] it is essentially a unilateral decision by the Commission which the Commission can repeal, amend or suspend.[60]

9.3 In our last Report we sought reassurance from the Government that alternative methods of data exchange with the EU would be sufficient for UK businesses and stakeholders, given that a "no deal" outcome to the exit negotiations increasingly seems possible. We refer here to the Commission's "Notice to Stakeholders" which highlights

56 So either at 29 March 2019 if there is a non-negotiated exit, or 31 December 2020 if the draft Withdrawal Agreement is adopted and ratified and there is a transition/implementation period.
57 See the Commission website on adequacy decisions.
58 Article 45 General Data Protection Regulation 2016/679.
59 For further explanation, see the Commission website.
60 See Article 45(5) General Data Protection Regulation 2016 /679.

those alternative mechanisms: Standard data protection clauses[61] binding corporate rules,[62] Approved Codes of Conduct[63] and approved certification mechanisms. The day following our last Report of 12 September, the Government published its 'no deal' notice. Also relevant to the data issues in this Chapter, is the European Commission's Communication on Contingency Planning.

9.4 The purpose of the proposal (document (b)) is to set out horizontal provisions for cross-border data flows and for personal data protection in EU trade negotiations. These were intended to be first deployed in trade negotiations with Indonesia but might change during those negotiations. As we reported on 12 September, the Government told us that they do not provide an alternative legal basis for the cross-border transfer of personal data, which is governed by the GDPR and Law Enforcement Directive (EU) 2016/680. While the Government considered that there were no immediate exit implications of the proposed provisions, it acknowledged that the Commission had stated the provisions would be a model for future FTA negotiations. Therefore, there are potential implications for the UK's future relationship with the EU.

9.5 We recommended both documents for debate on the floor of the House because of their potential importance to Brexit. The Government scheduled the debate instead in European Committee B for 23 October. Following the debate, which was of an exceptionally short duration, we wrote to the Government on 14 November requesting outstanding responses to questions in our Report of 12 September. The Government has now responded with their letter of 24 January, together with a detailed 15 page annex.

9.6 **We thank the Minister for Digital and the Creative Industries (Margot James MP) and the Minister of State for Trade Policy (George Hollingbery MP) for their letter and the comprehensive annex attached.**

9.7 **These documents have already been cleared from scrutiny following the debate in European Committee B on 23 October. However, given the importance of data issues in the event of both a "no deal" or "deal" scenario, we draw to the attention of the House the Government's further responses to our scrutiny questions and questions in the debate. In particular, we draw these documents and this chapter to the attention of the Digital, Culture, Media and Sport Committee, the International Trade Committee, the Science and Technology Committee, the Business, Energy and Industrial Strategy Committee and the Exiting the EU Committee.**

9.8 **In doing so, we see little point in summarising all of the Government's responses here as they can be accessed in full in the annex to the Ministers' letter. From the repetitive nature of some of the responses received, we also consider that there is little to be gained from further protracted scrutiny or correspondence with the Government on either the Communication or the proposed horizontal data clauses. But we think it might be useful to highlight some key statements made. Although some are readily available from other published documents, they are worth marshalling into "no deal" and "deal" categories to get a better picture of the overall implications.**

61 The Commission has adopted three sets of model clauses which are available on the Commission's website: https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/data-protection/data-transfers-outside-eu/model-contracts-transfer-personal-data-third-countries_en.

62 Legally binding data protection rules approved by the competent data protection authority which apply within a corporate group.

63 Together with binding and enforceable commitments of the controller or processor in the third country.

Responses relevant to a 'no deal' scenario

- **In their 13 November Communication, the European Commission has said that the adoption of an Adequacy Decision is not part of their contingency planning for a 'no deal' scenario in March 2019.**
- **There would be no immediate change to the UK's data protection standards. The Data Protection Act 2018 will remain in place and the GDPR will be incorporated in UK domestic law by the EU (Withdrawal) Act 2018 (EUWA). Secondary legislation was laid using powers under the EUWA to correct deficiencies in the General Data Protection Regulation (GDPR) and Data Protection Act 2018 (DPA) resulting from the UK leaving the EU. This maintains the data protection standards of the GDPR and the DPA 2018 but transfers a number of functions conferred on the EU Commission by the GDPR to the Secretary of State. It also makes further transitional, transitory and saving provisions, so that the use of standard contractual clauses that have previously been issued by the EU Commission will continue to be an effective basis for international data transfers from the UK to third countries after exit day.**
- **The Government's 28 November 2018 paper on the long-term economic analysis of EU exit looked at the impact of non-tariff barriers to trade including data protection regulation. The cost to businesses will vary depending on the size of the organisation and the nature of the personal data being processed and the type of contract in question. The Government expects most businesses will use be able to use Standard Contractual Clauses in the event of a no deal Brexit**
- **In proceedings pending in the European Court of Justice (CJEU) on the validity of Standard Contractual Clauses, Data Protection Commissioner v. Facebook Ireland Ltd and others (the Schrems II case),[64] the Government has submitted written observations. It is of the view that the Commission Decisions which set out approved Standard Contractual Clauses (SCC's) under which personal data may be transferred to a third non-EEA country, are valid and do not violate the rights of data subjects under Directive 95/46/EC (the predecessor to the GDPR) and the Charter of Fundamental Rights.**
- **In recognition of the unprecedented degree of alignment between the UK and EU's data protection regimes at the point of exit, the UK does not intend to impose additional requirements on transfers of data from the UK to the EU.**
- **The UK will also preserve the effect of existing EU adequacy decisions with 12 non-EEA states on a transitional basis.**

64 Case 311/18.

Responses relevant to a 'deal' scenario

- **EU law will continue to apply to data transferred during the transition/ implementation period (TIP) until adequacy decisions are granted to the UK, after which time it will be governed by UK domestic law.**
- **Related to this, the Political Declaration states that the EU will begin its assessment of the UK as soon as possible after the UK's withdrawal, endeavouring to adopt adequacy decisions by the end of the TIP.**
- **The UK being a party to the updated Council of Europe Personal Data Convention 108 will be looked on favourably by the European Commission in any consideration as to the future arrangement for EU-UK personal data flows.**
- **The Government appears not to be ruling out a future data-sharing Treaty which goes beyond adequacy, in terms of an EU-UK future relationship on data. It repeats in response to questions about this that "The form and vehicle for such arrangements … is a matter for future negotiations."**
- **The Government continues to maintain that as part of the negotiations on the future relationship, the UK will explore with the EU the terms on which the UK could remain part of relevant EU bodies. This would mean abiding by the rules of those bodies and respecting the remit of the CJEU. The Government adds that the UK Parliament would remain ultimately sovereign, and so could in principle decide not to accept these rules, but with consequences for UK membership of the relevant body.**
- **Provisions on data in existing FTAs refer to all data flows, not just personal data flows. The EU's horizontal clauses do not provide a legal basis for personal data flows; they simply state an aim to remove barriers to data flows, insofar as compatible with EU data protection law, and respecting domestic data protection regimes. The Government's ambition is to include substantive provisions on data clauses in the UK's future economic partnership. However, it is a priority to have an adequacy decision in place to ensure data flows continue between EU-UK and so will factor this process into the negotiations.**

Full details of the documents

(a) Communication from the Commission to the European Parliament and the Council on Exchanging and Protecting Personal Data in a Globalised World: (38493), 5191/17, COM (17) 7; (b) EU proposal for provisions on cross-border data flows and protection of personal data and privacy: (40020),—.

Previous Committee Reports

(a) Thirty-eighth Report HC 301–xxxvii, chapter 1 (12 September 2018); Twenty-ninth Report HC 301–xxviii (2017–19), chapter 1 (23 May 2018); Thirty-fourth Report HC 71–xxxii (2016–17), chapter 5 (8 March 2017); (b) Thirty-eighth Report HC 301–xxxvii, chapter 1 (12 September 2018).

10 European Maritime and Fisheries Fund

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; further information requested; drawn to the attention of the Environment, Food and Rural Affairs Committee
Document details	Proposal for a Regulation of the European Parliament and of the Council on the European Maritime and Fisheries Fund
Legal base	Articles 42, 43(2), 91(1), 100(2), 173(3), 175, 188, 192(1), 194(2), 195(2) and 349 TFEU; Ordinary legislative procedure; QMV
Department	Environment, Food and Rural Affairs
Document Number	(39938), 9627/18 + ADDs 1–2, COM(18) 390

Summary and Committee's conclusions

10.1 The EU's European Maritime and Fisheries Fund (EMFF) targets EU funding to support implementation of the Common Fisheries Policy (CFP), the EU's maritime policy and the EU's international ocean governance commitments. The UK does not expect to participate in the EMFF after any post-Brexit implementation period ending on 31 December 2020. In the event of no Brexit deal, the Government has guaranteed EMFF funding until the end of 2020.[65] It recently confirmed, as set out below, that domestic funding schemes will also be in place from 2021.

10.2 The Commission proposed legislation last summer establishing the EMFF for the 2021–27 Multi-annual Financial Framework (MFF). As requested by Member States, the Fund has been simplified. Under this approach, it will be for Member States to draw up their programme, identifying the most appropriate means for achieving the priorities of the EMFF.

10.3 The Committee first considered the European Commission's proposal for the post-2020 European Maritime and Fisheries Fund (EMFF) at its meeting of 10 October 2018.[66] Since then, the Minister for Agriculture, Fisheries and Food (George Eustice MP) has written on three occasions.

10.4 In his most recent letter,[67] he draws the Committee's attention to the Environment Secretary's announcement on 10 December 2018 that an additional £37.2 million of funding would be made available to support the seafood sector during the next two financial years. This, says the Minister, illustrates the Government's commitment to continued support across the sector.

10.5 Furthermore, the Environment Secretary announced that the Government would put in place four new domestic funding schemes comparable to the EMFF to support the growth and development of the seafood sector from 2021. Each devolved administration will lead on its own scheme. The Minister hopes that this reassures the Committee that there will be sufficient support in place for the seafood sector post-EMFF.

65 Funding from EU programmes guaranteed until the end of 2020, HM Treasury, 24 July 2018.
66 Thirty-ninth Report HC 301–xxxviii (2017–19), chapter 4 (10 October 2018).
67 Letter from George Eustice MP to Sir William Cash MP, dated 20 January 2019 (received 23 January 2019).

10.6 Following the EU and UK negotiation of a draft Withdrawal Agreement, the Minister updated[68] the Committee, noting that the UK could not participate in the future EMFF even if the implementation period were extended beyond 31 December 2020 as the UK would be considered a third country for the purposes of EU programmes.

10.7 Regarding the potential impact of the Fund on the UK as a third country, the Minister indicated in his letter[69] of 28 October 2018 that potential UK involvement in that context was yet to be decided. Until the publication of Member States' Operational Programmes, it would be difficult to assess the potential impact on the UK of activities funded outside the EU.

10.8 Future EU-UK cooperation on control and enforcement, data collection and processing, maritime surveillance and coastguard cooperation—all activities which can be financially supported by the EMFF even where they take place outside the EU—would be a matter of negotiation, said the Minister.

10.9 Similarly, support and arrangements for maritime spatial planning, sea basin strategies and maritime regional cooperation—all of which can also be supported under the EMFF—are a matter for negotiations with the EU or other relevant countries. The UK will retain its autonomy to determine and manage what takes place within its territorial area.

10.10 Turning to the negotiations on the Commission's proposal, the Minister notes in his most recent letter that Member States have welcomed efforts to simplify the regulation. Some Member States have been concerned about the proposal for an action plan for small scale coastal fisheries, a sea basin SWOT (Strengths, Weaknesses, Opportunities, Threats) analysis and an action plan for the outermost regions where appropriate. Some Member States would like the primary focus of the EMFF to be delivery of the CFP, given the financial resources available. Given that the next EMFF is similar in scale and focus to the current programme, and the nature of issues raised by other Member States, the UK does not plan to make any formal comments at this stage.

10.11 **We are grateful for the information provided and welcome the recent commitments by the Environment Secretary (Rt Hon Michael Gove MP) regarding future funding to support the sector. We are now content to clear the document from scrutiny, but would welcome an update on the progress of negotiations as they move towards a conclusion. This chapter is drawn to the attention of the Environment, Food and Rural Affairs Committee.**

Full details of the documents

Proposal for a Regulation of the European Parliament and of the Council on the European Maritime and Fisheries Fund: (39938), 9627/18 + ADDs 1–2, COM(18) 390.

Previous Committee Reports

Thirty-ninth Report HC 301–xxxviii (2017–19), chapter 4 (10 October 2018).

68 Letter from George Eustice MP to Sir William Cash MP, dated 12 December 2018 (received 18 December 2018).
69 Letter from George Eustice MP to Sir William Cash MP, dated 28 October 2018 (received 30 October 2018).

11 EU-Morocco Fisheries Partnership Agreement

Committee's assessment	Legally and politically important
Committee's decision	Cleared from scrutiny (decision reported on 14/11/2018)
Document details	(a) Proposal for a Council Decision on the signing, on behalf of the Union, of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and an exchange of letters accompanying the said Agreement; (b) Proposal for a Council Decision on the conclusion of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and an exchange of letters accompanying the said Agreement; (c) Proposal for a Council Regulation on the allocation of fishing opportunities under the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco and the Implementation Protocol thereto.
Legal base	(a) Articles 43(2) and 218(5) TFEU, QMV; (b) Articles 43(2) and 218(6)(a)(v), QMV; (c) Article 43(3) TFEU, QMV
Department	Environment, Food and Rural Affairs
Document Numbers	(a) (40107), 12863/18 + ADD 1, COM(18) 677; (b) (40108), 12864/18 + ADD 1, COM(18) 678; (c) (40109), 12865/18, COM(18) 679

Summary and Committee's conclusions

11.1 Last year, the Commission proposed changes to the Fisheries Partnership Agreement (FPA) between the EU and Morocco with a view to revising the conditions for exploitation of Moroccan waters by EU vessels and to resolving questions over the application of the agreement to the Western Sahara following two European Court of Justice (CJEU) Grand Chamber cases.[70] These cases decided that the EU-Morocco Association Agreement (which provides for fish and fish products to be imported into the EU from Morocco at reduced or no duty subject to a tariff quota) and the FPA did not apply to the Western Sahara. Both cases interpreted the relevant agreements in accordance with the rules of international law which require: (a) recognition that the people of Western Sahara are entitled to self-determination; and (b) that obligations can only be imposed upon states (in this case Western Sahara) with their consent.

11.2 At our meeting of 14 November 2018, we concluded that there remained a question as to whether the consultation exercise undertaken to support these proposals on the FPA meet the underlying objections of the CJEU, which centred on respect for the principle

70 Case C-973/2006P. and Case C-266/16.

of self-determination and respect for the principle of the relative effect of treaties. While we cleared the proposals from scrutiny in advance of adoption, we requested further information on the preparations underway to reach agreement between the UK and Morocco on the future economic relationship, including fisheries. We asked that the information provided extend to what consideration the Government has given to any need for the UK to engage in consultation with the people of Western Sahara.

11.3 In response, the Minister for Agriculture, Fisheries and Food (George Eustice MP) says[71] that the EU consulted a wide spectrum of Western Saharan representatives, stakeholders, civil society, and other organisations. The Government's view is that the European Commission took all practicable steps to consult those affected by the new fisheries deal, but notes that the UK is not in a position to judge whether this meets the standard required by the CJEU case. This, says the Minister, can only be determined by the courts.

11.4 The UK is committed to mutually beneficial economic cooperation with Morocco, explains the Minister, and is keen to develop trade and investment ties further. It is working with the Moroccan Ministry of Foreign Affairs to ensure stability and continuity in the UK-Morocco trading relationship post-Brexit.

11.5 With specific regard to Western Sahara, the Minister repeats the UK's longstanding position that it considers the status of Western Sahara as undetermined, and it supports UN-led efforts to reach a lasting and mutually acceptable political solution that provides for the self-determination of the people of Western Sahara. He adds that the Government is of course cognisant of the need to engage with the people of Western Sahara as necessary, but contends that it is too early to comment on what form those engagements will take.

11.6 The Government will work closely with the UK fishing industry to ascertain the level of interest in fishing in the area post-exit.

11.7 **We note the Minister's response. While we consider that the question remains as to whether the consultation exercise undertaken to support these proposals on the FPA meet the underlying objections of the CJEU as regards respect for the self-determination of Western Sahara, we accept the Minister's contention that this will only be resolved by further litigation.**

11.8 **We note the Government's commitment to mutually beneficial economic cooperation and its cognisance of the need to engage with the people of Western Sahara as necessary.**

11.9 **The documents have already been cleared from scrutiny and we require no further information.**

Full details of the documents

(a) Proposal for a Council Decision on the signing, on behalf of the Union, of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and an exchange of letters accompanying the said Agreement: (40107), 12863/18 + ADD 1, COM(18) 677;

71 Letter from George Eustice MP to Sir William Cash MP dated 20 January 2019 (received 23 January 2019).

(b) Proposal for a Council Decision on the conclusion of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and an exchange of letters accompanying the said Agreement: (40108), 12864/18 + ADD 1, COM(18) 678;

(c) Proposal for a Council Regulation on the allocation of fishing opportunities under the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco and the Implementation Protocol thereto: (40109), 12865/18, COM(18) 679.

Previous Committee Reports

Forty-fourth Report HC 301–xliii (2017–19), chapter 19 (14 November 2018); see also, in respect of the amendment of the Association Agreement, Thirty-eighth Report HC 301–xxxvii (2017–19), chapter 33 (12 September 2018).

12 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

(40240) 15166/18 + ADD 1 COM(18) 776	Recommendation for a Council Decision authorising the opening of negotiations on an agreement between the European Union and each individual European Neighbourhood Policy South country for the purpose of agreeing the terms and conditions for extending the provision of the European Geostationary Navigation Overlay Service (EGNOS) over European Neighbourhood Policy.
(40310) 15821/18 —	Commission Delegated Regulation (EU) …/... of 19.12.2018 amending Commission Regulation No 389/2013 of 2 May 2013 establishing a Union Registry.
(40321) 5163/19 COM(19) 1 ADDs 1–11	Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Energy Prices and Costs in Europe.

Department for Digital, Culture, Media and Sport

(40280) 15647/18 COM(18) 822	Report from the Commission to the European Parliament and the Council on the implementation of Regulation (EU) 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union, as amended by Regulation (EU) 2015/2120 and Regulation (EU) 2017/920.

Department for Environment, Food and Rural Affairs

(40294) — —	Special report No. 33/2018: Combating desertification in the EU: a growing threat in need of more action.
(40308) 5052/18 + ADD 1 COM(18) 848	Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions On the review and update of the second European Union Implementation Plan in accordance with Article 8 (4) of Regulation No 850/2004 on persistent organic pollutants.

Foreign and Commonwealth Office

(40339)	Council Implementing Decision (CFSP) 2019/87 of 21 January 2019 implementing Decision 2013/255/CFSP concerning restrictive measures against Syria
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(40340)	Council Implementing Regulation (EU) 2019/85 of 21 January 2019 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria
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HM Treasury

(40203)	Draft Joint Employment Report from the Commission and the Council accompanying the Communication from the Commission on the Annual Growth Survey 2019.
14442/18	
COM(18) 761	
(40218)	Recommendation for a Council Recommendation on the economic policy of the euro area.
14445/18	
+ ADD 1	
COM (18) 759	
(40219)	Report from the Commission to the European parliament, the Council, the European Central bank and the European Economic and social Committee Alert Mechanism Report 2019 (prepared in accordance with Articles 3 and 4 of Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances).
14444/18	
+ ADD 1	
COM (18) 758	
(40220)	Communication from the Commission Annual Growth Survey 2019: For a stronger Europe in the face of global uncertainty.
14443/18	
+ ADD 1	
COM (18) 770	
(40222)	Report from the Commission to the European Parliament and the Council Annual Monitoring Report on the implementation of Structural Reform Support Programme 2017.
14926/18	
+ ADD 1	
COM(18) 755	

Home Office

(40266) 15496/18 + ADD 1 COM(18) 799	Proposal for a Council Decision on the signing, on behalf of the Union, of the status agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia.
(40267) 15486/18 + ADD 1 COM(18) 797	Proposal for a Council Decision on the conclusion of the status agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia.
(40292) 15677/18 + ADD 1 COM(18) 777	Report from the Commission to the European Parliament and the Council Second report on the progress made in the fight against trafficking in human beings (2018) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.
(40323) 5349/19 COM(19) 2	Proposal for a Council Implementing Decision on the transitional rules for the appointment of European Prosecutors for and during the first mandate period, provided for in Article 16(4) of Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO").

Formal Minutes

Wednesday 6 February 2019

Members present:

Sir William Cash, in the Chair

Martyn Day	Mr David Jones
Richard Drax	Stephen Kinnock
Geraint Davies	Andrew Lewer
Kate Hoey	Michael Tomlinson
Kelvin Hopkins	Dr Philippa Whitford
Darren Jones	

Scrutiny Report

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 12 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Fifty-fourth Report of the Committee to the House.

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

[Adjourned till Wednesday 13 February 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)

Geraint Davies MP (*Labour/Cooperative, Swansea West*)

Martyn Day MP (*Scottish National Party, Linlithgow and East Falkirk*)

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

Richard Drax MP (*Conservative, South Dorset*)

Mr Marcus Fysh MP (*Conservative, Yeovil*)

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

Kate Hoey MP (*Labour, Vauxhall*)

Kelvin Hopkins MP (*Independent, Luton North*)

Darren Jones MP (*Labour, Bristol North West*)

Mr David Jones MP (*Conservative, Clwyd West*)

Stephen Kinnock MP (*Labour, Aberavon*)

Andrew Lewer MP (*Conservative, Northampton South*)

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

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

Dr Philippa Whitford MP (*Scottish National Party, Central Ayrshire*)